

**Written Submission
to the
Ministry of Municipal Affairs and Housing
concerning
Life Lease Housing in Ontario**

Respectfully Submitted By:

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1. Introduction to ACE

The Advocacy Centre for the Elderly (ACE) is a specialty community legal clinic that was established to provide a range of legal services to low-income seniors in the Province of Ontario. These legal services include individual and group client advice and representation, public legal education, community development, and law reform activities. ACE has been operating since 1984 and is the only legal clinic in Canada with a specific mandate and expertise in legal issues of the older population.

Clients regularly seek our advice on issues relating to accommodation and care in retirement homes, long-term care homes, and other forms of housing. We also receive many requests for assistance from community legal aid clinics and others across Ontario for assistance in how to approach legal questions on seniors' housing. ACE lawyers are in high demand as speakers on seniors' issues and residents' rights. Numerous presentations on these issues have been made by ACE at the local, provincial, national and international levels.

Few of our clients are wealthy enough to be able to purchase life lease housing. However, we have had clients in life lease housing who have sought our advice on issues relating to the care and services they are receiving. They have also contacted us concerning their rights in relation to the life lease sponsor/operator.¹ We are pleased to contribute our views on the regulation of life lease housing based on our extensive experience advocating for seniors in Ontario.

2. Importance of Regulation

Life lease housing projects in Ontario are currently not covered by any legal framework. Some sources describe life leases as operating "outside the law". It is critical that Ontario create a proper framework within which life lease arrangements will be regulated, particularly given the projections about Ontario's demographic changes over the next few decades. Life lease housing appears to be an attractive option for older Ontarians and seems likely to grow in popularity.

Shelter and personal care decisions are among the most important aspects of daily life for Ontarians at every stage of life. For seniors, who may be moving out of a home they have lived in for many years, these decisions may have an even greater importance. Life lease purchasers must have the comfort of knowing that their form of housing is operating within the bounds of agreed-upon legislated standards.

It is encouraging that the government appears to be moving in the direction of creating consumer protection legislation to cover this area. ACE strongly supports this initiative. We respectfully offer the following comments concerning areas that should be covered in any new legislative scheme.

¹ In this submission we use the term "sponsor/operator" to refer to the organization or organizations that create, build, and operate life lease projects. We understand that the different phases of the project may be the responsibility of different corporate or administrative entities.

3. Key Issues for Legislative Action: Rights and Protection

The following are recommendations as to what should be included in proposed legislation concerning life lease housing. As we do not have experience with all of the matters raised in the Ministry's March 2007 consultation document, we will comment only on topics that have been raised by ACE's clients as issues of fundamental importance to their situation as life lease holders. The recommendations fall into two categories: seniors' rights and consumer protection.

a. Seniors' Rights

i. Non-Discrimination Within Life Lease Settings

It will be crucial to recognize and confirm that life lease holders maintain all of the same civil and human rights as any other Ontarian. In particular, the protections of the Ontario *Human Rights Code* must continue to apply to the relationship between life lease holders and sponsors/operators of life lease projects.

In our practice, we have represented clients who live in life lease units within retirement home/care home settings.² Surprisingly, they report that these homes have discriminatory attitudes and practices concerning mobility devices and the duty to accommodate physical disability. This is surprising to us because one would expect operators of services and accommodation for seniors to be proactive in their approach to accessibility, given that many people acquire a disability as they age.

For example, one ACE client is a life lease holder whose mobility impairments have caused her to require a progression of assistive devices. As her mobility has declined, she has needed to use a walker, a manual wheelchair, a scooter, and eventually an electric wheelchair to move around. She was informed by the manager of her building that the life lease agreement she had entered into prohibited the use of "motorized vehicles in common areas". The manager was interpreting this to mean that the client was not allowed to use her scooter or electric wheelchair to move independently from her unit through the hallway to the elevator or in the lounge areas of the building.

It is unclear why the manager would take such a position in this case, particularly since the client had a proven record of safe operation of her mobility devices. However, we have been told by other clients in various forms of seniors' housing that those people using wheelchairs and walkers are frequently told that they cannot use their mobility device in common areas, including communal dining rooms. There is a perception that seeing these devices will make other tenants feel old or disabled, or surrounded by frailty.

² The form of housing popularly known as a "retirement home" or "seniors' residence" is properly referred to as a "care home" and is defined and governed under Part IX of the *Residential Tenancies Act, 2006*.

