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Planning Law and Accessibility: Third Party Permit Appeals by Persons with Disabilities

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Résumé de l'article

Les obstacles physiques, comme les marches à l'entrée d'un immeuble, découlent de l'interaction des règlements qui régissent ce que l'on construit. Le processus de plainte en matière de droits de la personne peut offrir un recours aux personnes handicapées lorsqu'elles sont exclues des espaces publics. Cependant, ce processus n'est pas une panacée à tous les problèmes. Les commissions et tribunaux des droits de la personne ne sont pas compétents pour agir comme médiateurs ou arbitres à l'égard de plaintes sur l'accessibilité déposées avant le début des travaux de construction, car toute discrimination alléguée n'est qu'hypothétique. Cependant, cela ne signifie pas pour autant que les personnes handicapées doivent attendre que le problème d'accessibilité se pose avant de pouvoir exercer une influence sur ce que nous bâtissons et sur le mode de construction que nous choisissons. Les lois canadiennes en matière d'urbanisme et d'aménagement du territoire imposent la consultation publique et permettent aux membres du public de contester les décisions prises dans ce domaine en interjetant appel. Dans le cas des personnes handicapées, elles pourraient contester les permis de construction et d'aménagement qui ont déjà été délivrés, si le projet proposé n'est pas accessible.

La plupart des provinces et territoires canadiens permettent à de tierces parties d'interjeter appel une fois que la municipalité a délivré un permis d'aménagement. Certains d'entre eux permettent également ce type d'appel après la délivrance d'un permis de construction. S'ils ont gain de cause en appel, les membres du public qui s'opposent à un projet ou à certains de ses aspects peuvent carrément empêcher la construction ou exiger des modifications. Ces processus d'appel pourraient permettre aux personnes handicapées d'exercer une influence directe sur la façon dont nous aménageons l'environnement bâti. En raison de sa nature prospective plutôt que rétroactive, l'appel à l'étape du permis représente un complément prometteur de la plainte en matière de droits de la personne.

Planning Law and Accessibility: Third Party Permit Appeals by Persons with Disabilities

Stephanie Chipeur[*]

A physical obstacle, such as a step at the entrance of a building, is the product of the interplay of regulations that govern what and we build. The human rights complaint process can provide a remedy to people with disabilities when they are excluded from public spaces. But there are limits to what can be accomplished by way of a human rights complaint. Human rights commissions and tribunals are not competent to mediate or adjudicate complaints about accessibility before construction commences, because any alleged discrimination is only hypothetical. But just because human rights law is limited in this way should not mean that people with disabilities must wait to encounter inaccessibility before they can influence what and how we build. Planning law legislation in Canada mandates public consultation and it also gives members of the public the right to contest planning decisions by way of an appeal. For people with disabilities, this would mean challenging development and building permits that have already been issued if the proposed development is not accessible.

After a municipality issues a development permit, most jurisdictions in Canada allow for an appeal by a third party. There are also some jurisdictions that also allow for this type of appeal after the municipality issues a building permit. If successful in an appeal, members of the public who are opposed to a project, or some of its aspects, may block construction altogether or require modifications. These appeal processes could offer an opportunity for people with disabilities to have a direct impact on how we construct the built environment. An appeal at the permit stage is a promising complement to a human rights complaint, because it is prospective rather than retroactive.

Les obstacles physiques, comme les marches à l'entrée d'un immeuble, découlent de l'interaction des règlements qui régissent ce que l'on construit. Le processus de plainte en matière de droits de la personne peut offrir un recours aux personnes handicapées lorsqu'elles sont exclues des espaces publics. Cependant, ce processus n'est pas une panacée à tous les problèmes. Les commissions et tribunaux des droits de la personne ne sont pas compétents pour agir comme médiateurs ou arbitres à l'égard de plaintes sur l'accessibilité déposées avant le début des travaux de construction, car toute discrimination alléguée n'est qu'hypothétique. Cependant, cela ne signifie pas pour autant que les personnes handicapées doivent attendre que le problème d'accessibilité se pose avant de pouvoir exercer une influence sur ce que nous bâtissons et sur le mode de construction que nous choisissons. Les lois canadiennes en matière d'urbanisme et d'aménagement du territoire imposent la consultation publique et permettent aux membres du public de contester les décisions prises dans ce domaine en interjetant appel. Dans le cas des personnes handicapées, elles pourraient contester les permis de construction et d'aménagement qui ont déjà été délivrés, si le projet proposé n'est pas accessible.

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Certains d'entre eux permettent également ce type d'appel après la délivrance d'un permis de construction. S'ils ont gain de cause en appel, les membres du public qui s'opposent à un projet ou à certains de ses aspects peuvent carrément empêcher la construction ou exiger des modifications. Ces processus d'appel pourraient permettre aux personnes handicapées d'exercer une influence directe sur la façon dont nous aménageons l'environnement bâti. En raison de sa nature prospective plutôt que rétroactive, l'appel à l'étape du permis représente un complément prometteur de la plainte en matière de droits de la personne.

I. INTORDUCTION

Ideally, everyone in Canada would take it for granted that there is infrastructure in place allowing them to go about their day, whether to work, school or the grocery store. For people with disabilities, however, the built environment can be difficult or impossible to navigate when it has not been planned with disabled bodies in mind. Coping with inaccessibility requires researching and planning routes, including access to washrooms, which is extra time and energy that able-bodied people do not need to expend in their daily lives.

A physical obstacle, such as a step at the entrance of a building, is the product of the interplay of regulations that govern what and how we build. The human rights complaint process can provide a remedy to people with disabilities when they are excluded from public spaces. But there are limits to what can be accomplished by way of a human rights complaint. Human rights commissions and tribunals are not competent to mediate or adjudicate complaints about accessibility before construction commences, because any alleged discrimination is only hypothetical. But just because human rights law is limited in this way should not mean that people with disabilities must wait to encounter inaccessibility before they can influence what and how we build. Planning law legislation in Canada mandates public consultation and it also gives members of the public the right to contest planning decisions by way of an appeal. For people with disabilities, this would mean challenging development and building permits that have already been issued if the proposed development is not accessible.

After a municipality issues a development permit, most jurisdictions in Canada allow for an appeal by a third party. There are also some jurisdictions that also allow for this type of appeal after the municipality issues a building permit. If successful in an appeal, members of the public who are opposed to a project, or some of its aspects, may block construction altogether or require modifications. These appeal processes could offer an opportunity for people with disabilities to have a direct impact on how we construct the built environment. An appeal at the permit stage is a promising complement to a human rights complaint because it is prospective rather than retroactive.

In this article, I look at examples from case law to explain why the human rights complaint process is ill-suited to prevent inaccessible design before it is constructed. The law currently requires the complainant to wait until the physical barrier exists. Since permits are issued on the basis of plans and inspections by the municipality, the design features are knowable but also in flux, which makes the permitting stage well-suited for making design changes in favour of accessibility. The permit appeal process is the only way for people with disabilities and their allies to enforce accessibility before construction is completed. This type of appeal is already in use by disgruntled neighbours who simply do not want to live near a proposed development (known colloquially as "NIMBYism"). It has also been used by litigants that identify as public interest groups for the purpose of blocking projects on environmental

grounds. Considerations about accessibility design features are already being litigated in NIMBY cases and so persons with disabilities have much at stake in this area of law.

II. THE LIMITS OF HUMAN RIGHTS LAW REMEDIES TO INACCESSIBILITY

Members of the public generally expect that when a municipality issues a building or development permit all legal requirements have been met, including those related to accessibility. However, the availability of a permit appeal process demonstrates that there is potential for error or for differing interpretations of permit requirements. Case law contains examples of disputes over municipal negligence and liability when a building owner relies on the issuance of a building permit to conclude that they have met the requirements of the building code. Some of these cases involve buildings that do not meet the accessibility requirements of the applicable code but were nonetheless issued a permit by the municipality.

