

ISSUE DATE:

**January 5, 2012**



PL110737

Ontario  
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

Appellant:	Jagdev Singh Dhillon
Applicant:	INS Consulting
Subject:	Minor Variance
Variance from By-law No.:	0225-2007
Property Address/Description:	4025 Brandon Gate Drive
Municipality:	City of Mississauga
Municipal File No.:	A184/11
OMB Case No.:	PL110737
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**APPEARANCES:**

**Parties**

City of Mississauga

**Counsel**

A. Wilson-Peebles  
D. Koehn, Student-at-law

**DECISION DELIVERED BY H. JACKSON AND ORDER OF THE BOARD**

**Introduction**

This Hearing was for an appeal by Jagdev Singh Dhillon ("Appellant") of a City of Mississauga Committee of Adjustment (COA) Decision, dated June 30, 2011. Mr. Singh is a neighbour at 3905 Pennylane. The COA Decision authorized the amended request to continue to permit the existing restaurant within units "A" and "B" of the subject commercial plaza being within 60.0 m of a residential zone; and to continue to permit an outdoor patio. By-law 0225-2007, as amended, requires a minimum separation distance of 60.0 m (196.85 ft) measured in a straight line from the building containing the restaurant use to the lot line of a residential zone and does not permit an outdoor patio use in this instance. The application was approved (with conditions) for a temporary period of two years. The commercial plaza is located at 4025 Brandon Gate, and the Applicant is ISN Consulting, the owner of the restaurant.

The Board was contacted by the Appellant a day prior to the hearing requesting an adjournment. The Appellant did not have consent of the City nor of the Applicant, and he did not provide reasons for the adjournment. The adjournment request was denied by the Board prior to the Hearing.<sup>1</sup>

The Hearing was scheduled to begin at 10 am, November 24, 2011. Neither the Applicant nor the Appellant was present at the start of the Hearing, however, the City attended in opposition to the continued permission for the outdoor patio. The Board stood down for 30 minutes, as required by the Board Rules of Practice and Procedure, to permit sufficient time for the Applicant and Appellant to attend. At 10:30 a.m. the Hearing began with only the City in attendance.

The City was represented by Counsel Andrea Wilson-Peebles, assisted by D. Koehn, student-at-law. The City staff planner Stephanie Segreti was present to give planning evidence in the matter. Ms Segreti has been a planner with the City for almost two years. The Board qualified Ms Segreti to provide opinion evidence on land use planning for this hearing. Ms Segreti submitted a document book as Exhibit 1.

### **Requested Variance and COA Decision**

The variance application is provided in Exhibit 1 Tab 2, and the COA Decision is in Tab 4. The variance application seeks permission for the existing restaurant to continue to have an outdoor patio and to continue a delivery and pick-up service for the restaurant. The City advised that the variance to permit the take-out operation for the restaurant is not required as this use benefits from a legal non-conforming status. Therefore, the application was amended to delete the variance for pick-up and delivery. However, an additional variance is required to permit the existing restaurant within 60.0

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<sup>1</sup>The Board's Notice of Hearing is clear: Board hearing dates are firm and those wishing to seek an adjournment must do so well in advance of the scheduled date, and must have a very good reason to support the request.

m (196.85 m) of a residential zone in this instance. The amended variance application was agreed to by the Applicant and authorized by the Committee.

The June 23, 2011 COA Decision states:

...the Committee resolves to authorize and grant the amended request to continue to permit the existing restaurant within Units 'A' and 'B' of the subject commercial plaza being within 60.00 m (196.85 feet) of a Residential zone and to continue to permit an accessory outdoor patio; whereas By-law 0225-2007, as amended, requires a minimum separation distance of 60.00 m (196.85 feet) measured in a straight line from the building containing the restaurant use to the lot line of a Residential zone and does not permit an outdoor patio use in this instance.

The application is approved for a temporary period of two (2) years to expire and terminate on or before July 31, 2013, subject to the following conditions:

1. The outdoor patio shall be restricted to a maximum of 16 seats.
2. There shall be no music, live or otherwise or speakers in the patio area.
3. The outdoor patio shall close by 10:30 p.m. on Sunday through to Thursday and by 11:00 p.m. on Friday and Saturday nights.
4. The applicant agrees to operate in accordance with the terms of the Compliance Plan with respect to the Liquor Licence approval.

