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NEW CHALLENGES IN LAND USE REGULATION

DECEMBER 2, 2011

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I. AIRPORT ZONING REGULATIONS

The federal Cabinet has authority under the *Aeronautics Act* (Canada) to enact zoning regulations for land in the vicinity of airports. While land use regulation is otherwise a matter within exclusive provincial jurisdiction under the *Constitution Act, 1867*, the regulation of land use in the vicinity of airports is necessary for the safety of aerial navigation. Section 5.4(2) of the Aeronautics Act permits regulations to:

- Prevent land adjacent to or in the vicinity of a federal airport from being used or developed in a manner that is incompatible with the operation of an airport;
- Prevent land adjacent to or in the vicinity of any other airport from being used or developed in a manner that is incompatible with the safe operation of an airport or aircraft; and
- Prevent land adjacent to or in the vicinity of facilities used to provide aeronautics services, from being used or developed in a manner that would cause interference with signals or communications to and from aircraft or those facilities

Airport zoning regulations are in place for airports at Abbotsford, Boundary Bay, Campbell River, Chilliwack, Comox, Cranbrook, Dawson Creek, Fort Nelson, Fort St. John, Kamloops, Kelowna, Langley, Penticton, Pitt Meadows, Port Hardy, Prince George, Quesnel, Smithers, Vancouver and Victoria. The regulations may be reviewed on the Department of Justice website: http://www.laws-lois.justice.gc.ca/eng/acts/A-2/index.html#r3lR3g

This is a matter in relation to which two levels of government each clearly have jurisdiction, and the applicable legal principle is that enunciated in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 (Supreme Court of Canada). Where compliance with one regulation does not necessarily involve contravention of the other, the landowner must comply with both regulations, so the more onerous of the two regulations will set the applicable standard.

The *Aeronautics Act* requires the Minister of Transport to give newspaper notice of proposals to enact or amend airport zoning regulations and to afford a reasonable opportunity to interested persons to make representations to the Minister on the proposed regulations. The Minister must also publish enacted regulations in the *Canada Gazette* and a local newspaper. Finally, in order to bring the regulations into effect, the Minister must file a copy with a plan and description of the affected lands, in the relevant land title office. This filing does not automatically result in a "notice on title" to each affected parcel of land. The Land Title Act Regulation B.C. Reg. 334/79, in addition to providing reciprocal authority for the registrar to

accept for deposit a copy of federal airport zoning regulations, enables the Minister of Transport to have a notice of the regulations filed on title to each affected parcel of land, on payment of a fee of $1 per parcel. Because this step is optional, there are circumstances where BC land may be subject to regulations under the *Aeronautics Act*, but no notice of that fact appears on the title to the land.

Airport zoning regulations typically establish several types of hypothetical "surfaces" above which buildings, structures, and objects including natural growth are not allowed to extend. These surfaces typically include an "approach surface", being an inclined plane extending outward and upwards from the ends of airport runways; a "transitional surface", being additional planes extending outward and upwards from the sides of airport runways near their point of intersection; and a "horizontal surface" located at a specified elevation above the airport and encompassing a relatively large area that has presumably been identified as being potentially required for manoeuvres associated with aircraft landings and departures, or perhaps for air traffic control or communications purposes. These surfaces are all described by metes and bounds in the text of the individual regulations, and on coloured plans that are described in the regulations but not included in them. Copies of the plans can be obtained from local airport officials or Transport Canada, and should be on file in the relevant Land Title Office.

The regulations also typically include a prohibition on the use of land whose "outer limits" are also described in the individual regulations, for the disposal or accumulation of waste or other material or substances edible by or attractive to birds.

The Minister of Transport may enforce airport zoning regulations by ordering owners and occupiers of land to remove unlawful buildings, structures and other objects, and by entering on their land to remove the offensive building, structure or object. The regulations don't apply to uses, buildings, structures or objects that were in existence on the day the regulations came into force. The Minister has authority to grant exemptions from the regulations if the exemption is in the public interest and not likely to adversely affect aviation safety or security. Such exemptions have apparently been provided in relation to such objects as construction cranes, but are not likely to be granted in relation to permanent structures that significantly encroach above designated "surfaces".