In *Beutel Goodman Real Estate Group Inc. v. Halifax (City)*, a building owner sued the City of Halifax for issuing a building permit for the construction of a building that was later subject to a human rights complaint by a person with a disability.[1] Prior to construction, city employees told the developer's architect that access for persons with disabilities was not required for the second storey of the building. The municipality issued building and occupancy permits to the developer and the inspectors never addressed the inaccessibility of the second storey. A few years later, a wheelchair user successfully brought a human rights complaint against the building's owner (who was not the original developer) and against the City of Halifax, which resulted in the City electing to issue an order requiring the owner to install an elevator to make the second floor accessible. The owner then sued the City for negligence in erroneously issuing the building permit and claimed the cost of the elevator as damages, approximately $50,000. The Court held in favour of the City, finding that the owner did not reasonably rely upon the City's interpretation of the building code. The Court left open the possibility that the representations to the developer's architect could form the basis of liability but that there could be no remedy because the original developer had not brought the negligence claim.

The Court in *Beutel Goodman* treated the statutory right to appeal a building permit as evidence that the municipality is not the ultimate authority on whether the building code provisions are met.[2] The municipal employees involved in the inspection process had misapplied the building code requirements for elevator access to the second floor. Presumably, given the Court's acknowledgement of the appeal process available at the building permit stage, this misapplication of the building code could have been addressed before the building's construction had completed. Pursuant to legislation on standing, third parties affected by the misapplication can bring an appeal of the issuance of a building permit. This means that the wheelchair user, who successfully brought a human rights complaint years after the building was constructed, could have appealed the issuance of the building permit in the first place. Practically, retrofitting a building with an elevator is much more expensive than installing one during the initial construction phase.

As a matter of cost, the permit appeal process can be more efficient in reaching the same outcome (namely, an elevator) as a human rights complaint. Importantly, the wheelchair user could not have brought a human rights complaint to challenge the misapplication of accessibility standards during the permitting stage and before the building had been constructed. This is because a human rights complaint

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1 *Beutel Goodman Real Estate Group Inc v Halifax (City)*, 1998 CanLII 2244 (NS SC).

2 *Ibid* at paras at 9 and 14.

cannot be brought until the complainant directly experiences discrimination when encountering the stairs that prevented them from accessing the second floor of the building.

The requirement that a complainant experience the discrimination in the built environment also precludes any challenges to the substance of provincial building codes by way of a human rights complaint. In *Shuparski v. Toronto (City)*, a disabled resident of a condominium building brought a human rights complaint about the absence of power door openers in the building.[3] The resident sought an order requiring the condominium corporation to install power door openers, and sought damages from the City of Toronto and the Province of Ontario. The City had issued a building permit for the construction of the condominium building without power door openers because this feature was not required by the *Ontario Building Code*. The applicant argued that by issuing this permit, the City violated the *Ontario Human Rights Code* and failed to implement its own *Accessibility Design Guidelines,* which had been in place since 2004. The applicant's case against the province challenged the *Ontario Building Code* "on the basis that it is under-inclusive and therefore systemically discriminates against people with disabilities by authorizing inaccessible construction."[4]

By the time the case reached adjudication, the condominium corporation had voluntarily installed the power door openers and so the Tribunal dealt only with the case against the City and the Province. The Tribunal rejected the applicant's case against the province on the basis that it would be outside its jurisdiction to modify or set aside provincial legislation, namely, the *Ontario Building Code*. The Tribunal also held that the City's action in issuing the permit had no temporal or causal link to discrimination against the applicant. The Tribunal put great emphasis on the fact that when the City issued the permit, the building did not yet exist:

> what if the applicant had filed his Application on the day the permit was issued (the date of the allegedly discriminatory action); how would the Tribunal address the issue of whether the building is accessible? It would be impossible to adjudicate. The building would exist only in theory and the City would not necessarily have any further involvement in the project. Any alleged discriminatory action would be prospective and by others, not the City.[5]

The Tribunal went on to cite many cases supporting the proposition that human rights codes are "not designed to protect against hypothetical or even anticipated violations" rather, they are "retrospective and remedial in nature."[6] The difference between the requirements of Toronto's *Accessibility Design Guidelines* and provincial building code was irrelevant to the issue of alleged discrimination. However, in the context of a permit appeal, the fact that the City's *Accessibility Design Guidelines* required power door operators may have been determinative. As I discuss in the next section, a third party permit appeal has been used successfully to block a permit where a municipality holds itself to a higher standard of accessibility than provincial building code but fails to implement the higher standard when issuing a building permit. The Ontario Human Rights Tribunal's analysis in *Shuparski* illustrates the inadequacies of a human rights complaint to address these substantive aspects of building code and any accessibility concerns about a proposed construction project.

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3 *Shuparski v Toronto (City)*, 2010 HRTO 726 (CanLII).
4 *Ibid* at para 13.
5 *Ibid* at para 36.
6 *Ibid* at para 37.

Malkowski v. Ontario Human Rights Commission is another example of how the human rights complaint process cannot challenge the substantive accessibility requirements in provincial building code. The complainant had severe hearing loss and he alleged that the *Ontario Building Code* discriminated against him because it did not require the provision of a rear window caption board at movie theatres.[7] The *Ontario Building Code* did require assisted listening devices, but these were of no benefit to the complainant because he could not hear, even with the use of technology. The complainant argued that, in order to comply with the *Ontario Human Rights Code*, the *Ontario Building Code* ought to require theatres to install a caption board at the rear of a theatre such that a portable reflector, obtained on request from the box office and installed on the armrest, can be used to read the captions. At the time of the case, the rear window caption technology had been available for almost a decade and, six years previous, during a province-wide public consultation with the disability community, the Canadian Hearing Society had recommended that the *Ontario Building Code* ought to require this technology in all movie theatres.[8]

The Ontario Human Rights Commission refused to refer the complaint to a board of inquiry and the complainant appealed to the Divisional Court. The Divisional Court held that the complainant could not use the human rights complaint process to challenge the *Ontario Building Code* itself.[9] The Court did not address a hypothetical scenario wherein the complainant alleged discrimination on the part of an individual theatre for failing to provide rear window captioning. This ended up being a successful strategy a few years later, culminating in a settlement mediated by the Ontario Human Rights Commission requiring large film exhibitors to begin installing rear window captioning.[10] The Court did propose a different hypothetical strategy open to the complainant – bringing a constitutional challenge to the *Ontario Building Code*. However, perhaps because of the success of individual complaints against theatres, the complainant did not bring a Charter challenge and the *Ontario Building Code* does not require rear window captioning to this day.

There has been only one case where a human rights tribunal has been prepared to consider a municipality's decision to issue a building permit as evidence of discrimination.[11] The complainant brought a human rights complaint against an inaccessible restaurant and the municipality that issued the building permit for the restaurant's premises several years after the building had been constructed. The Tribunal would not assess the merits of the case against the municipality because the complainant failed to meet the six-month period of limitations required by the *Human Rights Code* in British Columbia. This meant that the alleged discriminatory action of the municipality, the issuance of the building permit, could not be considered and the Tribunal allowed only the complaint against the restaurant to proceed.

These human rights cases demonstrate the challenges of trying to hold provincial and municipal governments to account for their legislative and permitting functions in the construction of buildings. Part of the problem is that human rights adjudicators find it difficult to identify discrimination at the planning stage, when no building yet exists. If a complainant waits until there is a physical building, then it will almost always be too late to address the actions of the municipality because of the significant period of time between when a permit is issued and when the building is constructed and open to the public.

There is another limitation on the availability of a remedy under human rights law for inaccessibility in the built environment: the requirement that only people with disabilities who have been directly

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7 *Malkowski v Ontario Human Rights Commission*, 2006 CanLII 43415 (ON SCDC).

8 The Canadian Hearing Society, *Response to The Ontario Ministry of Municipal Affairs and Housing: A Consultation on Barrier-Free Access Requirements in the Ontario Building Code* (Toronto: The Canadian Hearing Society, 2002).

9 *Ibid* at para 38.

10 "Backgrounder: Settlement with respect to the exhibition of movies with closed captioning" online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/backgrounder-settlement-respect-exhibition-movies-closed-captioning>.

11 *Miele v Pat Quinn's Restaurant and Bar and another*, 2017 BCHRT 244 (CanLII) at para 16.

impacted can initiate a complaint. In the next example, I explain the limitations of addressing government responsibility for inaccessibility when the complainant cannot adequately prove their disability or cannot prove how the barrier affects them specifically even if the barrier affects other persons with different disabilities.

