

ISSUE DATE:  
**NOV 13, 2008**



PL080817

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: 1611161 Ontario Ltd.  
Subject: Minor Variance  
Variance from By-law No.: 0225-2007  
Property Address/Description: 3899 Trelawny Circle  
Municipality: City of Mississauga  
OMB Case No.: PL080817  
OMB File No.: PL080817  
Municipal No.: A220/08

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

1611161 Ontario Ltd.

C. Higgs\*

Area Residents

C. Kerr, J. Pagano

**DECISION DELIVERED BY C. CONTI AND ORDER OF THE BOARD**

**Background**

1611161 Ontario Ltd. (the Appellant) applied to the Committee of Adjustment of the City of Mississauga for a variance to Zoning By-law 0225-2007 in order to permit the location of a take-out restaurant at 3899 Trelawny Circle, Mississauga. The City's Zoning By-law requires a 60m minimum separation distance between a take-out restaurant and a residential zone. The Appellant is proposing a separation distance of 39.62m. The Committee of Adjustment refused the application, which has led to this appeal.

At the beginning of the hearing, the Board was informed by M. Commisso of Mississauga's Legal Services Department that the City would not seek party status. She

filed potential conditions of approval (Exhibit 10) and indicated that both the City and the Appellant have agreed that the application could be approved on terms set out therein.

Ms Kerr and Mr. Pagano requested party status on behalf of area residents. The Appellant did not object and the residents were granted party status on consent with Ms Kerr and Mr. Pagano acting as their agents.

### **Proposed Variance**

The proposal involves the conversion of one unit in a nineteen unit commercial plaza into a take-out restaurant. The building is located on the northwest corner of Trelawny Circle and Tenth Line West with the north and west sections of the property containing the building and the remainder of the site occupied by a parking lot and landscaped area.

The property is bounded on the north by a pipeline corridor with residential properties abutting the north limit of the corridor. Abutting the western limit of the site are single-family residential properties.

The site is designated as Convenience Commercial in the City of Mississauga Official Plan and it is zoned C-1 in the City's Zoning By-law. Both the Official Plan and By-law permit a take-out restaurant at this location. As noted above, the provisions of By-law 0225-2007 require a 60m separation distance between the take-out restaurant and a residential zone.

The proposed restaurant is located in the central portion of the northerly wing of the commercial plaza. It is 39.62m from the closest residential property to the west. It is this proposed variance from the separation distance requirement of the By-law that is the subject of this appeal.

The Board heard testimony on behalf of the Appellant from Karen Bennett, Senior Planner with Glen Schnarr and Associates Inc. Ms Bennett is a Registered Professional Planner with approximately ten years of experience. She was qualified as

an expert in land use planning. David Bishop who lives at 3845 Trelawny Circle testified on behalf of the area residents.

## **Position of the Parties**

### *Appellant's Position*

The Appellant maintains that the proposed variance is appropriate and will not cause substantial change for residents of the area. The Appellant notes that the plaza currently contains a grocery store and the unit which is proposed for the take-out restaurant, had been previously occupied by a fish market. There is a border fence at the rear of the plaza adjacent to the residential area and pipeline easement. Also, there is no laneway or loading area at the rear of the units. This provides a buffer to the residential area and limits the commercial activities to the front of the plaza.

Ms Bennett testified that the variance is appropriate and meets the four tests under Section 45(1) of the *Planning Act*. She maintains that the 60m separation distance is intended to be applied with some flexibility. She referenced a 1995 report of the City's Planning Department (Exhibit 1, Tab 4), which reviewed the establishment of the separation distance for restaurants and states that the 60m separation distance was, "...not intended to be inflexible..." She indicated that because of the characteristics of the proposed restaurant with the buffer at the rear and focus of activity at the front, and with restrictions imposed upon the operation (Exhibit 10), its impact will be limited. Therefore, in her opinion reduction of the separation distance is appropriate in this case.

Ms Bennett maintains that there are numerous examples where the City has granted relief from the 60m separation distance requirement. She noted the Dominion Plaza on the northwest corner of Derry Road and Tenth Line West. Two take-out restaurants in this plaza were given approval by the City for a reduced separation distance. She also mentioned the Danton Promenade located northeast of the subject property where approval for a take-out restaurant with a reduced separation distance

was first granted in 1987 and has been renewed by the City every five years. She stated that the separation distance appears to be similar to that being sought by the Appellant.

Ms Bennett's opinion is that the proposal conforms to provincial policy. She noted sections 1.1 and 1.3 of the Provincial Policy Statement, which indicates that a range of needs should be provided through development activities. The proposal helps to meet this objective.