The federal government has no permitting or other administrative process in place to prevent the construction of over-height buildings or structures in the vicinity of airports, equivalent to the building permit application process that is used by local governments to prevent the construction of buildings that don't comply with zoning regulations. Thus the onus is on the owners of affected land, and their consultants, to discover and interpret applicable airport zoning regulations before they design or construct buildings. The standard form contract published by the Architectural Institute of BC requires the architect to "review applicable statutes, regulations, codes and by-laws" and to "assist the Client to obtain approval of

authorities having jurisdiction, if applicable"; this would include airport zoning regulations applicable to their client's land.

The *Aeronautics Act* permits the Minister to enter into an agreement with a local authority, including a BC municipality or regional district, to authorize the local authority to regulate the use of lands near an airport that are not subject to a federal airport zoning regulation, for the purpose of ensuring that use is not incompatible with the safe operation of an airport or aircraft. The Province of BC has reciprocally authorized such agreements in the Additional Municipal Powers – Aeronautics Act Agreements Regulation B.C. Reg. 307/2007 under the *Community Charter*, and the Additional Regional District Powers – Aeronautics Act Agreements Regulation, B.C. Reg. 308/2007 under the *Local Government Act*. What is particularly interesting about these arrangements is that they empower the local authority to exercise the same powers as the Minister of Transport may exercise under the *Aeronautics Act*, rather than merely exercising their own land use regulation powers in relation to airport lands. These ministerial powers include at least two that are not otherwise available to BC local governments exercising zoning authority – the power to regulate the height of trees, and the power to enter on land without a court order to rectify a zoning contravention. Contraventions of regulations made by a local authority pursuant to such an agreement continue to be contraventions of the *Aeronautics Act*.

In two recent instances, we have become aware of buildings having been constructed in contravention of federal airport zoning regulations, apparently without the approval or knowledge of the Minister of Transport. In such circumstances the Minister has several options, the first of which is require the removal or alteration of the offending building. Another would be to require the owner to apply for an exemption, and authorize the exemption if the building does not adversely affect aviation safety or security. The Minister has a third option: ordering the cessation of airport traffic that cannot be safely accommodated at the airport given the presence of the offending building. This measure might be taken on an interim basis to protect the federal government from potential liability in the event of an aircraft incident during the period leading up to the removal of the building or the granting of an exemption, or on a permanent basis. In each of the situations we mention, local governments have suggested to Transport Canada that the airport zoning regulations may be obsolete in view of intervening advances in aviation and aeronautics technology, and should therefore be reviewed and, if appropriate, amended so that none of these options has to be implemented. It appears that this additional alternative is not useful in the short term, due to the length of time that Transport Canada apparently requires to conduct this sort of review.

It should be a normal aspect of drafting zoning regulations for land in the vicinity of an airport, for local government planning staff or consultants to review applicable airport zoning regulations made under the *Aeronautics Act*, and consider whether local regulations should be permitting any buildings or structures that would contravene the federal regulations. Section 15 of the *Community Charter* permits a municipal council (but not a regional district board), in regulating in relation to a matter under the *Local Government Act*, to establish rules by

adopting rules enacted as a law of another jurisdiction, as it stands at the time of adoption on a specific date, or as amended from time to time. This would enable a municipal council to include in a zoning bylaw, building height rules that incorporate specified federal airport zoning regulations in addition to the local government's own building height limits, so as to prevent the construction of buildings that would contravene federal law.

Any such regulations would have to be complemented by building permit application procedures requiring the applicant to ascertain the building height on their land that is permitted by the federal regulations, in order to demonstrate that their proposed building height is lawful under the bylaw. This will usually be more difficult than ascertaining the permitted building height under local zoning rules, because it is established in relation to the location of a hypothetical surface over the land (the elevation of which is given in relation to a datum point at the airport itself) rather than by measurement from the natural or finished grade of the land on which the building would be constructed. Another approach, also open to regional districts, would be to work with airport officials to translate the height of the various hypothetical surfaces described in the federal regulations into permitted building heights measured from natural or finished grade for each portion of the area beneath the surfaces, and incorporate these into the zoning bylaw as maximum permitted building heights.

Neither of these approaches is appropriate, of course, if as a matter of policy the local government considers that the height limits imposed by federal law are too onerous and ought to be increased; in that circumstance the local government would presumably wish to enact its own height regulations and leave Transport Canada to its own devices in relation to the administration and enforcement of its own regulations.