In a series of decisions, involving nearly 20 complaints by one individual against the town of Penetanguishene and some of its private businesses, the Ontario Human Rights Tribunal held that a human rights complaint cannot be used to enforce general compliance with the accessibility provisions of provincial building code.[12] Henry Freitag, the complainant, tried to use the human rights complaint process to improve accessibility in his community. However, Freitag's complaints were dismissed by the Ontario Human Rights Tribunal because Freitag could not show that he was personally impacted by the inaccessibility that he identified in his complaints. It was not sufficient for Freitag to argue that the respondents to his complaints were in violation of the provincial building code because these violations would only impact a hypothetical disabled person, but not Freitag himself. Freitag, who was in his mid-80s, asserted that his arthritis and heart condition qualified as disabilities affecting his mobility, but he did not submit any medical records as evidence and so the Tribunal did not accept this characterization.

Freitag's human rights complaints against the Town of Penetanguishene alleged discrimination against persons with disabilities because of its inaccessible built environment and he specifically identified the following issues: steep sidewalk slopes, lack of curb cuts, absence of sidewalks, obstructions on the sidewalk, narrow doorways, inadequate parking for persons with disabilities, inaccessible washrooms, lack of power operated doors, and lack of a fire safety plan for the evacuation of persons with disabilities.[13] Freitag argued that even if the barriers did not affect him directly, they would still impact other people with disabilities.

When questioned about why he required power operated doors in municipal facilities, Freitag said he was "concerned more about disabled persons with walkers or wheelchairs, but agreed that he did not currently use either a walker or a wheelchair."[14] Even when Freitag was able to show that a municipality or private business did not actually meet provincial building code requirements, the Tribunal held that this was no basis for bringing a human rights complaint:

> [t]his Tribunal does not have general jurisdiction to enforce the Building Code, or regulations under other legislation, or non-legislative accessibility standards, although these things may be referenced in evidence in a Tribunal proceeding.[15]

In one of the decisions, the Tribunal commended Freitag for his otherwise legitimate aim in making his town more accessible but admonished him for selecting to do so in an overly litigious way. The Tribunal suggested that Freitag ought to work cooperatively with municipal officials and raise his concerns in the processes available to him, such as formal presentations or petitions to the municipality.[16]

Freitag's efforts to use the human rights complaint process to achieve accessibility in his community were unsuccessful, primarily because only people with disabilities may initiate these complaints and only about inaccessibility that affects them vis-à-vis their particular disability. David Lepofsky argues that

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12 *Freitag v Penetanguishene (Municipality),* 2010 HRTO 1704 [*Freitag* (2010)]; *Freitag v Penetanguishene (Town),* 2013 HRTO 554 [*Freitag* (2013)]; *Freitag v Penetanguishene (Town) et al*, 2015 HRTO 1275 [*Freitag* (2015)].

13 *Freitag* (2013), *supra* note 12 at paras 2-3.

14 *Ibid* at para 98.

15 *Ibid* at para 9.

16 *Ibid* at paras 53, 135.

remedying inaccessibility by way of individual human rights complaints requires people with disabilities to be "private human rights cops".[17] The Ontario Human Rights Tribunal's rejection of Freitag's complaints reinforces Lepofsky's critique that the burden of policing inaccessibility is on disabled people alone. However, the onus on people with disabilities to enforce accessibility is only true of the human rights complaint process. The availability of planning law remedies, such as a third party permit appeal, are promising because they can be preventative and they do not require litigants to prove their disability. The appellants in a PEI building permit appeal case, which I will discuss below, invoked the powerful legal remedy of quashing a building permit, preventing the construction of an inaccessible motel, and it was irrelevant whether the inaccessibility would affect them personally. The permit appeal process gives broad right of standing to any person or organization, like Mr. Freitag, that seeks to improve accessibility in their communities.

III. THIRD PARTY PERMIT APPEALS

There are limits on what private landowners may build on their property and some of these exist to ensure that residents of a particular city or neighbourhood can influence the decisions about what is built in their community. The public consultations required by statute during the planning phase of a development project are one example of this type of input. While a public consultation provides the opportunity for participants to present their views, there is no formal legal requirement that decisionmakers in government or private landowners have to act on any of these views. In this section I will look at a formal legal intervention during the permit process, a third party permit appeal, that gives members of the public standing to challenge aspects of or to block the construction of a particular building project.

Permit appeals might close the current gap that prevents people with disabilities from proactively challenging inaccessibility before the construction phase. Here I discuss examples from case law where accessible design features are opposed by able-bodied litigants by way of permit appeals. This area of law, which has direct impact on whether we build accessibly, is a new potential tool for disability activism.

Where a construction project involves a new building or a change in a building's use, prior to getting a building permit the landowner must obtain approval from the municipality. In most Canadian jurisdictions this approval is called a development permit (or sometimes a site plan approval).[18] The requirements for a development permit are set out in a municipality's land use (or zoning) bylaw and they include specifications like permitted uses, density or height. Typically, an application for a development permit will contain quite detailed information about the proposed project that are relevant to accessibility, including: floor plans, proposed changes to public sidewalks and a statement of existing and proposed uses.[19] If anything significant about the proposed project does not conform with the land use bylaw, then the landowner must apply to the municipality for an amendment to this bylaw. In some cases, landowners can also apply for a variance or relaxation, which means that the project conforms with the bylaw in general but that a small exemption is required. For example, the mandated distance between neighbouring buildings may be impossible in some instances because of an odd lot shape.[20] Or, a building owner may

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17 M David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act — The First Chapter" (2004) 15 NJCL 125.

18 Parks Canada, *National Planning Permit Process: Discussion Paper* (2018), online: *Parks Canada* <https://www.pc.gc.ca/en/agence-agency/lr-ar/consultations/discussion> at 6.

19 *Ibid* at 7.

20 Province of Manitoba, *Municipal Planning Guide to Zoning Bylaws in Manitoba: Component A* (Winnipeg: Province of Manitoba, 2015) at 31.

apply to reduce the amount of barrier-free parking due to space restrictions.[21] If a municipality refuses to issue a development permit or variance it may effectively terminate a proposed construction project or add significant cost. Applicants have a right to appeal these decisions in almost every Canadian jurisdiction (as I explain in detail below).

After the development permit stage, or if none is required, the next step is to obtain a building permit. Before constructing a new building or conducting major renovations, landowners must show that they intend to comply with their jurisdiction's building code by submitting their plans in an application for a building permit. This may be a familiar process to those who have built or renovated their own home since building permits are required for almost any major construction project. The work of reviewing building plans, issuing a building permit and conducting inspections is also a municipal responsibility. Since building codes are provincial legislation, the municipal officials issuing building permits have almost no discretion to refuse a permit, if the applicant meets all legislated requirements. However, like applications for development permits, there are also instances where building permit applicants can seek a relaxation of or exception from the requirements of the building code, including accessibility requirements.[22]

Throughout the construction phase, further building inspections are usually required, depending on municipal regulations. After construction is complete, an inspector must issue an occupancy permit before the building may be used. As a result of the variety of permits and inspections required during a construction project, there are many opportunities for building officials to identify building code contraventions. At any point during construction, a building official may issue an order requiring changes to the design of the building or ceasing construction altogether. The permit cannot be issued if the proposed building will contravene certain laws and regulations. For example, Ontario's *Building Code Act* allows the chief building official to deny a permit if "the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law".[23] Those who fail to comply with an order or who contravene building code regulations may be subject to monetary penalties that can range from $10,000 to $100,000 depending on the province or municipality. There are differing interpretations of these requirements so, like for development permits, applicants have a right to appeal if the municipality denies their building permit application.

While development and building permit applicants are always entitled to appeal a decision not to issue a permit, most Canadian provinces and territories also allow third parties to apply to have an issued permit revoked. The third parties that bring these challenges are often neighbours unhappy with a nearby construction project on the basis that it will ruin their enjoyment of their own property. In a smaller number of cases, individuals or organizations appeal an issued permit on the basis of a "public interest". Canadian lawyers who advise developers take the risk of third party appeals very seriously and see them as very disruptive to a project even if the third party appeal is unsuccessful. This is because delays to a project are very costly. Lawyers advise their developer clients to adopt preventative strategies to ensure that there will be no delays – primarily through extensive consultation with the community during project development and learning from past third party appeals.[24]

The powerful incentive for developers to avoid third party appeals demonstrates the potential of this legal remedy for people with disabilities. Even one high profile appeal could influence the decisions of developers in the future because of the risk of expensive delays to a construction project. Permit appeals,

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21 *Barcis v Sault Ste. Marie (City)*, 2019 CanLII 2233 (ON LPAT).