She also maintains that the proposal conforms to the purpose and intent of the Official Plan. The property is identified as part of the urban system in the Peel Region Official Plan, which contains policies recognizing the need for redevelopment and providing a mix of land uses. In the Mississauga Official Plan the property is designated Convenience Commercial. The proposal conforms to the definition provided in section 3.5.1.4.1. and it also falls under the specific policies for site 3 in the Lisgar District Plan. The proposal does not offend any of these policies and in Ms Bennett's expert opinion it meets the intent and purpose of both Official Plans.

Ms Bennett testified that the variance maintains the purpose and intent of the Zoning By-law. The C-1 zoning permits a number of commercial uses including restaurants and take-out restaurants. The separation distance requirements in the By-law have been varied frequently in the past and to a similar degree as being proposed by the Appellant. The provisions of the By-law will be maintained in all other ways.

Ms Bennett's opinion is that the proposal is desirable. There is a need for the take-out restaurant and it will serve the community. No seating is proposed in conjunction with the restaurant. It will not have any significant negative consequences.

Ms Bennett also testified that the requested variance is minor. The variance represents only a small numerical reduction in the required separation distance. The exposure of the plaza is mainly to the south, away from the residential areas. This is where the majority of activity associated with the restaurant will occur. Therefore, it will have little or no impact on the residential areas.

*Residents' Position*

The residents maintain that the full 60m separation distance is necessary to avoid impacts on the neighbourhood. They have invested significantly in their properties and are concerned about the proposal impacting property values and their enjoyment of their homes. They feel that for some types of impacts, the 60m separation distance will not be sufficient.

Mr. Bishop lives to the west of the proposed restaurant. He expressed concern about being able to enjoy the use of his backyard if the variance is approved. He maintains that the prevailing winds will bring odours toward his house from the restaurant. He notes the existence of a high school to the west. There is likelihood that students will leave litter in the neighbourhood after buying food at the take-out restaurant.

Ms Kerr contends that there have been three applications for take-out restaurants on the subject property and they have all been refused by City Council. The residents have consistently opposed these proposals. Ms Kerr also noted in cross-examination of Ms Bennett that an application to locate a McDonalds at the Dominion Plaza had been refused by Council.

Ms Kerr maintains that the variance does not meet the four tests under the *Planning Act*. She contends that the subject property was originally zoned commercial with the intent that the surrounding lands would have high-density residential development. However, the surrounding area was developed as low-density residential which she maintains is less compatible with the commercial use. She contends that when the plaza was originally developed it was designed so that there would not be a take-out restaurant. The proposal for a take-out restaurant then is not in keeping with the purpose and intent of the Official Plan.

Ms Kerr also maintains that the proposed variance is not minor. She contends that the restaurant will generate odours and garbage, which will negatively impact the

community. Also, the 60m separation distance is the minimum required and impacts are likely to extend beyond this distance.

For all of these reasons, because the variance does not meet the four tests and because of the consistent opposition of the community to take-out restaurants at this location, the residents contend that the appeal should be denied.

## **Findings**

The key considerations for the Board in making this decision fall under the test of whether or not the variance is minor. While the Board recognizes Ms Kerr's contention that the proposal does not conform to the Official Plan, the evidence is to the contrary. Ms Bennett's evidence clearly demonstrates that the designations in both the Official Plans of Mississauga and Peel Region allow the proposed use on the subject lands. While there may have been some intent on the part of those who originally designed and approved the plaza not to allow take-out restaurants, this is not reflected in the Official Plans and related submissions.

Similarly, based upon the evidence provided to the Board it must be concluded that the proposal conforms to the purpose and intent of Zoning By-law 225-2007. The By-law clearly permits take out restaurants in convenience commercial (C1) zones (Exhibit 1, Tab 3). The only offence to the By-law is the proposed reduction in separation distance.

To determine if the variance is minor two considerations are relevant; first is the magnitude of variance appropriate and does it fall within the past practice of the City, and second will approval of the variance cause significant negative impact?

### *Magnitude of the Variance*

The proposed variance will reduce the minimum separation distance by one third. In numerical terms this is a substantial but not excessive number. If the By-law is establishing a standard, in purely numerical terms the proposal does not appear to be an excessive variation from the standard.