A third approach, which really has no regulatory effect, would be to simply include in the zoning bylaw an "information note" drawing the reader's attention to the existence of federal regulations that could be more onerous than the local zoning regulations. Local government staff could alternatively be directed to advise those making inquiries, of the possible effect of federal airport zoning regulations (though this approach could give rise to a pattern of reliance exposing the local government to potential liability if the advice is ever omitted when it should not have been), or a copy of a map showing the location and extent of the various local airport "surfaces" could be posted at the permits counter with an information note.

II. PERMITTED USES VS. PERMITTED BUILDINGS: HOW DOES YOUR BYLAW WORK?

Modern land use trends seem to be placing significant pressure on the interpretation of some very basic elements of BC zoning and land use bylaws – those identifying permitted uses of land in the various zones established by the bylaw. Section 903 of the *Local Government Act* authorizes the regulation of "the use of land", which would include regulation of the types of buildings and structures that may be constructed on the land, which are themselves uses of the land, as well as regulation of uses of land requiring no buildings or structures at all. Thus, a zoning bylaw could properly include a list of permitted uses, as well as a list of permitted

buildings and structures, though most BC zoning bylaws contain only the former. In this part of our paper, we address the following questions:

- Can a zoning bylaw permit a use only if it is contained within a specified type of building?
- If a zoning bylaw permits a specified type of building, should the bylaw also address what uses of the building are permitted?

A quick look at typical BC zoning bylaws confirms that they do both of these things, but not at all consistently. Consider the following list of permitted "commercial zone" uses, taken from a zoning bylaw that has requested anonymity:

> Art gallery*
> Business Office*
> Medical/Dental Office*
> Civic Use
> Financial Institution
> Neighbourhood Restaurant*
> Personal Service Use
> Apartment*
> Retail Sales
> Service Business

This is a mixture of terms denoting uses, and terms denoting building types. "Civic use", "personal service use", "retail sales" and "service business" describe uses that could conceivably occur in a rather broad range of building types; for example, a library or municipal hall is a "civic use" that could operate out of a Britco trailer on municipal land, or within a purpose-designed municipal hall or library. (The terms in this list are all defined in the bylaw in question, but not in such a manner as to restrict the type of building in which they may be conducted.)

The term "retail sales" could be interpreted to permit the sale of goods whether within a building or not. Many zoning bylaws do not define "retail sales" or define the term in a broad manner such as "a business establishment involved in the selling of goods and merchandise directly to the consumer for personal or household use". The term may or may not imply something about the permanency of the business, such that retail sales are restricted to sales transactions occurring within a building. The term "retail sales" could therefore be construed as permitting the retail sale of goods within tents or from stands, which may have not been the intent of the bylaw in permitting the use in the commercial zone. The issue could be addressed by defining the term "retail sales" more precisely to deal with where retail sales may be conducted, or by identifying the types of permitted buildings and structures in which the permitted use may be conducted.

Most of the other permitted "uses" (those with asterisks) are really descriptions of types of buildings. The question that frequently arises with regard to such descriptions is whether, in the context of a zoning bylaw, they are enforceable descriptions of permitted uses. In some cases the answer is yes, but in others it is probably no. For example, "art gallery", without a bylaw definition, would probably be interpreted in accordance with its ordinary dictionary meaning, which is "room or building for showing works of art". "Restaurant", without a bylaw definition, would be interpreted to mean "public premises where meals and refreshments may be had". (Both types of premises are sometimes used in a manner that is slightly different from their principal use, such as for private receptions, which are assembly-type uses normally covered by "accessory use" provisions of zoning bylaws.) Art galleries and restaurants tend to be purpose-designed premises not easily adaptable to other uses, and it would not ordinarily be necessary to address the use of such buildings in a zoning bylaw; the permitted use is more or less obvious from the description of the permitted building type.