22 See e.g. *Voropanov v Alberta (Municipal Affairs)*, 2012 ABQB 551 [*Voropanov*].

23 *Building Code Act,* SO 1992, c 23, s 8(2) [*Building Code Act* (ON)].

24 Allan Wu, "Regulating Project Risk: Project Development in the Regulatory State" (2018) 2018 J Can C Construction Law 213 at 244-5.

third party or otherwise, are rarely discussed in Canadian legal scholarship. Therefore, I will introduce the provincial and territorial legislation and case law that define who may bring such appeals and on what grounds. Before doing so, I first describe the rationale for third party appeal rights, along with some criticisms, by reviewing scholarship from Australia and the UK, where these issues have been debated by scholars and policy makers.

Stephen Willey, an Australian academic, has conducted broad comparative studies of third party appeals in various cities in the UK and Australia, and in Vancouver, British Columbia. Based on this research, Willey argues that appeal rights, for permit applicants and third parties, are "fundamental to ensure that decision-makers are held accountable and do not act in a capricious manner."[25] Whether the appeal is to a court or administrative tribunal, Willey finds that an independent and impartial adjudicator does not just correct mistakes in the interpretation and application of building regulations or land use bylaws, but also provides a check on corrupt relationships between municipal politicians and wealthy developers.[26]

In his comparative studies of the UK, Australia and Canada, Willey interviews government officials, planning professionals, developers, lawyers, academics and "environmental and resident action groups", which are the typical third party appellants in the jurisdictions he studies.[27] In general, interviewees representing government or developers tend to view third party appeals negatively and the interviewees from environmental and resident action groups, unsurprisingly, support the right to appeal as a third party. Willey uses Vancouver in his comparative study to illustrate a jurisdiction where third party appeals are very limited, in contrast to Australia (and other jurisdictions in Canada as I explain below). Rather than having the right to appeal permits, third parties may only appeal decisions related to zoning bylaws.[28] Willey observes that one consequence of limited appeal rights in Vancouver is that developers work closely with the municipality from the outset to ensure that projects will obtain necessary permits because most decisions are final. Some of those interviewed by Willey felt that this could potentially hurt the community, and minority interests in particular, because then the only accountability for planning decisions is municipal elections, which can be several years apart.[29]

In Victoria, Australia, where third party appeal rights are quite broad, Willey found that these appeals "draw the public into land-use planning, encourage greater participation and can often result in improved decision making."[30] The reason that the involvement of third parties improves decision making is that they can provide a "local level of knowledge" that was not considered during the initial planning or permitting decision.[31] Scotland does not give third parties the right to appeal planning decisions, but in 2006 Scottish legislators considered creating such a right. An environmental group that was strongly in favour of the proposed legislation argued that a third party right of appeal

> would establish a 'credible threat' for poor or disadvantaged communities otherwise hopelessly 'outgunned' by development interests (in terms of financial power, access to

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25 Stephen Willey, "Are planning appeal rights necessary? A comparative study of Australia, England and Vancouver BC" (2005) 63:3 Progress in Planning 265 at 266 [Willey, 2005].

26 *Ibid* at 304.

27 *Ibid.*

28 *Vancouver Charter*, SBC 1953, c 55, s 573.

29 Willey, 2005, *supra* note 25 at 302-3.

30 Stephen Willey, "Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia" (2006) 24:3 Urb Pol'y & Research 369 at 370 [Willey, 2006].

31 *Ibid* at 378.

> legal advice and lobbying influence). In this respect it could offer real accountability of planning authorities to citizens, and underpin genuine and meaningful participation.[32]

This understanding of a permit appeal makes it sound like a promising legal tool for people with disabilities, who have been and continue to be marginalized in the planning and construction process. However, as some critics point out, the very reasons that certain populations are not meaningfully represented in planning decisions in the first place, also explains why they do not know about or have the resources to pursue a permit appeal. One of the strongest arguments against third party appeals is the potential that they could be used to fight projects that are considered undesirable by the residents of a particular neighbourhood (so-called NIMBYism) and could thereby "become a tool to be exploited by elitist and capitalist interests at the expense of the vulnerable."[33] There are examples in Canadian caselaw of these types of appeals, including opposition to the construction of group homes for persons with disabilities in a particular community (which I will discuss further below).

The criticism about the co-optation of third party appeals by the powerful is also a compelling reason for marginalized communities to engage with the process. Whether it is developers or resident action groups that oppose or fail to consider the interests of the disability community, there are a variety of procedural opportunities to advance an accessibility agenda during a permit appeal. People with disabilities can self-advocate in the planning process and provide what Willey describes as a "local level of knowledge" that might otherwise not be presented to decision makers.

The limited third-party appeal rights in Vancouver, the only jurisdiction in Canada that Willey studies, are not representative of other jurisdictions in Canada.[34] In fact, most provinces and territories in Canada offer a broad right of appeal to third parties. Each of the provinces and territories that provide for a third-party appeal require some connection between the third party and the decision to issue a permit. Nova Scotia, Newfoundland and Nunavut give third parties the broadest right of appeal because it is not limited to the building or development permit decision alone. In Nova Scotia, "any person adversely affected by an order given or decision made by a building official" may bring an appeal.[35] Third parties in Nova Scotia may also appeal the decisions of the Building Advisory Committee. This committee makes rulings where there is a dispute between a permit applicant and a building official "respecting the technical requirements of the Building Code or the sufficiency of compliance with such requirements"[36] Newfoundland gives a right of appeal to anyone aggrieved by a decision regarding an application or a permit to undertake a development.[37] Third parties can also appear and make representations at an appeal brought by the permit applicant if the third party is affected by the subject matter of the appeal.[38] In Nunavut, any "person aggrieved" by the decision of the chief building official may bring an appeal regarding "an interpretation of the technical requirements of the [Nunuvut Building] Code or the sufficiency of compliance with those requirements".[39]

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32 Duncan McLaren "Third-party Rights of Appeal in Scotland: Something Rotten?" (2006) 7:3 Planning Theory & Practice 346 at 346.

33 Willey, 2006, *supra* note 30 at 380.

34 Even though there is no right of appeal for building or development permits in British Columbia, third parties that qualify as public interest litigants can apply for judicial review on the basis that the decision to issue the permit was unreasonable: *The Architectural Institute of British Columbia v Langford (City)*, 2020 BCSC 801.

35 *Building Code Act*, RSNS 1989, c 46, s 16.

36 *Ibid* at s 15.

37 *Urban and Rural Planning Act*, 2000, SNL 2000, c U-8 at s 42.

38 *Ibid*.

39 *Building Code Act*, SNU 2012, c 15, s 17(1).

The rest of the provinces and territories limit a third-party appeal to a decision regarding the issuance of a permit. Alberta allows "any person affected" and Prince Edward Island allows "any person who is dissatisfied" with a development or building permit to appeal the issued permit.[40] Ontario provides a right of appeal to any "person who considers themself aggrieved" by the decision to issue a building permit.[41] Manitoba uses similar language, allowing "[a]ny person who feels aggrieved" by the issue of a building permit to bring an appeal.[42]

The language used in New Brunswick's *Community Planning Act* appears to require a higher threshold than merely being affected or aggrieved. The appellant must show that the approval of the permit "would cause him or her special or unreasonable hardship."[43] Saskatchewan and the Northwest Territories explicitly require third parties to prove not only that they are affected but that the permit was incorrectly issued. In Saskatchewan "a person affected" can appeal a permit only if there is "an alleged misapplication of a zoning bylaw."[44]

Similarily, in the Northwest Territories any person who is "adversely affected" by the decision to issue a building permit can appeal only where the building would contravene a zoning bylaw.[45]