ACE was able to assist in resolving this situation in a way that respected our client's human rights without having to file a complaint under the Ontario *Human Rights Code*. However, it is crucial that on a go-forward basis, rules governing life lease projects reinforce that such arrangements are subject to non-discrimination principles and policies of the Ontario *Human Rights Code*. Life lease holders do not give up any of their rights to equal treatment and dignity. While the example provided above concerns the right to equal treatment on the ground of physical disability, the right to non-discrimination must be recognized to extend to all prohibited grounds covered under the *Code*.

ii. Care Services in Life Lease Housing Should Be Subject to the Same Regulation as in Retirement Homes

Many life lease arrangements are physically located within retirement home/ care home settings. One of the advertised benefits of many life lease communities is that life lease holders may have access to amenities and services, including some care services, of the adjoining or co-located retirement homes. Two main issues arise in this context.

First, clients have informed us that in some life lease projects, life lease holders are told that they can only contract for care services with the provider that is associated with the project sponsor/operator. Such a provider may be contracted to provide nursing or other services to tenants in the co-located retirement home, or to residents at co-located long-term care homes. This effectively restricts the life lease holder's ability to contract for the kinds of services she may require and with the provider of her choice. ACE submits that the life lease holder's freedom to contract must be recognized in any life lease agreement, and that life lease operators should not be able to restrict the life lease holder's ability to select and contract with service providers of their choosing.

Second, ACE is aware that the Ontario Seniors' Secretariat is presently considering regulatory legislation to cover what are popularly known as retirement homes.³ We have previously made submissions to the OSS on their proposed regulation. While we do not intend to repeat those submissions here, we strongly submit that any future regulation that pertains to retirement homes/ care homes in terms of care services, meal provision, security, etc., should also pertain to life lease holders insofar as they are contracting to purchase these services from the project sponsor. In this respect, life lease holders are in no different position than care home tenants when they are dependent on care services provided by the project sponsor or operator. Their rights should be equally protected.

iii. Illegal Promises of Automatic Admission to Long-Term Care

Life lease projects may be located in proximity to retirement homes (private pay tenancies) and long-term care homes (publicly funded health care facilities). These

³ See footnote 2.

different types of accommodation may even be operated by the same charitable or not-for-profit operators as part of a seniors' community.

Our clients report that upon entering into a life lease arrangement, the project sponsor/operator has purported to promise the life lease holder a "seamless transition" into the co-located long-term care home if and when the client needs care in a long-term care home. While this idea of a "seamless transition" may appear attractive both to the life lease holder and to the sponsor/operator, such a promise is contrary to law.

Admission to long-term care is governed by legislation and is controlled by the Community Care Access Centres (CCACs). Long-term care home operators cannot "promise" anyone admission to their long-term care home, as the admission process and waiting lists are managed by CCACs according to comprehensive criteria and categorization. Bed offers for long-term care homes must come from the CCAC and not from individual homes nor from their administrators.

ACE recommends that any proposed legislation stipulate that any purported promise to a life lease holder concerning guaranteed or preferential access to a particular long-term care home be considered void. Such a provision would help educate seniors, would reinforce the importance of respecting the process for admission into long-term care, and would ensure the integrity of the long-term care admission process.

b. Consumer Protection

i. Dispute Resolution Mechanism

ACE submits that life lease legislation should set out a dispute resolution mechanism for disagreements that may arise between a life lease holder and the project sponsor. Such a mechanism should cover disputes that may arise during both the building stage of the project and the subsequent occupancy period. Many seniors do not have the means to pursue dispute resolution by way of civil litigation through the court system. They should not be left without the opportunity to air their legitimate grievances about the operation of the project or decisions that affect their investment or their daily lives.

While some types of disputes may eventually need to be adjudicated in court, a less formal and less costly dispute resolution mechanism should be included within life lease legislation.

ii. Transparent Business Practices

The life lease concept is not well known or understood by most people, including those seniors considering buying into a life lease project. In order for consumers to be well-informed and educated about the decisions they make, life lease sponsors must be subject to broad disclosure requirements at all stages of project development. Following the example of Manitoba's *Life Leases Act*, disclosure should be made in the form prescribed by regulation. This will help to ensure that the disclosure requirement is carried out in a completely transparent and consistent manner.

The disclosure requirement must be contained in legislation and must be accompanied by strict consequences for breach of the obligation to disclose. In ACE's experience, landlords of care homes regularly disregard the requirement in section 140(1) of the *Residential Tenancies Act, 2006*, concerning the obligation to provide a care home information package ("CHIP") to new tenants. In any proposed life lease legislation, the failure to provide full disclosure should be grounds for the life lease holder to terminate the agreement.

At the front end, disclosure should cover the risks and potential benefits of involvement in a life lease arrangement throughout the building process. Front end disclosure must include a copy of the life lease agreement so that the potential purchaser has an appropriate period of time to understand its contents and seek professional advice.