Consider, however, the term "apartment". An "apartment" is a dwelling unit in a building that contains other apartments, or in this commercial zone a dwelling unit in a building that also contains some commercial uses. (Again, the term is defined in the bylaw in question, but not in a way that adequately addresses the issue we are dealing with here.) It may be a rental apartment, or it may be a separate strata lot. Similar zoning bylaw terms describing building types in the residential context are "single-family dwelling", "townhouse" or "row house", and "duplex" or "two-family dwelling". In many parts of BC there is a healthy demand for temporary tourist accommodation that is being met through short-term rentals of residential premises such as apartments, in both rental and strata-titled buildings. Short-term rentals of residential premises are, essentially, commercial uses that are usually neither intended nor appropriate in zones permitting "apartment" uses. A variation of this use is the time-share in which ownership or use rights are divided among multiple owners, producing a use pattern very similar to that of a hotel or motel.

In jurisdictions where the zoning bylaw expressly permits "nightly rentals" of residential dwellings in some neighbourhoods but not others, it might be possible to interpret the bylaw as impliedly prohibiting such a use where it is not expressly permitted; this is an application of the "winkling out" approach to zoning bylaw interpretation applied by the B.C. Supreme Court in *S.R.V. Developments Ltd. v. Courtenay (City)*, [1992] B.C.J. No. 2068, affirmed [1992] B.C.J. No. 3033 (B.C. Court of Appeal). However, in a bylaw that merely restricts tourist accommodation to conventional premises such as motels, hotels and campgrounds, it is not nearly so clear that a temporary tourist accommodation use is not permitted in an "apartment".

There are two approaches to clearing up the uncertainty. The simplest approach is to address in the various zone regulations, both permitted uses and permitted buildings. For example:

Permitted Uses	Permitted Buildings and Structures
Residential use	Apartment buildings, townhouses and row houses

A less transparent approach is to include in the bylaw, definitions of the permitted building types that restrict their use to that which is intended to be permitted; for example:

> "Apartment" means a self-contained dwelling unit in a building providing access to the dwelling units from interior corridors, used for residential occupancies only.

Similar issues arise with permitted "church" and "club" uses. Many older zoning bylaws permit, in all zones or more typically in residential zones, "churches". A church is a type of building that can be used for many kinds of activities, of which the (probably intended) "religious assembly" use is only one, and in recent years the owners of churches have begun to undertake these activities with more frequency. Churches are being used as emergency shelters for homeless persons, for preparing and serving meals to "street people", for the asylum of political refugees, and so forth, and these other uses are not always appropriate in a residential setting. Putting aside for a moment the *Charter of Rights* issues that might arise from doing so, but acknowledging that the term "church" is defined in the dictionary we use as a "building for public Christian worship" and is therefore too narrow a term to use in a post-*Charter of Rights* zoning bylaw, the bylaw could read something like this:

Permitted Uses	Permitted Buildings and Structures
Religious assembly	Churches, mosques, temples and synagogues

(The issue that we are putting aside is the constitutionality of limiting the use of a church, mosque, temple or synagogue to a core "religious assembly" use. Some religious faiths engage the believer in much more than periodic assembly for worship, and it may be an unjustified infringement of their right to religious freedom to limit the use of these buildings to religious assembly – a question that is beyond the scope of this paper.)

Older zoning bylaws often permit "clubs" or, worse, "fraternal and charitable organizations" as land uses. The intention here was probably to permit the various activities of the members of fraternal and charitable organizations (Lions, Rotarians, Oddfellows, Masons, Legionnaires, Elks) in their respective clubs and halls. However, the bare term "club" conveys very little of this intent. A generous application of the meaning from our dictionary would yield "premises used by an association of persons united by some common interest, for resort, meals, temporary residence, etc.", which is still a description of a building and not a land use. The permitted "club" use, under that definition, would potentially include any use to which the club members chose to put their premises and at a minimum, applying the dictionary meaning, would include temporary accommodation uses that the bylaw might otherwise deal with very restrictively. Addressing permitted uses as well as permitted buildings might produce the following:

Permitted Uses	Permitted Buildings and Structures
Public assembly	Clubs and halls

A final example concerns the use of recreational vehicles. Many zoning bylaws permit "campground" uses, often defined simply as premises on which tents and recreational vehicles may be placed. In earlier times, it may have been sufficient for a zoning bylaw to leave it at that. However, with the advent of "park model" RVs, and the prior long-term occupancies of smaller RVs that revealed a demand for park model vehicles, there have been issues in this province with the use of recreational vehicles as long-term residential accommodation. A bylaw that permits the use of land for the placing of RVs does not provide a clear basis for enforcement action in respect of residential occupancies of the campground. Again, there are two solutions: define the permitted "campground" use more precisely by dealing with the question of length of stay, or address permitted uses as well as permitted buildings and structures.