There is some variation between jurisdictions as to in which type of adjudicating body will hear an appeal of a permit decision. In Nova Scotia, appeals are heard by application to the provincial superior court. In Ontario, New Brunswick, Saskatchewan, Newfoundland, Alberta, Prince Edward Island and the Yukon, the appeal is first heard by an administrative board rather than by a court (the parties can apply for judicial review after the board makes a determination). In Manitoba the appellant must first apply for a hearing with the Minister charged with administration of the *Building and Mobile Homes Act*. The Minister may make any order as he or she "sees fit".[46] It is only after the Minister makes an order that the appellant (or respondent) can apply to the Court of Queen's Bench.[47] In Nunavut, where third parties have the broadest right of appeal, the appeal is heard by the Building Advisory Committee. The composition of the committee is mostly representatives from the construction industry but also includes "a representative nominated by the Nunavummi Disabilities Makinnasuaqtiit Society."[48]

In Québec, third parties do not have an explicit right to appeal an issued development or building permit, but the *Act respecting land use planning and development* contains a provision that has a similar effect. Any "interested person" may apply to the Superior Court "to order the cessation of (1) a use of land or a structure incompatible with [zoning or other municipal bylaws]…It may also order, at the expense of the owner, the carrying out of the works required to bring the use of the land or the structure into conformity with [applicable bylaws]".[49] This provision has been used by third parties to challenge the issuance of a building permit.[50]

Since the majority of Canadian jurisdictions have an administrative body that hears planning appeals, the online access to the archives of these decisions varies and written reasons can often be sparse.[51] Despite these limits, I have been able to find a case from Prince Edward Island that illustrates the use a building

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40 *Municipal Government Act*, RSA 2000, c M-26, s 685(2); *Planning Act*, RSPEI 1988, s 28.
41 *Building Code Act* (ON)*, supra* note 566 at s 25(1).
42 *Buildings and Mobile Homes Act,* CCSM 1987, c B93, s 12 [*Buildings and Mobile Homes Act*].
43 *Community Planning Act*, SNB 2017, c 19, s 120(1)(b)(ii).
44 *The Planning and Development Act*, SS 2007, c P-13.2, s 219.
45 *Community Planning and Development Act*, SNWT 2011, c 22, s 62.
46 *Buildings and Mobile Homes Act, supra* note 42 at 12(4).
47 *Ibid* at 13.
48 *Building Code Regulations,* Nu Reg 009-2018*,* s 46.
49 *Act respecting land use planning and development*, CQLR, c A-19.1 at 227.
50 See e.g. *Bell c Mount-Royal (Town of),* 2011 QCCS 6011; *Fontaine c Lapointe-Chartrand*, 1996 CanLII 6264 (QC CA).
51 Thomas W Wakeling, "Frederick A. Laux, Q.C., Memorial Lecture" (2018) 55:3 Alberta L Rev 839.

permit appeal to challenge inaccessibility.[52] The Town of Montague had issued a building permit for the construction of a new motel and the appellants, who were neighbours to the proposed site, appealed this permit to the Island Regulatory and Appeals Commission, arguing that the Town misapplied its own bylaws in issuing the permit. One of the grounds of the appeal was that the building plans for the motel, which would be composed of several individual cottages, evidenced that none of units would be accessible to wheelchair users. The Town argued that it had properly applied the provincial building code, which exempted "rental cottages" from any barrier free design requirements. However, the appellants argued that the Town had failed to apply its own bylaw that stated "[a]ll commercial buildings must be accessible to wheelchairs and physically challenged persons." The Commission found that the more stringent accessibility requirements found in the Town's bylaw should apply. The issue of accessibility, however, was only one of many grounds of appeal, which were overall much more related to their concerns about the potential for noise and the aesthetics of the project. There is no comment in the decision about whether the appellants were disabled themselves. Since one of them, Keir Clark, was a prominent politician in PEI for decades, the fact that accessibility was raised in this case seems more likely due to the sophistication of appellants rather than their own personal experience with disability. Ultimately, the Commission quashed the building permit on the grounds that the Town had misapplied its Official Plan and its bylaws in issuing the permit. The Commission stressed that the motel could be built on the proposed site eventually but that the developer would have to update its building plans to comply with the municipal regulations that the Town had failed to apply.

The appellants in the PEI case were neighbours to the proposed motel and so their standing to bring this appeal was not at issue. They were able to use the inaccessibility of the proposed project as grounds for their appeal but accessibility was not the end goal of their appeal. My proposal here is to consider whether a third-party appeal could be initiated by a individual or a group that oppose a project or aspects of a project because it would not be accessible to persons with disabilities.

Ontario is the only province to have case law on the issue of standing in building and development permit appeals. In the leading Ontario case, the Superior Court held that to meet the statutory requirement of "a person who considers themself aggrieved", an appellant must have reasonable grounds for this belief: an appellant's belief that he or she is 'aggrieved' must be reasonable and not fanciful and should demonstrate some nexus or connection between the decision complained of and some legitimate interest of the appellant.[53]

Reasonable grounds include when an appellant has suffered a legal grievance, in the sense of having been wrongfully deprived of something.[54] However, it is not necessary for the appellant to have suffered legal harm; they may simply "consider themselves wronged by a decision of the chief official within the context of the Building Code Act…[and] an appeal is not to be barred simply because the appellant does not have a personal, proprietary or pecuniary interest."[55] Economic interest is a sufficient basis for a permit appeal. Several owners of grocery store chains or other types of commercial chains have been granted standing to appeal the permits issued to their competitors.[56]

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52 *Keir & Marion Clark v Town of Montague*, (1997) Order LA97-08 - LA97003 (PEI Regulatory and Appeals Commission).

53 *Berjawi v Ottawa (City),* 2011 ONSC 236 at para 8 [*Berjawi*].

54 *Friends of Toronto Parkland v Toronto (City)* (1991), 8 MPLR (2d) 127 [*Friends of Toronto Parkland*].

55 *Ibid.*

56 See *Loblaws Inc v Ancaster (Town), Chief Building Officer,* (1992), 12 MPLR (2d) 94; *York Region Condominium Corp No 890 v Toronto (City),* [2005] OJ No 873.

In *Friends of Toronto Parkland v. Toronto*, a third party appealled the building permit issued for the construction of a community centre in Eglinton Park on the basis that the proposed underground parking would violate a city bylaw. The City of Toronto had already conducted several public consultations regarding the construction of the community centre. Friends of Toronto Parkland was a non-profit corporation opposed to the construction of the community centre because of its membership's interest in preserving green space in Eglinton Park. Representatives of Friends of Toronto Parkland appeared and made submissions at several of the public consultations. The Court found that these appearances were relevant to the issue of standing:

> It is clear that the appellant's have a different approach to the appropriate use of parks and parklands. Their main objective was to prevent or obstruct the construction of the community centre project. This is a battle which they had fought and lost. Questioning the parking component of the building permit as constituting a violation of the by-law was the last effort to realize their goal. Considering the history of their involvement, it is doubtful that they consider themselves aggrieved by the underground facilities for parking permitted by the building permit.[57]

However, courts do not always consider past participation in public consultations as evidence of a bad faith appeal. In *Friends of McNichol Park v. Burlington (City)*, the appellant challenged a building permit that had been issued to a hospital that was planning to build a rehabilitation centre in McNichol Park. The court of first instance applied *Friends of Toronto Parkland* and held that the appellant's "voice ha[d] been heard and its opinions rejected by the persons elected to represent the interests of the community as a whole."[58] The appeal court disagreed, finding that the appellant had an interest not only in preserving the parkland but also in being deprived of its right to challenge a rezoning bylaw, which the City of Burlington ought to have passed before allowing the rehabilitation centre to be built.[59]

Since *Friends of McNichol Park*, Ontario courts have been fairly generous with the test for standing and have not treated an appellant's participation in public consultations as evidence that the appellant is attempting to block a project by any means necessary. In *Berjawi*, the appellants were neighbours of a proposed group home for survivors of domestic violence.[60] The Court gave the appellants standing even after finding that these neighbours were not satisfied that their concerns had been addressed in the public hearing process and so were now using the building permit appeal process to block the construction of the group home. Even though the appellants were granted standing, their appeal was ultimately unsuccessful because the court disagreed with their position on whether the group home was permitted by the zoning bylaw.