Ms Bennett's evidence is that the practice of the City has been to provide relief from this standard to the extent that is being sought. Ms Bennett's submits that the standard is intended to be applied with some flexibility. In addition, the Board notes that the conclusion section of the 1995 City's Planning Department Report (Exhibit 1, Tab 4) which reviewed the establishment of the separation distance for restaurants, states:

"The 60m setback requirement for restaurants from the abutting residential zone in the zoning by-laws was not based on a comprehensive study of the appropriate distance required to ameliorate the impacts of a restaurant on nearby residential areas. Instead, it was an arbitrary distance selected to give the City some additional control where a restaurant is established by way of a Committee of Adjustment variance or in an outmoded commercial zone where it is not a permitted use."

Based upon the evidence, the Board concludes that the separation distance standard was intended to be applied with some degree of flexibility and it is an arbitrary standard not based upon a comprehensive review of the distance required to ameliorate the impacts of take-out restaurants. The evidence demonstrates that in other cases the City has exercised the standard with some degree of flexibility.

While Ms Kerr maintains that the City has consistently refused variance applications for take-out restaurants in the subject plaza, Ms Bennett noted that the previous applications involved other units in the plaza, which were considerably closer to the residential area. The Board understands that those applications were for units in the western portion of the plaza, which are adjacent to residential properties. The unit that is subject to this appeal is located in the north section of the plaza and is bounded by the pipeline corridor at the rear. This provides more of a buffer than exists for the units in the westerly section. The residents' evidence does not conclusively establish that the proposed variance will provide relief from the standard that is substantially beyond relief provided in past approvals.

While the examples of past City approvals cited by Ms Bennett are not completely comparable to the proposal, the Board must conclude that the practice of the City has been, in cases it feels appropriate, to provide relief from the separation distance requirement to a similar extent as that being sought by the Appellant. Based

upon the evidence, the Board finds that the magnitude of variance is acceptable and falls within the past practice of the City.

*Impact of the Variance*

With regard to impact, it appears that there are no universal standards for restaurant separation distances unlike those established by the province for agricultural and industrial uses. Furthermore, the evidence in this case has established (note the quote above) that the 60m separation distance was not based upon a comprehensive review of impacts, but is an arbitrary standard, which allows the City to review applications in more detail.

Ms Bennett's expert evidence is that there will be little to no impact resulting from reduction in the separation distance. She notes that most of the exposure and activity associated with the restaurant will be to the south, away from the residential area. The layout of the plaza, fencing and lack of laneway at the rear all provide some buffering and shield the residential area from some of the potential impact.

The residents' evidence raises concerns about impacts from restaurant odours, litter, and general disturbance of the neighbourhood from those using the restaurant. A major concern seems to be the potential for high school students walking to and from the restaurant dropping litter and causing disturbances.

With regard to the latter concern, the Board agrees with Ms Bennett that the majority of activity associated with the restaurant will be to the south and the residential area will be shielded. There may be some increase in litter in the residential area as a result of students walking to and from the high school. However, no clear evidence was provided to substantiate this impact. This same potential exists if a convenience store were to occupy the unit and it is not clear from the evidence that the potential will be significantly increased through the proposal.

With regard to odours, the Board disagrees with Mr. Bishop's contention that prevailing winds would direct odours toward the residential area. A review of wind



direction data from Pearson International Airport indicates that prevailing winds are from the west and northwest for the majority of the year. This would direct odours primarily toward the east and southeast away from the residential areas in question.

The Board has not been presented with any substantive evidence to demonstrate that there is a need to maintain the 60m separation distance in order to reduce the impacts of odours on the residential areas. The 60m standard was not established through a comprehensive review of restaurant odour impacts. It is clear that the City has reduced this standard in some circumstances and the Board has noted situations in other Municipalities where the separation distance is less than 60m. No evidence was brought forward of significant negative impacts resulting from these cases.

The Board also notes that the conditions agreed upon by the Appellant and City (Exhibit 10), are intended to mitigate some of the impacts on the neighbourhood. These include limiting the proposed use to the Appellant, limiting signage, restricting the hours of operation of the restaurant, prohibiting seating, ensuring proper ventilation that will be directed toward the east, prohibiting glass containers and requiring daily garbage pick-up. The Board expects that the City will also review with the Appellant the need to install appropriate filters and other mitigation measures in the ventilation system to further reduce any potential odour impacts.

Based upon the evidence, the Board finds that there will be no significant increase in negative impact as a result of the proposed variance and the magnitude is not such that makes it consequential. In conclusion, the Board finds that the variance passes the test of being minor.