Permitted Uses	Permitted Buildings and Structures
Camping	Tents, tent trailers, recreational vehicles
	Communal laundry facilities and washrooms
	Campground manager's accommodation

Interestingly, the term "camp" is defined in our dictionary as "temporary quarters for holiday-makers" which is probably sufficient to rule out residential occupancies without a bylaw definition of "camping"; in common parlance, one cannot be said to be "camping" if one is living permanently in a campground.

III. THE USE OF RESIDENTIAL DWELLINGS

A. Types of Households

The typical residential zoning scheme permits a "single detached dwelling" in a residential zone. A "single detached dwelling" is usually defined as a building consisting of one dwelling unit, defined as a unit that contains cooking, sleeping and bathroom facilities occupied by a "family" unit or a "household" unit up to a specified maximum number of persons. Boarders and lodgers may also be permitted in addition to the family or household unit, up to a specified maximum number of boarders or lodgers.

The traditional "family" model is traditionally described as persons related by marriage or blood. In more recent times, persons related by common law marriage or adoption have been recognized as a family unit. Some zoning bylaws also include foster children in the definition of family, perhaps limiting the number of foster children. This raises an interesting question as to whether zoning regulations can properly distinguish between foster children and natural or adopted children such that the number of foster children who can be accommodated in a residential dwelling is limited but the number of natural or adopted children is not. It would likely be unlawful to limit the number of natural or adopted children who may be

accommodated in a residential dwelling as part of a "family". Foster children, however, are different in that a foster parent does not have the same legal responsibility for foster children as a person has for their natural or adopted children, and may be paid by the government to care for the foster child – raising the possibility that a commercial use of the dwelling is occurring. Furthermore, foster children often reside with a family on a more temporary basis and there may be a continual succession of foster children moving through the households. For these reasons, we think a zoning regulation limiting the number of foster children in a residential dwelling may be viable.

A zoning bylaw that restricts the occupancy of a residential dwelling unit to a family unit would probably be invalid on the basis that the zoning power does not authorize regulations dealing with who uses land or buildings. In *R. v. Bell*, [1972] 2 S.C.R. 212, the Supreme Court of Canada considered the issue of a zoning bylaw that only permitted an individual or a family to occupy a dwelling unit in a small city with a university. The appellant occupied a residential dwelling unit with two other unrelated persons who contributed to the costs of the upkeep of the dwelling. The court held that in permitting only a family (which was defined in part as a group of two or more persons living together and inter-related by bonds of consanguinity, marriage or legal adoption) to occupy a dwelling unit, the zoning bylaw was oppressive and unreasonable and therefore an invalid exercise of the power under the Ontario *Planning Act* for regulating the use of land and buildings. The Court was of the view that the zoning bylaw was actually regulating the "user" of land, and not the "use" of land.

Since *R. v. Bell*, the case law surrounding the "use" vs. "user" issue in zoning regulations has not been consistent. Most recently in this jurisdiction, in *Greater Victoria School District No. 61 v. Oak Bay (District)*, [2006] B.C.J. No. 110, the B.C. Court of Appeal held that a zoning bylaw could not lawfully distinguish between public and non-public offices and yards, schools, colleges and universities, hospitals and other similar uses, on the grounds that the regulation amounted to one based on "user" rather than "use" itself. The court commented:

> I view s. 903 as authorizing a municipality to specify that the property may be used for "office" purposes, but not to distinguish between offices used by a private body and those used by government. Similarly, the legislation allows a municipality to restrict the property to use for a "school" or a "college", but does not in my opinion allow the municipality effectively to provide that no such school or college may be operated as a private enterprise.