Since the test for standing is relatively broad, in some cases the municipality responding to a permit appeal requests that the appellants post security for costs prior to the adjudication of the permit appeal. This has been a successful strategy for municipalities in cases where environmental groups use the permit appeal process to challenge land development projects.[61] There are concerns that requiring these groups to post security for costs is an unfair deterrent to those with a legitimate case that a permit should not have

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57 *Friends of Toronto Parkland*, *supra* note 54 at paras 15-16.

58 *Friends of McNichol Park v Burlington (City),* (1996), 33 MPLR (2d) 198 (Ont Gen Div) at 8.

59 *Friends of McNichol Park v Burlington (City),* 1996 CanLII 11771 (ON SC).

60 *Berjawi, supra* note 53 at para 8.

61 *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. v Durham (Regional Municipality),* 2011 ONSC 7143 [*Durham CLEAR*]; *Pointes Protection Association v Sault Ste. Marie Region Conservation Authority*, 2013 ONSC 5323.

been issued.[62] The threat of a costs order could ensure that only wealthy individuals and organizations can launch a third party appeal. However, if the appellants challenging the permit are "public interest litigants" then, according to the law of costs, the Court can excuse the appellant from posting security for the legal costs of the opposing party.

The test for public interest litigant status in the context of a permit appeal is set out by the Ontario Superior Court of Justice in *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc. (Durham CLEAR) v. Durham (Regional Municipality)*.[63] The appellant brought a third-party challenge to a permit issued by the municipality of Durham for the construction of a waste incinerator plant by Covanta Durham York Renewal Energy Limited Partnership (Covanta). Extensive public consultation took place before the selection of the site, including 99 public information sessions throughout the Durham Region. The appellant, Durham CLEAR, described itself as a "public interest not-for-profit corporation…formed…as an environmental advocacy organization for all of the Regional Municipality of Durham."[64] Its appeal was based on the argument that the construction of the waste incinerator plant would contravene provincial planning legislation and municipal zoning by-laws.

When Covanta, one of the respondents, brought a motion to have the appellant post security for cost, Durham CLEAR argued that such an order would be inappropriate because it qualified as a public interest litigant. The Court assessed the appellant's status as a public interest litigant by applying the following considerations:

- the proceeding involves issues the importance of which extends beyond the immediate interest of the parties involved;
- the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;
- the issues have not been previously determined by a court in a proceeding against the same defendant;
- the defendant has a clearly superior capacity to bear the costs of the proceeding; and,
- the litigation has not engaged in vexatious, frivolous or abusive conduct.[65]

The Court found that Durham CLEAR did qualify as a public interest litigant but declined to rule that the group was immune from posting security for costs because it was not a "pure" public interest litigant. When considering what would have made the appellant a "pure" public interest litigant, the Court emphasized the relevance of whether a litigant is "a marginalized, powerless or underprivileged member of society" and whether the interests at stake are "the relief of poverty or the vindication of the constitutional rights of beleaguered minorities."[66] The Court was persuaded that Durham CLEAR was more akin to a resident action group collectively opposed to living near a waste incineration plant rather than a group representing a marginalized population. When applying the public interest litigant test in another planning case, *House v. Lincoln (Town),* the Ontario Superior Court of Justice gave public interest

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62 Mark McAree, "Security for Costs Orders Against Environmental Groups Bolstered by Pointes Decision" (24 February 2014), online: *Mondaq* <https://www.mondaq.com/canada/Environment/294972/Security-For-Costs-Orders-Against-Environmental-Groups-Bolstered-By-Pointes-Decision>.

63 *Durham CLEAR, supra* note 61 at para 4.

64 *Ibid* at para 9.

65 *Ibid* at para 51.

66 *Ibid* at paras 55 and 80.

litigant status to (and refused to order costs against) an individual seeking to prevent the demolition of an older school building that he considered a heritage property.[67]

Given the jurisprudence on public interest litigants and costs in third party planning appeals, a person with a disability or a disability advocacy group could use this type of proceeding without fear of posting security for costs or paying the government or developers costs if the appeal is unsuccessful. A permit appeal of this type may be the only legal remedy to challenge a proposed construction project that is not accessible either because of a misapplication of a provincial building code or a municipal bylaw. As in the PEI case discussed above, the third-party appellant does not actually need to be disabled themselves. This is important because human rights complaints about the built environment must not only be brought by a person with a disability but also must pertain to a specific instance of discrimination. As a result, a permit appeal is the only opportunity to challenge inaccessibility during the pre-construction phase.

IV. PLANNING LAW AND OPPOSITION TO ACCESSIBILITY

The formal opportunities for public participation in the planning process, including a third party permit appeal, can expand both standing and the legal remedies available for those who seek to challenge inaccessibility. Yet third party appeals and other planning law tools can also be used to reduce or prevent the construction of accessible buildings. In this section I will explain how planning law remedies are used to threaten accessibility in the built environment. My point is not to criticize the availability of these remedies but to emphasize the exclusive way that they have been exercised to assert privilege for able-bodied people. Some of these cases also reveal how building projects that introduce accessibility into the built environment can trigger special permit requirements since they introduce new design features that were not contemplated by land use or zoning bylaws.

One of the criticisms of third party appeals in the planning contexts (as I discussed above) is that, instead of empowering marginalized people, they will only be initiated by sophisticated and wealthy litigants. This was a concern raised by some in Willey's study of the use of third party appeals in Australia, which involved interviews with a variety of stakeholders, including government planning departments, developers and resident action groups. In another study from Australia, researchers assessed the impact of third party appeals on the construction of high density and social (or low income) housing developments by reviewing permit applications and any appeals for all housing developments in the city of Melbourne from 2009-10.[68] The results of this study showed a higher number of third party appeals in neighbourhoods with "higher relative advantage", both in terms of wealth and education.[69] The researchers in Melbourne also conducted interviews with third party appellants to learn more about the reasons for their objections. As in Canadian jurisdictions, the official grounds for an appeal must demonstrate that the municipality erred in issuing the permit by improperly applying planning regulations, which typically concern building height or access to parking. But during interviews, third party appellants from affluent areas revealed to the researchers their "desire to exclude particular social groups from the neighbourhood", such as the beneficiaries of government-subsidized housing, because of their effects on the status of the community and property values.[70]

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67 *House v Lincoln (Town)*, 2015 ONSC 6286.

68 Nicole Cook, et al, *Resident third party objections and appeals against planning applications: implications for higher density and social housing* (Melbourne: Australian Housing and Urban Research Institute, 2012).

69 *Ibid* at 85.

70 *Ibid* at 88.

The Melbourne study on third party appellants was conducted in 2012 and is the only one of its kind. Canadian legal scholarship does not address third party planning appeals in a comparable way to the research from Australia. However, we do have case law and academic discussion of the history of the use of planning law, including third party permit appeals, by residents of a particular neighbourhood to "protect" their community from undesirable social groups, using similar arguments to those litigants interviewed for the Melbourne study. [71] The most controversial goal of organized community action in recent years has been the opposition to group homes or supportive housing for persons with disabilities. In the typical case, neighbours initiate a permit appeal to block the proposed construction of a group home, or they lobby for certain zoning bylaws that would exclude or limit the number group homes in their community. Zoning of this nature was successfully challenged at the Ontario Human Rights Tribunal in a series of complaints between 2011 and 2014. Municipalities across Canada have been revising their bylaws accordingly.[72] However, group homes remain the subject of intense scrutiny during the planning approval process and the threat that neighbours will initiate a permit appeal puts group home developers and operators in a defensive position from the beginning of the construction project.

Part of the stigma associated with group homes is that, in many cases, they house persons with psychiatric disabilities who have left institutional settings or those seeking addiction recovery services.[73] In addition to myths about the criminality of these populations, some opposition is based on the perception that these group homes are only a temporary residence for individuals who require support or supervision until they can live independently. However, group homes also house people with disabilities who need permanent supports, such as 24-hour caregivers or design features that are almost impossible to find in affordable housing, like ceiling lifts. This means that the construction of group homes directly addresses the shortage of accessible housing in Canada.

