

ISSUE DATE:

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PL100163

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: 1140971 Ontario Limited
Subject: Minor Variance
Variance from By-law No.: 1916
Property Address/Description: 65 Thorncliffe Park Drive, Toronto
Municipality: City of Toronto
OMB Case No.: PL100163
OMB File No.: PL100163
Municipal No. A0270/09NY

A P P E A R A N C E S :

Parties

1140971 Ontario Limited
City of Toronto

Counsel

J. Streisfield
S. O'Connor

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

1. INTRODUCTION

This variance dispute centers on Moslem prayer in the converted storage space of an apartment complex.

In the City of Toronto (the City), 1140971 Ontario Limited (the Owner) owns a complex with a mainly Moslem population. The Owner proposed making two redundant storage rooms into "Meeting Rooms", with the smaller room available for prayers five times daily.

Renovations, linked to removal of the apartment lockers (previously installed in the storage rooms), prompted a City Notice of Violation, for illegally inserting a "Place of Worship". The City followed up with an Order, objecting to

interior alterations... (whereby) Occupancy of the building has been converted from an F3 Occupancy (Storage) to an A2 Occupancy (Mosque).

The Owner's planner objected, but was told by City staff that to proceed, the Owner should either (a) send a Lawyer's Letter challenging the City's interpretation of "Place of Worship", or (b) apply for a variance, or (c) apply for rezoning. The Owner chose (b), calling it a variance for "Meeting room and.... daily prayer activities as part of the space use". However, City staff still called it "creating" "a 'Place of Worship'". The Committee of Adjustment (COA) refused the variance, and the Owner appealed to the Board, maintaining that no variance was necessary under the By-law, but even if it were, it would meet the tests of the *Planning Act* for variances.

The Board has carefully considered all the evidence, as well as the able submissions of Counsel. Despite the eloquent arguments of the City's Counsel and Planner, the Board finds for the Owner.

The By-law has two different categories for religious activities, treated differently:

- "**Religious Institutions**" are allowed "as-of-right" (i.e. they already fit within legal parameters, so no special permissions are required for those uses),
- whereas "**Places of Worship**" are not.

So which is this? The Board finds that the distinction, in this existing Bylaw, is that the former do not involve people moving on/off site in significant numbers, whereas the latter do. By that criterion, the Board finds the proposal to be a "similar use" to a "Religious Institution", because it is for use by tenants *on-site*. It is not a proposal for a "Place of Worship", which would attract the community at large. The latter is

- not what the Owner applied for,
- not what this converted storage space is likely to do,
- and not what the evidence substantiated. Though the Board finds nothing

unreasonable in City vigilance about parking, traffic and bustle, there was no evidence that these concerns here represented more than apprehension.

The proposal is thus feasible as-of-right; and a variance is not technically necessary.

In the alternative, even if the Board were incorrect in that characterization, the proposal meets the four tests for a minor variance under Section 45(1) of the *Planning Act*. Out of an abundance of caution, the minor variance is authorized; but Conditions are imposed, reflecting the Owner's stated intent about *tenant* use, and the City's understandable concerns on that account. The details and reasons are set out below.

2. CONTEXT

The property is at 65 Thorncliffe Park Drive, in the former Borough of East York – a seven-minute walk (three blocks) from the Masjid Darus Salaam Mosque. The 20-storey complex (332 rental units) was built in 1967, apparently before interior amenity space became a zoning requirement, because it had none. Two storage rooms with apartment lockers were on the main floor, a few steps up from a door off the elevator lobby. The rooms covered 594 square metres (the smaller room at the far end covering a third of the space, the larger room covering the rest). Though the lockers are now removed, the entire space is still austere, with windows but no decoration. Plumbing is exposed, though there are intentions to enclose it. There are no lavatories. There is an exit via a metallic door to the parking lot, and a second exit is planned. Although principal access would be expected via the lobby (where visitors from outside would need to be buzzed in), there was some question about security for the other door(s).

The smaller room has been used for prayer (usually 15 minutes at a time), though there are other uses. A few exceptional times per year, over forty worshippers attend, with overflow into the larger room; but numbers are usually much smaller.