However, other cases have gone beyond the threshold question of whether there is a distinction based on "user" to determine whether the distinction is reasonable in the circumstances. In *North Vancouver (District) v. Fawcett* [1998] B.C.J. No. 150 the B.C. Court of Appeal held that a covenant under what is now s. 219 of the *Land Title Act* which authorizes covenants dealing with "the use of land", could require that the building on the land be

occupied exclusively by persons over a certain age. The Court reviewed the cases regarding "use" vs. "user" and commented as follows:

> Some of the cases suggest that a distinction should be made between the use of land and the person who uses the land and that a power in respect of "the use of land" permits regulation of the former but not the latter. See, for example, *Bell v. R*. and *Galbraith v. Madawaska Club Ltd*. Other cases treat the describing of class of persons who occupy the land as a regulation in respect of "the use of land", see *Smith v. Tiny* and *Faminow v. Corporation of the District of North Vancouver*.
>
> To some extent the cases may seem difficult to reconcile. Perhaps the key lies in deciding whether in any particular case a more ample or a more restricted interpretation and application of the word "use" is reasonable in the circumstances. If one of two alternative interpretations leads to an unreasonable provision, as in the *Bell* case, then the interpretation requiring a more reasonable application will be preferred.

Unfortunately, the *Greater Victoria School District* case does not refer to the Court of Appeal's previous decision in *Fawcett*. Thus it is not clear whether "user" distinctions in zoning bylaws are on their face unreasonable, or whether their validity will depend on whether the "user" distinctions are reasonable in the circumstances. The leading Supreme Court of Canada case on the issue, however, remains *R. v. Bell*, which suggests that courts may still consider whether the consequences of the "user" distinction are reasonable in the circumstances while determining their validity.

We think a zoning bylaw that continues the basic restriction on the occupancy of a residential dwelling unit to a family unit or a household unit comprising up to a specified number of unrelated persons would likely be considered to be enforceable, on the basis that the "user" distinction that it is making (between "family" members who may be unlimited in number, and unrelated persons whose numbers the bylaw limits) has a reasonable basis in legitimate land use management objectives (preventing the overcrowding of dwellings by unrelated persons while avoiding restrictions on family size that would probably be unconstitutional).

What qualifies as a non-family household unit will depend on the wording of the particular zoning bylaw. The case law in relation to the use of a residential dwelling suggests that the courts will consider the zoning bylaw scheme as a whole, and read the specific provisions in question in context and harmoniously with the rest of the zoning bylaw. Careful consideration should therefore be given to the categories of permitted uses and the definitions in the zoning bylaw surrounding residential dwellings.

B. Other Typical Uses of Residential Dwellings

1. Tourist Accommodation

A question that commonly arises in British Columbia is whether the zoning bylaw is intended to permit tourists and other persons who require only temporary lodging to occupy a residential dwelling. Another is whether it intends to permit in a residential dwelling, communal living arrangements involving individuals recovering from drug or alcohol addictions, or foster children who cannot be placed in conventional foster homes. Or is it the intention to restrict such uses to specific zones that are more conducive to these uses such as commercial or institutional zones?

If the intention is to prohibit tourists and other persons who require only temporary lodging from occupying residential dwellings, the issue could be addressed as noted in the previous section by defining the permitted "single detached dwelling" use more precisely to refer to residential occupancies or to the length of stay, or to address permitted uses ("residential") as well as permitted buildings and structures ("single-family dwelling", "duplex").

In *Kamloops (City) v. Northland Properties Ltd*. [2000] B.C.J. No. 1125, the B.C. Court of Appeal considered the term "residential" in a zoning bylaw in relation to temporary tourist accommodation in multiple family residential dwellings. The term was not defined in the bylaw so the court considered several dictionary definitions for the meaning of "reside" or "residential" The term "reside" meant "having one's home in a particular place for a considerable length of time" and the term "residential" meant "occupied mainly by private houses." The Court concluded:

> In the result, it appears the intention of the by-law is to permit units to be occupied by persons who normally reside there and to prohibit their occupation by tourists, travelers, and other persons who require only temporary lodging, including furniture, facilities and services of a kind not normally required by or provided to the tenants of houses or other dwelling units.

Thus even without a bylaw definition of "residential", describing the permitted use of dwelling units as "residential" use can be effective in ruling out the use of the building for tourist accommodation.

2. Lodging Houses

If the intention is to prohibit certain types of communal living arrangements in residential dwellings, the issue could be addressed by limiting the number of non-family household members who may occupy a residential dwelling and making clear in the definition of "household" the type of communal living arrangements that are permitted in a residential dwelling. Some zoning bylaws permit "lodging houses" or "boarding houses" in certain zones.