It is the very design features that are required to make an existing structure or new building accessible that can trigger the requirement for a variance or development permit, which in turn creates a right of appeal for neighbours who do not want to live next to a group home. For example, *Aldighieri v. Niagara Escarpment Commission*, a 1995 case from Ontario, involved a third party appeal of a development permit that had been issued for renovations to an existing structure so that it could become a group home for six persons with developmental disabilities.[74] The appellants, the neighbours on either side of the property, raised several objections to the project that, on the surface, were connected to planning matters such as concerns about the increased wear and tear on roads, increased traffic, stress on the water supply and inadequate parking spaces. However, some objections directly targeted the individuals who would be living in the home because of their disability, alleging that:

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71 Ian Skelton, *Keeping them at Bay: Practices of Municipal Exclusion*, (Winnipeg: Canadian Centre for Policy Alternatives, 2012); Sandeep Agrawal, "Balancing Municipal Planning with Human Rights: A Case Study" (2014) 23:1 Can J Urban Research 1; Lilith Finkler & Jill L Grant, "Minimum Separation Distance Bylaws for Group Homes The Negative Side of Planning Regulation" (2011) 20:1 Can J Urban Research 33; Lilith Finkler, "Re-placing (in)justice: Disability-related facilities at the Ontario Municipal Board (OMB)" in Law Commission of Ontario, ed, *The Place of Justice* (Halifax: Fernwood Publishing, 2011), 95-119.

72 City of Hamilton, Planning and Economic Development Division, *Residential Care Facilities and Group Homes: Human Rights and the Zoning Bylaws within the Urban Area* (City of Hamilton, 2019).

73 Skelton, supra note 71.

74 *Aldighieri v Niagara Escarpment Commission*, 1995 CarswellOnt 5411 (Niagara Escarpment Hearing Office) [*Aldighieri*].

- the proposal will depreciate property values in the vicinity. It would be more appropriately located in the inner city, rather than in the countryside. Mr. Furlong, a resident of Hamilton, testified that property values in the vicinity of a group home in his neighbourhood had declined after the group home was established there [and]
  …
- there is an intangible stigma that comes from living close to a group home. Safety hazards posed to the children of surrounding residents must be considered.[75]

The adjudicator expressed confusion about why the developer of the group home had to apply for a development permit in this instance:

> When I asked why a development permit is required, since the structure would be a single dwelling both before and after approval, Mr. Stone [a land use planner] cited as reasons the change from an existing residence to a group home, the structural modifications needed for the wheelchair ramp and the fact that it constitutes a new residential use.
> In response to additional questions, Mr. Stone stated that the principal reason for the requirement of approval is that the wheelchair ramp would not constitute an extension to the dwelling that is exempt under [applicable regulations]…Consequently, a permit is required [emphasis added].[76]

The adjudicator rejected the neighbours' appeal, finding that the primary reason for the development permit was to authorize the construction of the ramp and none of the grounds of appeal were relevant to this narrow issue. Even though courts and administrative bodies tend to dismiss these types of appeals as thinly veiled attempts to prevent people with disabilities from living in a particular neighbourhood, these appeals still impose the cost and delay of litigation on group home projects.[77]

Third party permit appeals related to the construction of group homes are such a common threat that government departments and nonprofit organizations across Canada have published guides that offer detailed strategic advice about how to avoid this type of litigation.[78] These guides encourage developers to initiate community engagement from the beginning of any project and they also warn about the targeted use of planning law procedures by municipalities to foster community opposition. Sometimes local municipal politicians will encourage or request developers to hold public consultations that are not

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75 *Ibid* at para 10.

76 *Ibid* at paras 28 and 29.

77 See e.g. *Steinbock v Toronto (City),* 2017 CarswellOnt 14611 (OMB); *Nantuck Investments Inc. v Oshawa (City),* 2016 CarswellOnt 22180; *S. Kossatz v Development Authority of the City of Edmonton*, 2020 ABESDAB 10132; *Ronald L. Bruce v Fredericton Planning Advisory Committee and al.,* 2008 NBAPAB 20.

78 Canadian Housing and Renewal Association, *Minimizing and Managing Neighbourhood Resistance to Affordable and Supportive Housing Projects* (September 2014) online: CHRA < https://chra-achru.ca/wp-content/uploads/2015/08/Minimizing-and-Managing-Neighbourhood-Resistance-to-Affordable-and-Supportive-Housing-Projects.pdf>; Focus Consulting, *Finding Common Ground: Best Practices in Managing Resistance to Affordable Housing* (March 2014) online: Focus Consulting <http://www.focus-consult.com/wp-content/uploads/Finding-Common-Ground_Best-Practices-in-Managing-Resistance-to-Affordable-Housing-.pdf>; New Directions, Beyond NIMBY: A Toolkit for Opening Staffed Community Homes in Manitoba (December 2015) online: New Directions <https://newdirections.mb.ca/wp-content/uploads/2016/01/Nimby-Toolkit-web.pdf>; Canadian Homebuilders' Association – Newfoundland and Labrador, *Building "Yes": A Not-In-My-Backyard (Nimby) Toolkit* (June 2016) online: Canadian Home Builders' Association – Newfoundland & Labrador <https://chbanl.ca/building-yes-a-not-in-my-backyard-toolkit/>.

required by law.[79] Significant turnout from opposition in the community can lead to outcomes where developers elect not to proceed with the project or make significant concessions about the design of the project that affect who will be able to live in the group home once constructed. For example, in 2017 at a public consultation about a proposal for a group home in Brockville, Ontario, neighbours and city councillors were careful to emphasize that they had "no problem" with the future residents of the group home but that they had concerns about the layout of the building and parking spots.[80] The building was designed in a bungalow style to make it accessible to wheelchair users, but those opposed to the project felt the lot was too small to accommodate a four unit residence along with four parking spots. One of the individuals speaking against the project argued: "'Maybe it's the right application in the wrong location...It looks like it's a great building but it doesn't look like it fits the lot.'"[81] Another suggested that a better use of the space would be to redesign the project so that it would be a two storey building with only two accessible units on the groundfloor and two non-accessible units on the second floor.[82]

The threat of a permit appeal ensures that public consultations have a significant impact on the design of a group home and on whether the project goes ahead at all. In a news story about HomeSpace, a charity in Calgary that develops and manages group homes, the organization's success was defined by the fact that it had completed five projects "without one angry neighbour appealing permits to the city."[83] Instead of waiting for requests from the city to hold a public consultation, HomeSpace goes door-to-door inviting neighbours to "open houses" where the community can hear from the project architect, police and representatives from any support services for the group home residents. Not only do they answer all questions at these meetings, but they also sign what they term "good-neighbour contracts" that itemize any changes to the design of the project that are suggested by the community and agreed upon.

The ways that community groups can exercise influence over the construction of group homes for persons with disabilities evidence the power of planning law procedures for public participation. But opposition at a public consultation only matters because of the background threat of a permit appeal. As I explained earlier in this section, because of the costs of delay to a construction project, lawyers who specialize in this area of law advise their clients to mitigate any risks of third-party litigation during the development stage. In the case of group homes, developers mitigate this risk by giving significant attention and influence to the neighbours of a proposed group home. Yet this is not the only way that planning law can disproportionately impact the lives of people with disabilities. The adjudicator in the *Aldighieri* case pointed out some the equity issues for people with disabilities that need to make renovations to make their living spaces accessible:

> An examination of [the regulation requiring a development permit for a ramp] in the context of this case suggests that the Regulation reflects an interesting value system. Wheelchair ramps require a development permit, carrying with it the possibility of an appeal and a long waiting period for a person who has become handicapped and requires the structure.

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79 Skelton, *supra* note 71 at 17.
80 Ronald Zajac, "Neighbours object to group home parking" *The Recorder and Times* (6 April 2017).
81 *Ibid.*
82 City of Brockville, Economic Development and Planning Committee Public Planning Meeting Minutes (4 April 2017).
83 Elise Stolte, "Calgary supportive-housing effort harnesses the power of buy-in" *Edmonton Journal* (20 May 2017), B3.

> A frontyard or backyard swimming pool, however, where certain set back or size restrictions are met, can be built without the need of a development permit. I suggest that the Regulation be re-examined, in light of this case.[84]

Just as a group home developers might require special permits to create accessible living spaces, private homeowners may also be vulnerable to legal interventions from neighbours when adding accessibility features to their homes.