Once life lease holders are actually living in their leased units, they should be legally entitled to disclosure of the audited financial statements of the project on at least an annual basis. They should also be entitled to information up front and on an ongoing basis concerning any reserves maintained by the project, and the proposed use(s) to be made thereof.

iii. Life Lease Holder Involvement in Operations

Our clients report that their concerns and suggestions may not be taken seriously by life lease project managers. In ACE's view, life lease holders should have the opportunity to participate in decision-making concerning the operation of the project. This should take the form of representation on the board of the sponsor organization or of the corporation running the project. It is crucial that legislation include a requirement that life lease holders be represented on the board of the organization sponsoring or operating the project.

Life lease holders should also be free to organize residents' councils or other organizations to gather and voice the opinions of their membership. Legislation must specify that the board of the organization is required to permit the formation of a residents' council if the residents choose to establish one, and that the board is

required to co-operate with the residents' council by, for example, providing the council with copies of audited financial statements.

iv. Registration on Title and Title Insurance

Life lease holders should be entitled to register their leasehold interest on title. Registering the interest by way of notice of lease would protect the life lease holder's interest against third parties in the event that the project sponsor or other entity defaults on the agreement.

As a corollary, title insurance should be available to life lease holders to protect against unforeseen claims arising from unregistered legal or equitable interests, or fraud.

v. Cooling-Off Period

Any proposed life lease legislation should include a cooling-off period during which the purchaser can cancel his or her agreement to purchase. This ability to cancel the agreement must also be accompanied by a legislated requirement that the sponsor advise the purchaser of the right to cancel. This notice should be in writing and should be in the form prescribed by regulation.

vi. Process to Scrutinize Increases in Monthly Payments

The monthly fees paid by life lease holders should be made subject to the rent control regime currently found in Part VII of the *Residential Tenancies Act, 2006*. The amount of "rent" paid by life lease holders may vary according to the type of life lease arrangement entered into: a higher up-front purchase price may mean a lower monthly "rent", and vice versa. There may also be monthly payments to cover maintenance, operating expenses, and other aspects of the project's management. In ACE's submission, whatever monthly fee is levied on life lease holders should be subject to the same types of restrictions as those found in residential tenancy legislation.

Whether a person is a tenant under the *Residential Tenancies Act, 2006* or a life lease holder, he will have made a calculation about the maximum monthly "rent" charge his financial situation can bear. Life lease holders are no less vulnerable than other kinds of tenants in the sense that they could find themselves in financial difficulty if their monthly fees went up considerably or unexpectedly. While yearly lawful rent increases are to be expected, anything higher than a prescribed percentage of annual increase should be subject to a similar process of scrutiny and justification to that found in section 126 of the *Residential Tenancies Act, 2006*. Whether it is the Landlord Tenant Board or another neutral body that carries out the process of scrutiny and justification, such a process is necessary in order to protect the legitimate expectations of life lease holders.

vii. Independent Legal Advice

Entering into a life lease agreement is a very important step in a senior's life. It may be her biggest purchase in decades, or even the biggest purchase of her life. There is likely to be a significant inequality of bargaining power between the prospective purchaser and the project sponsor/operator. Further, as previously noted, the life lease is not a concept many people understand. There is a need for greater education and awareness among all potential purchasers about the precise nature of the transaction and its attendant rights, risks, and responsibilities.

As such, ACE recommends that legislation include a requirement for the purchaser to provide a certificate of independent legal advice before entering into a life lease agreement. Such a requirement will ensure that the purchaser understands the nature of the investment she is making, the nature and extent of the risks and benefits, and the character of the rights she will be acquiring. Any lawyer providing this independent legal advice will have to be aware of the legislative scheme before agreeing to advise a potential purchaser. The need for clarity in the legislation will therefore be paramount to protecting the rights and interests of all parties.

vii. Restrict Life Leases to Not-for-Profit Sponsors

It has been suggested in the literature that many life lease projects have arisen among not-for-profit organizations that may be faith-based, community-based or otherwise interested in the welfare and well-being of a group of seniors. ACE is aware that OANHSS, the Ontario Association of Non-Profit Homes and Services for Seniors, represents a large number of life lease projects in Ontario.

ACE submits that the life lease structure must be restricted to not-for-profit project sponsors. Not-for-profit organizations are accountable to their boards and to the local communities which they serve. Further, those not-for-profit organizations which are also charitable institutions may be eligible for certain charitable exemptions which would help them keep costs down and pass along these savings to life lease purchasers.

Most importantly, not-for-profit organizations are required to maintain their financial focus on the well-being and interests of the life lease holders who are the main stakeholders in life lease projects, both in terms of day-to-day living and in terms of the financial investment they have made in the project. There would be an inherent conflict of interest for a life lease sponsor/operator seeking to maximize shareholder profit while at the same time protecting the "investment" of the lease holders.

4. Conclusion

ACE respectfully submits these comments to the Life Lease Consultation. We would be pleased to elaborate on any of these points. Please contact us if we can be of further assistance.