The City produced Internet pages, which called the space “Thorncliffe Musallah” (one, *Halalmaps*, called it “Thorncliffe Musallah Mosque”). The Board was told that unlike a mosque, “Musallah” refers to unconsecrated space, usually temporary. Another page, *Salatomatic*, listed it under “Denomination: Sunni (Traditional)”, with “Imam Unknown” and “Director/President Unknown”. The Owner’s principal, Ms Dossa, professed confusion at

these official-sounding labels: though she referred to a Manana who came by for sermons weekly, she said neither the space nor the worshippers had any formal organization, let alone a formal title; nor was the space assigned to any one branch of Islam. On the contrary, she said, it was used by tenants, whether Sunni, Shi'a, Ismaili or otherwise, as the Owner intended. The Internet pages, she added, were published without the Owner's knowledge or consent.

3. BACKGROUND

The actual variance application before the Board was as follows:

To permit the use of approximately 6200 square feet on the main floor of the 358,750 square foot apartment (complex) for recreation and meeting room space (including daily prayers) for existing apartment residents.

But that is not how the City *interpreted* it, calling it "a *de facto* Place of Worship". In this 2½ year dispute, it issued its Notice of Violation in April, 2008, alleging a "defect" under the applicable Borough Zoning By-law – a use "other than a permitted use, namely Place of Worship", with the follow-up Order calling it a "mosque". The Owner's Planner testified it was City staff which then indicated three options: (a) dispute "Place of Worship", or (b) apply for a variance, or (c) apply for rezoning.

That testimony was undisputed. Furthermore, beyond a stated apprehension about parking, staff's procedural preference was for a rezoning application:

Numerous complaints had been received regarding the operation of the recreation space/meeting room as a place of worship. The complaints include concerns about noise and parking.... Conversion of the locker storage area as a meeting room and indoor recreation space to be used in daily prayers constituted a "place of worship". This use is not permitted in the form proposed by the applicant within the Residential R3B Density Zone, as a "place of worship" is defined as a building dedicated to religious worship.

The lack of opportunity afforded through a minor variance application, to explore the impacts and the necessary zoning requirements (including parking) which this proposed use would generate, makes the minor variance process an inadequate means of reviewing this application. The complaints regarding parking associated with the operation of the place of worship reinforce this concern... (which) requires a broader review of applicable zoning requirements not afforded through a minor variance application.

The Minutes of the COA meeting, turning down the variance application, similarly open with the preface, “WHEREAS a place of worship is not (a) permitted use....”The local Councillor later repeated that the proposal should have been via rezoning – which he would have supported:

I repeat my expression of regret that you have declined my recommendation to deal with your renovations by way of rezoning application.... I would support a properly prepared rezoning application. I could not in good conscience support the Committee of Adjustment application....

As of this hearing, no major construction awaits the Board’s Decision; a building permit would be necessary to legalize renovations, but there was no dispute that these were physically minor. The primary apparent purpose of this variance application was to put to rest the City’s objections to prayer in these premises.

4. APPLICABLE CRITERIA

For variances, the criteria (often called “the four tests”) are set out at Section 45(1) of the *Planning Act*, namely that a variance from the applicable By-law may be authorized if it is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the Official Plan and the Zoning By-law.

The structure of that applicable Zoning By-law, however, is particular. The Borough’s By-law No. 1917 (dated 1966) sets out two distinct forms of categorization:

- In parts of the By-law, categorization is by *building type* – “automobile service station”, “dwelling apartment”, “dwelling multiple attached”, “church” etc.
 - Specifically, each of the above is defined as being a “*building*”. The By-law contains no hint that *part* of a building can be considered a “church” (unlike, e.g., the new draft Toronto by-law currently in process, or the existing By-law’s definition of “restaurant”).
 - The Planners agreed that this existing wording denoted that a “**church**” was equated only with a *stand-alone building*.
- Aside from permissible *buildings*, the By-law elsewhere refers to categorization

by permissible *use*, independent of building typology. The definition of **“Religious Institution”** does not refer to it being a “building”, but says instead that it

shall include a Bible Institute, Christian Science reading room, a religious library, a religious school, a monastery, a nunnery, a religious retreat or similar use but shall not include a church or synagogue.

Years later, the Borough inserted a further term in the Definition section:

“Place of Worship” shall mean a building dedicated to religious worship.

That definition was identical to the definition of "church" (except that “church” could include a Sunday School). It was undisputed that under this wording, “Place of Worship” was equated with a specific kind of “building”.