People with disabilities and their families may decide to renovate their homes to add features that will make the home accessible, like a ramp, and these types of renovations usually require a building permit and may sometimes require a minor variance application. Since most jurisdictions in Canada allow third parties to appeal these types of decisions, there are examples from caselaw and in the media of litigation between neighbours over these construction projects. In *Porter v. Toronto (City) Committee of Adjustment*, after a wheelchair user obtained a variance from the City to extend the size of her deck and build a ramp to access the deck, her next-door neighbour brought an appeal.[85] The neighbour argued that the proposed deck and ramp would be too close to his backyard and would interfere with his barbecueing activities. While the appeal was unsuccessful, the wheelchair user had to incur the legal costs of the appeal along with the costs of retaining a planner to appear as an expert witness.

In addition to a formal appeal, there are other tools of planning law that give individuals influence over their neighbour's accessibility construction projects. For example, in order to stop a couple from demolishing their home in order to rebuild an accessible one (because of a newly diagnosed health condition), their neighbour initiated a campaign to have the home designated as a heritage property.[86] The neighbour successfully brought a motion at the municipal council to have the heritage preservation staff conduct a report on the property, which ended up delaying her neighbour's construction project until the report could be completed.[87]

In another case, an individual anonymously contacted the municipality to report that their neighbour had completed a deck renovation project without obtaining a variance to allow for a larger structure than permitted by applicable zoning laws.[88] The municipality investigated the complaint and found that the deck had been built for the use of a wheelchair user and so to allow for the individual to safely move around, the deck was twice the size of what the applicable zoning law would allow. The municipality ordered the homeowners to remove half of the deck, which thy had spent $700 to build, or apply for a variance at an expense of $1,400 (which the neighbour could then appeal).

The planning appeal process is also effective for organized groups of neighbours to oppose accessible design features in commercial or other types of public buildings. In 2017 the Richmond/Knob Hill Community Association (the Community Association) brought an appeal to the Calgary Subdivision and Development Appeal Board regarding a development permit that had been issued to a personal injury law firm to construct a new office building in an area that was being redeveloped from residential into a "Main Street".[89] The Community Association brought the appeal because of its members' concern over the proposed law office fitting into the plans for redevelopment, and, in particular the part of the property that would be in the "public realm". In this case the public realm was the space between the curb and the front

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84 *Aldighieri*, *supra* note 74 at paras 54-55.

85 *Porter v Toronto (City) Committee of Adjustment*, 2007 CarswellOnt 5350, 57 O.M.B.R. 213.

86 Megan O'Toole, "Family Plight Sparks Furor in the Beach" *National Post* (27 May 2010).

87 The report ultimately concluded that the house did not meet the requirements to be considered a heritage property and the couple was issued a demolition permit.

88 Ellwood Shreve, "Scotti's Spot Tarnished" *The Chatham Daily News* (5 May 2017).

89 Calgary, SDAB2017-0062 (Re), 2017 CGYSDAB 62.

of the building. Many of the Community Association's objections stemmed from the law firm's plan to build a ramp for wheelchair users that would "protrude into the sidewalk zone" and "diminish the public realm".[90] The reason the ramp was necessary to the law firm's proposed offices was that one of the partners of the firm is a wheelchair user and many of its clients have disabilities.

The Community Association proposed changing the grading of the site to eliminate the need for a ramp but this would necessitate building a ramp at the back of the building with the parking spots. The Community Association also wanted more parking spots than were planned for but they would accept less parking spots to eliminate the ramp at the front of the building and relegate the ramp to the back. Finally, the Community Association proposed more landscaping at the front of the building to help "lessen the ramp's visual impact for passersby".[91] The Subdivision and Development Appeal Board ultimately rejected the appeal on the basis that the Development Authority that issued the permit considered all the plans and exercised its discretion to allow the ramp to cross into the public realm.

The final aspect of the building and development and permit process that I will discuss here is the availability of exemptions from or relaxations of accessibility standards for developers and building owners that can demonstrate that their application would be inappropriate. These decisions are not public so the circumstances in which these exemptions are granted is not subject to scrutiny unless there is a dispute that warrants judicial review. In *Voropanov v. Alberta (Municipal Affairs)*, the applicants brought a request to relax barrier-free building code requirements when applying for a permit to conduct renovations.[92] The applicants ran a private club that included a sauna and other spa services. They wanted to conduct their renovations in a building that was subject to new accessibility standards that had been added to provincial building code since the building's construction. They applied for judicial review of the decision of the Chief Building Administrator [CBA] to deny their request for a relaxation of the building code requirements that required a barrier-free shower space in their private club.

The *Alberta Building Code* gives the CBA the authority to grant a relaxation of accessibility requirements where a building owner can demonstrate that "the specific requirements are unnecessary" or "extraordinary circumstances prevent conformance".[93] The applicants submitted that it was their club policy to refuse individuals with certain health risks, including all individuals who use wheelchairs, from being members of the club due to the sauna's high temperatures. The policy of denying club membership to those who use wheelchairs was not at issue in the case and so the Court proceeded on the assumption that this was a legal policy. The applicants argued that their club was too small to accommodate showers that would meet the requirements of the accessibility standards and that these types of showers were unnecessary because of their membership restrictions. The Court ultimately held that the CBA's decision to deny the relaxation was unreasonable because the CBA relied on the fact that the club might change its policy on wheelchair users in the future or that people in wheelchairs might still be present in the private club. The Court remitted the case back for reconsideration by the CBA, finding that:

> The relevant provisions of the [Alberta Building] Code help to ensure that new and renovated buildings are constructed barrier-free, thus allowing individuals with physical and sensory disabilities to have access to and use of buildings. The [CBA's] role in deciding whether or not to approve a relaxation application therefore involves balancing the interests

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90 *Ibid* at para 22.

91 *Ibid* at para 35.

92 *Voropanov*, *supra* note 22.

93 Alberta Ministry of Municipal Affairs, *Application for Barrier-free Relaxation,* online: *Alberta Ministry of Municipal Affairs* <http://www.municipalaffairs.alberta.ca/documents/Barrier-Free-Application-Form.pdf>.

> of individuals with disabilities and those of business owners. Such balancing of interests weighs in favour of greater deference [emphasis added]."[94]

It is not possible to determine from publicly available documents the ultimate result of the *Voropanov* case. It is possible that a different judge could have found the CBA's determination to be a reasonable balancing of the interests of persons with disabilities and business owners. The CBA, in my view, understood the permanence of buildings and that people who use wheelchairs might one day be present in the space. The owners of the private club could sell at any point and future owners may not have a policy of excluding wheelchair users from their facility.

The judge in the *Voropanov* case described the discretion to issue a relaxation of accessibility standards as a balancing of interests between people with disabilities and business owners. Leaving aside the obvious fact that people with disabilities are sometimes business owners, this description gives the appearance that the interests of persons with disabilities were represented during the relaxation decision or at the judicial review hearing. Yet, the only parties to any of these proceedings were the applicants, the Chief Building Administrator and the Government of Alberta. It will not always be, like in *Aldighieri*, that decisionmakers will rule in favour of improving accessibility without evidence or submissions from the disability community. In *Voropanov* it would have been open to a third party, such as a local organization of disabled activists, to appeal the issued building permit once the matter was remitted to the CBA for reconsideration. If successful, a permit appeal in this case by persons with disabilities would not only require the building at issue to have accessible facilities but would create precedent for future decisions regarding requests for relaxation or exemption from accessibility standards.

V. CONCLUSION

Planning law gives motivated individuals a variety of tools to influence the built environment whether for large projects, such as a new hospital or library, or for small, like the size of a neighbour's deck. Given the significant impact of the built environment on people with disabilities, utilizing the tools of planning law to intervene in these construction projects could be a preventative strategy against inaccessible design. Third party permit appeals, even when they are unsuccessful, have had a significant influence on the decisions that developers make in the context of group home projects. People with disabilities could strategically engage in permit appeals to command the attention of developers, architects, planners and other stakeholders involved in the construction of the built environment. Not only could people with disabilities present their input on proposals at public hearings, but developers may start to seek out their feedback as part of their risk mitigation during the planning stages. And, in contrast to the human rights complaint process, the individuals and organizations initiating these kinds of permit appeals would not have to prove their disability status and they could assess the building plans prior to construction, thereby avoiding the burden of expense of retrofitting. The human rights complaint process is not the only or even the best way for persons with disabilities to demand changes to the built environment.

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94 *Voropanov, supra* note 22 at para 17.