"Group homes" or "group living facilities" may also be permitted uses in certain zones. It may not, however, be clear whether a type of communal living arrangement that fits within one of those permitted use categories is also permitted in a residential dwelling. The zoning bylaw should therefore address what types of communal living arrangements qualify as non-family household units such that other types of arrangements are clearly prohibited in residential dwellings.

In *Neighbourhoods of Winfields Limited Partnership v. Death*, [2009] O.J. No. 1324, the Ontario Court of Appeal upheld a lower court order requiring owners to cease using houses on land zoned for single detached dwellings from renting individual rooms to students. In that case the zoning bylaw permitted "single detached dwellings" and "lodging houses" in different zones. A "single detached dwelling" was defined as containing only one dwelling unit. A "dwelling unit" was defined as "a unit consisting of one or more rooms, which unit contains toilet and cooking facilities and which is designed for use as a single housekeeping establishment". The term "lodging" was defined, in part, as three to ten lodging units, which do not appear to function as a dwelling unit, although one may be included with the lodging units. The term "lodging unit" was defined as one or more rooms within a lodging house used or designed to be used for sleeping accommodations. The owners argued that their properties were "single housekeeping establishments" for various groups of tenants, including students. The court disagreed finding that the essence of the relationship between the owners and the renters of individual rooms in the dwelling was one of "lodger" as defined in the zoning bylaw. The Court based its conclusion on the following factors:

- By definition, a "single detached dwelling" could not be a "lodging house". Each use was a distinct permitted use in different zones and excluded the other by the manner in which the bylaw operated. Lodging houses were not allowed in a residential area and had their own specific lot regulations.

- The term "single housekeeping establishment" was not defined but assistance was provided from the scheme of the Bylaw (parking requirements and density limits). Planning for use intensity would be rendered meaningless if the definition could include any number of persons independent from each other coming together for temporary short-term accommodation.

The court concluded as follows:

> I find that a "single housekeeping establishment" when read in context, means a use typical of a single-family unit or other similar basic social unit. For example, it could include a group of unrelated persons one or more of whom are dependent on the others due to physical or related challenges; or one person, or a couple cohabitating with children (not theirs biologically), to whom they stand *in loco parentis*. There are many examples of such basic social units in today's society which do not follow the traditional family

> model. However they involve more between them as a unit than simply short-term temporary sleeping quarters and shared facilities on a rental basis.

The issue could therefore be addressed by including a definition for "household" unit in the zoning bylaw which makes specific reference to a use typical of a single family unit or other similar basic social unit, similar to the court's comments in the *Neighbourhoods of Winfields* case.

3. Institutional Uses

Pursuant to s. 20 of the *Community Care and Assisted Living Act* zoning regulations in respect of residential dwellings would not apply to a community care facility licensed under the Act that is being used as a day care for no more than eight persons in care, or as a residence for no more than 10 persons, not more than six of whom are persons in care if the regulations:

- limit the number of person who may be cared for in a community care facility
- limit the type of persons who may be cared for in a community care facility
- apply to a community care facility only because the facility it is not being used as a single family dwelling house
- apply to a community care facility only because the facility operates as a community care facility, a charitable enterprise or a commercial venture

Thus regardless of the wording of a zoning bylaw, this type of small-scale institutional use is automatically permitted wherever single family dwelling houses are permitted. Facilities that are not licensed under the *Community Care and Assisted Living Act* would be subject to zoning regulations in respect of residential dwellings. Assuming the zoning bylaw is clear that a non-family household unit may occupy a residential dwelling, challenging questions can arise regarding whether particular care arrangements would qualify as a non-family household unit. For example, would groups of individuals recovering from drug or alcohol addiction, living communally and receiving care, supervision, guidance or counselling, be considered a "household unit"? Would foster children who cannot be placed in conventional-type foster homes, living communally with live-in or regularly visiting caregivers, be considered a "household unit"? The line as to what does or does not constitute a "household unit" is difficult to discern and will depend on the factual circumstances and the specific bylaw provisions that apply. In general, however, we think a "household unit" in a residential setting would likely be construed as something other than a group of individuals whose occupation of the dwelling is continually changing or who receive care, supervision, guidance or counselling within the dwelling, although the fact that members of traditional "families" may equally receive such services in their homes makes this a difficult judgement call.

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