There was, however, vigorous dispute over the intent of that Zoning By-law. That was the principal issue in contention, followed by the *Planning Act* tests about variances being minor, and desirable for appropriate development/use of the property. Consistency with the Official Plan was not in dispute, nor was compliance with the Provincial Policy Statement or the *Growth Plan for the Greater Golden Horseshoe*

Neither side cited any precedent where prayer space in an apartment complex had been approved or not. It was acknowledged that many residential buildings in the City, notably seniors' residences, have “meeting rooms” used weekly for religious purposes; but the City said these were distinguishable, because prayer five times daily represented a "different intensity of use". Neither side raised the provisions on religion in the *Ontario Human Rights Code* (the *Code*), or the *Canadian Charter of Rights and Freedoms* (the *Charter*). Aside from one case on Board jurisdiction, below, no jurisprudence was cited by either Party.

5. OBSERVATIONS AND FINDINGS

5.1 Jurisdiction and Feasibility As-of-Right

As mentioned, the Owner argued that it needed no variance – its proposal was already feasible as-of-right. By that reasoning, the variance was mainly for comfort/clarity

in dealing with the City. The City countered that if this were so, the Board would lack jurisdiction to issue any relevant Order.

The City relied on one sentence in the Board Decision in *Greenfield et al. v. Wellesley Hospital*, Issued April 20, 1976. There, a member of City staff had told the Hospital that a proposed addition needed a variance; the COA authorized same, but neighbours appealed to the Board. At their appeal hearing, a City Zoning Examiner then testified (corroborated by other evidence) that the first opinion had been erroneous no variance had ever been needed in the first place. The Board proceeded to "set aside" the COA Decision, on the ground of mootness

It is fundamental to the jurisdiction of the Committee that the variance sought was necessary.

The City now inferred that if the COA lacked jurisdiction in such cases, so would the Board, and hence that the Board could not now adjudicate whether the Owner's project was feasible as-of-right, or even Issue a relevant Order.

The Board was not persuaded – not merely because it was the City itself that had originally pointed to the variance route as an option for the Owner to pursue. More importantly, in *Greenfield*,

- The Board's finding, that the COA's Decision was moot, referred to COA jurisdiction; nowhere did it refer to Board jurisdiction.
- Nowhere did it suggest the Board lacked jurisdiction to adjudicate alternative arguments on whether a variance was required, and if so, whether it met statutory tests. The Board was offered no rationale for such a denial of its own jurisdiction.
- On the contrary, in *Greenfield*, the very fact that the Board made a finding of mootness presupposed that it had jurisdiction to consider the matter, to make such a finding, and to Issue an Order accordingly.

5.2. Focus

Two other preliminary clarifications are in order. First, the variance application before the Board is *not* for a "Place of Worship", but for "Meeting Rooms". The City's position was that the recital of prayers (five times daily in one room, with occasional spillover into the other) meant that the application was not what it purported to be, but rather it was to "create a *de facto* Place of Worship".

Second, from the Board's perspective, the *planning* issue is not the prayer:

- The purpose of the *Planning Act* is not to regulate what a person thinks, recites, or chants; religious belief is a quintessentially private matter;
- It is to regulate more public matters, e.g. compatibility of land uses, traffic, parking etc., in conformity with stated parameters in the *Act*, the Provincial Policy Statement, the Official Plan, and other relevant policies.

So when read in a purposive perspective, regulation of Places of Worship under the Act is not about prayer itself (zoning officials are not religious police), but about public/planning impacts from that use. If prayer itself had been the concern (a dubious proposition in a free society), then the By-law would not have specified monasteries, nunneries, religious retreats "and similar uses" as permissible here.

Closer to the proper focus of this matter, the City itemized real concerns about "Places of Worship" – traffic, parking and noise. However, this led planners for the City and Owner to outline opposing theories on the intent of the Bylaw, which had specified that a "Place of Worship" must, by definition, be a "building" (not *part* of a building):

- The Owner said the wording was clear: since "Place of Worship" was defined as a "building", it was to accuse the Owner of inserting a "Place of Worship" into this apartment complex, because this proposal was in no way about inserting one building inside another.
- The proposal was a "similar use" to a "Religious Institution" – already feasible as-of-right, without a variance.

- The City countered that the manifest *intent* of the By-law was to guarantee that locations for worship were in stand-alone buildings – set apart from other structures, precisely in order to regulate noise, traffic and parking. This proposal, said the City, was diametrically at odds with that intent.