#### *Other Considerations*

The Board notes two decisions dealing with similar issues, supposedly supporting the position of those opposed to the proposal, which were referenced in a letter provided by one of the residents (Exhibit 9). The Board has reviewed these decisions and finds that there are significant differences between those cases and this appeal.

The decision of *Weston Rutherford Centre v Vaughan, 2003* deals with take-out restaurant impacts. However, in that case, the municipality had specifically excluded take-out restaurants from the zone where the proposal was to be located. Also, the proposal involved a drive-through restaurant, not simply a take out restaurant. Issues such as increased traffic, parking facilities and requirements for stacking lanes were all major factors in that hearing. This appeal is dealing with a take-out restaurant with no seating and no drive-through capability. Evidence has not been provided about parking issues and traffic being significantly impacted. Furthermore, take-out restaurants are permitted at this location, both in the Official Plan and Zoning By-law.

In the other decision, *571106 Ontario v City of Mississauga, 2008* the City opposed the application to vary the 60m separation distance requirement for a take-out restaurant at the Board hearing and brought forward expert evidence. The Board relied upon that expert opinion in refusing the appeal. In the current case, the City has taken no position in the appeal and the only expert evidence before the Board supports the variance.

Consequently, the Board concludes that the referenced cases dealt with substantially different circumstances and they do not have a direct and automatic bearing on this appeal.

#### *Summary of Findings*

The Board recognizes the concern of the neighbourhood for the proposal and that residents seem to have consistently opposed take-out restaurants in the subject plaza. Residents should have a significant influence over the types of land uses that occur in their neighbourhoods.

However, Official Plans and Zoning By-laws are an expression of community will for the types of land use and development that should occur in a Municipality. In this regard, take-out restaurants are a permitted use in the planning documents that affect the site.

No objective criteria for evaluating the adequacy of the 60m separation distance were provided in the evidence. Issues regarding litter and disturbance could exist even if the 60m separation distance is maintained.

Furthermore, the evidence does not demonstrate that odours will be significantly increased by the reduction in separation distance. The Board was not presented with odour impact assessments or other studies for the proposal, which demonstrates that the proposed separation distance is insufficient.

Based upon the above, the Board accepts and relies upon the uncontradicted expert evidence provided on behalf of the Appellant. The variance conforms to Provincial Policy and maintains the purpose and intent of both the City of Mississauga and Region of Peel Official Plans. The variance also maintains the purpose and intent of the Zoning By-law. The Board also finds that the variance is desirable and that it is minor.

Based upon the evidence, the Board allows the appeal and authorizes the variance subject to the conditions contained in Exhibit 10, which is attached to this decision.

**Order**

**THE BOARD ORDERS** that the appeal is allowed and the variance to City of Mississauga By-law 225-2007 is authorized subject to the conditions as set out in Attachment "1".

So Orders the Board.

"C. Conti"

C. CONTI  
MEMBER

Ex. 10

ATTACHMENT "1"

PL080817

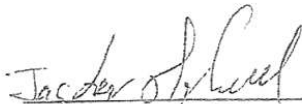
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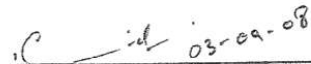
IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: 1611161 Ontario Ltd. (Jagdev Dhaliwal)  
 Subject: Minor Variance  
 Variance from By-law No.: 0225-2007, as amended  
 Property Address/Description: 3899 Trelawny Circle  
 Municipality: City of Mississauga  
 OMB Case and File No.: PL080817  
 Municipal No.: A220/08

The appellant, as registered owner of the subject property and Mr. Mohammad K. Taj (the "Tenant") hereby jointly and severally agree that the following conditions be imposed in the approval of minor variance A220/08:

1. This variance is personal to the Tenant and shall be in effect so long as Unit #14 of the subject premises are leased and/or occupied by the Tenant.
2. There is to be only one "open" neon sign on the premises with a maximum size of 23"(w) 14"(h) and 5.5'(d), and no other neon lighting on the subject premises. The "open" neon sign must be turned off no later than 11:00pm.
3. The hours of operation for the proposed take-out restaurant are to cease at 11:00 p.m., seven days a week.
4. There are to be no seating facilities within the proposed take-out restaurant.
5. The ventilation system for the proposed take-out restaurant is to comply with all applicable regulations and is to face to the East of the property.
6. The proposed take-out restaurant will not sell any beverages in glass containers.
7. All garbage is picked up outside of the subject premises on a daily basis.

  
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 1611161 Ontario Ltd.  
 (Jagdev Dhaliwal)

  
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 Mohammad K. Taj

Dated: Sep 30, 2008

Dated: 03-09-08