5.3 Feasible As-of-Right?

The Owner denied that the proposal involved a single-purpose prayer room. But even if it were, does the existing zoning make a variance even necessary? The By-law's authorization for "Religious Institutions" specifically includes "a Bible Institute, Christian Science reading room, a religious library, a religious school, a monastery, a nunnery, a religious retreat *or similar use* but shall *not include a church or synagogue*". So is the Owner's application for a "similar use" to the above? Or is it like a church or synagogue? To answer that question, one must identify the common denominator

- shared by, e.g., "a monastery, a nunnery, a religious retreat" etc.,
- but *not* shared by "a church or synagogue".

The most obvious response – and one clearly within the planning realm – is that worshippers at monasteries, nunneries and religious retreats are generally residing *on-site*. Monks and nuns do not travel to daily prayer – let alone worry about traffic and parking; and if the By-law was referring to "retreat houses", at which attendees reside for days at a time, the same applies. As for "a Bible Institute, Christian Science Reading room (or) a religious library", some travel is expected – but not in *crowds*.

In contrast, "a church or synagogue" serves a community at large – where people travel in numbers to religious functions, with planning implications for bustle, traffic and parking.

So the defining *planning* characteristic and common denominator of the uses identified as "Religious Institutions", which generally distinguishes them from "a church or synagogue" under this By-law, is that

- the former do not involve significant movement of people on/off the site,
- whereas the latter do.

By extension, since the Planners agreed that the By-law definition of "Place of Worship" put it into an identical position to "a church or synagogue", a "Place of Worship" would also be equated with significant numbers of people moving on/off site. In other words, if a religious proposal involved significant movement on/off the site, this By-law might be expected to assimilate it to a "Place of Worship"; but if not, the more likely characterization would be "Religious Institution", already permitted under the By-law.

What description best fits this proposal? The City said it did involve significant movement on/off site; the Owner's principal disagreed, saying the space was not for the community at large, but only for building tenants and their guests.

No signage indicated to passers-by either that (a) the room even existed, or on the other hand, (b) that it was for tenant use only; but that was not the only shortage of evidence. Despite the eloquence of the City's Counsel and Planner, its evidence was largely at the level of mere apprehension. Concerns about parking might have been more compelling, if corroborated by a pattern of parking violations/tickets during prayer; but no such hard evidence was presented. Although the staff report referred to "numerous complaints... about noise and parking", no corroboration was offered there either, aside from the City Planner's comment that during one Friday site visit mid-day, visitor parking was full and some cars were illegally parked. He could not confirm with certainty that this was due to non-residents driving to worship, but that was his inference.

That inference was still counterintuitive. The Board was never told why any non-resident would *want* to drive to a converted storage room to pray— particularly when more likely surroundings were nearby (including an actual mosque three blocks away). Perhaps this had to do with different branches of Islam; but if so, the Board was not told. On review of the photos of this rudimentary room, it is not clear why any non-resident – particularly one in a car – would make a detour here; it is clearly not for the ambience.

Nor is it for ease of access. In principle, any non-resident would need to be buzzed in to the lobby. The City's Planner countered that security at the back door appeared lax; but as Counsel for the Owner observed, in order for attendance by non-residents to reach

such a scale that it skewed parking/traffic (i.e., stated City concerns), that scenario presupposed that these outsiders would be routinely admitted to the building – systematic trespass.

That is again counterintuitive: it presupposes a breakdown in building security, as any non-resident could then gain easy access to the elevator lobby and the rest of the complex, for whatever purpose. The Board was offered no explanation why any landlord would tolerate such a thing, let alone promote an application which had such a corollary.

In summary, the Board finds an overall shortage of corroboration for the City contention that the application is *other than what it purported to be* – an amenity for use of tenants on-site. If anything, the use is therefore more similar to a "Religious Institution" as understood in the By-law, than to the By-law's framework for "Places of Worship". Since the activities of "Religious Institutions" – and/or "similar uses" thereto – are already permitted under the By-law, that scenario is feasible as-of-right.

That finding and characterization are obviously predicated on the space remaining specifically for the use of *tenants*. If that were to change, and participation by non-residents became significant, the above characterization would also change, as could the space's legal status. The Board therefore considers it appropriate for the Owner to post signage emphasizing that the space is for the use of tenants and their invited guests only. It would also be appropriate for the Owner to enforce security around the space, so as to restrict unauthorized access from the outside, e.g. via keypads or similar security devices.

5.4 Variances and the Four Tests

Even if the Board were incorrect in the above finding, the ultimate outcome would be little changed, since the circumstances would lend themselves to a minor variance under Subsection 45(1) of the *Planning Act*. The Board finds that the proposal would meet the four tests, as follows.

One test, compliance with the intent of the Official Plan, was never in dispute. As for the Zoning By-law, the Board has found that its underlying planning intent was to limit the bustle, traffic and parking issues involved with *non-resident attendees* moving on/off site; that intent is not compromised by this proposal, which is not for or about non-

residents. Concerning the test about desirability for the appropriate development/use of the property, the same arguments were advanced, with the same outcome.

On whether the variance was "minor", however, there were other arguments. The City said it could not be minor, because it foresaw a use intrinsically different from what was written in the By-law: "Sacred spaces are different". The Board, however, found no conclusive difference with "Religious Institution" activities, for reasons described; and as for supposed intensity of use, the Board was shown no conclusive difference with, say, religious activities in a "monastery, nunnery or religious retreat".

As to whether the variance is "minor", the space represents a very small proportion of the complex; but might there be negative impacts? Aside from its apprehensions about noise and parking, the City offered no specifics; on the contrary,

- the Councillor wrote that, as for substantive merits, he would have supported the proposal if it had been via rezoning.
- When the City's Planner was similarly asked about the substantive merits – e.g., if the proposal were resubmitted as a rezoning application – he too pointed to no clear negative impacts.

He would have preferred to see a parking study; but the Board has already dealt with traffic/parking. He would also have preferred that Council be given an opportunity to vote on the subject; but that is not, of itself, a sufficient objection under the four tests.

The City did, however, express a concern about precedent: "If it's permitted here, there is certainly the opportunity for that to be replicated". Will this situation open the floodgates to demands for prayer rooms in complexes across Toronto?

That was not demonstrated – and not merely because few landlords take an initiative like this. More importantly, this Decision is based on the 1966 By-law of the former Borough; the extent to which those circumstances could be "replicated" was not explained. On the contrary, the City said this By-law treatment was being replaced by new regulatory provisions in a forthcoming By-law. Under those circumstances, the Board was not shown how this Decision had precedent-setting potential, let alone that this constituted a significant factor.

Finally, although the Board (on its own motion) may also consider the *Code* and *Charter*, it is unnecessary to do so in this case, since the right to conduct prayer under the proposed arrangement has already been sustained on *Planning Act* grounds.

6. CONCLUSION

The Board agrees that the concern here, about a prayer room being an allegedly illegal use, should be put to rest. The Board also agrees with Counsel for the Owner that the definitive way to do so is two-pronged, with two alternative characterizations.

First, the Board has found that insofar as the Owner's proposal is for the use of tenants (and not for non-residents travelling in numbers from the community at large), it meets the description of a "similar use" to a "Religious Institution", already allowed by the existing zoning. Unlike a "Place of Worship", it is feasible as-of-right.

In the alternative, even if the above characterization were incorrect, the Board was not persuaded that the proposal would be at odds with any of the four tests under Subsection 45(1) of the *Planning Act*. The Board finds that the variance application, subject to Conditions below, is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the Zoning Bylaw and of the Official Plan.

The Board reiterates the premise that this amenity is for tenants and their invited guests only. The Board has expressed its expectation that the Owner will post signage saying so, and will secure access from the outside.

Out of an abundance of caution, and in accordance with the second alternative, THE BOARD THEREFORE ORDERS:

1. The variance to By-law 1916 of the former Borough of East York is authorized as requested, namely:

To permit the use of approximately 6200 square feet on the main floor of the 358,750 square foot apartment (complex) for recreation and meeting room space (including daily prayers) for existing apartment residents.

2. That authorization is subject to the following Conditions:
 - a) The Owner shall post signage in plain view, in and around the space in question, indicating that it is for the use of tenants and their invited guests only.
 - b) The Owner shall maintain a security system at the building to control access that ensures only tenants or authorized persons may enter. The Owner shall conduct periodic checks of the security system to ensure it operates as intended.

It is so Ordered.

“M. C. Denhez”

M. C. DENHEZ
MEMBER