## **Planning Context**

Ms Segreti described the location of the restaurant as Units 'A' and 'B' within the commercial plaza at 4025 Brandon Drive. The subject restaurant is known as the Timeout Sports Pub. The location is in the vicinity of Highway 427 and Finch Avenue, and is in the Malton Planning district. The subject property is designated General Retail Commercial, and falls under Zoning By-law 0225-2007. It is zoned C2, Neighbourhood Commercial, but is surrounded by low and medium density Residential use areas. Exhibit 1 (document book) provides excerpts of the relevant planning documents.

Ms Segreti testified that in 2005, the establishment of an outdoor patio at the restaurant was approved by the COA for five years. This permission expired on June

30, 2010. A Notice of Contravention was issued March 8, 2011, and the owner then applied for a variance to continue to have an outdoor patio (Exhibit 1, Tab 2). The COA approved this application, with conditions, for two years, on June 23, 2011 (Exhibit 1, Tab 4). This approval was appealed to the Board, and is the subject of this hearing.

Ms Segreti provided further detail regarding the previous approval of the patio in May 2005. At the time, the request to establish an outdoor patio at the existing restaurant was made. Approval was given with conditions limiting the size, hours of operation, and prohibiting music on the patio (among other conditions). The approval was given on a temporary basis in order to monitor its compatibility with adjacent residential lands. The Committee noted that the restriction in the hours of operation for the patio was appropriate in this instance due to the close proximity to residential properties. At that hearing, there were no objections by residents. The May, 2005 Decision is provided in Exhibit 1 Tab 11.

As described by Ms Segreti, and provided in the Document book in Exhibit 1, Tab 3, the Building and Planning Department had no objections (as described in their report of May 26, 2011) when the variances came again before the Committee of Adjustment. However, at the COA meeting of June 2, 2011, as described by the Building and Planning Department Report:

... several neighbours attended and indicated their strong concerns with the restaurant establishment and outdoor patio. It is our understanding the Peel Regional Police have imposed restrictions on the existing restaurant and marked improvements have been made since imposition. Notwithstanding this, the previous variance for the outdoor patio was granted temporarily to determine compatibility with the neighbouring residential properties. Given the residential neighbours' objections, the outdoor patio seems to be exacerbating the noise from the restaurant, as well as some safety concerns. Therefore, continuation of the accessory outdoor patio is not appropriate in this instance.

The decision was deferred to June 16, 2011, and subsequently to June 23, 2011. At the June 23, 2011 COA meeting, the Applicant provided a Compliance Plan with respect to the Liquor Licence approval. The Planning and Building Department continued in their recommendation that the outdoor patio be refused, however the COA approved the requested amended variance for a temporary period of two years, with four conditions. The first three conditions were the same as the previous approval in

2005, and the fourth was the additional condition that the applicant agrees to abide by the Compliance Plan for the Liquor Licence approval.

## **Issue**

Subsection 45(1) of the *Planning Act* allows the Board to authorize variances to a Zoning By-law where the variance is minor; is desirable for the appropriate development or use of the land, building or structure; maintains the general intent and purpose of the Official Plan; and maintains the general intent and purpose of the Zoning By-law.

The main issue in this appeal is whether the outdoor patio is compatible with the neighbourhood residential use.

## **Evidence**

In regards to whether the variance to permit the outdoor patio meets the intent and purpose of the Official Plan (OP), it is Ms. Segreti's opinion that it does not. She notes that development in the Malton District should "preserve the character of the existing neighbourhood", and in her view, the outdoor patio does not. She notes that the OP states "that building and site design will be compatible with site conditions, the surrounding context", and again in her view, this is not the case. The OP also provides that "Building, landscaping and site design will minimise the effects of noise ... and will buffer adjacent land uses." She testified that the patio is not buffered from the adjacent residential area, and there have been no landscaping improvements to the patio, and in any event, buffering for the noise attenuation has not been addressed by the Applicant. The noise issue is exacerbated by the patio doors being propped open, and the restaurant inside remains open until 3:00 a.m., resulting in noise emanating from the patio/restaurant into the neighbourhood. Noise related to vehicles at closing time was also described by Ms Segreti to be a problem that the residents had described to her. Ms Segreti testified that By-law Enforcement had sent a letter to the operator to instruct the operator to reduce the noise emanating from the establishment.

In regards to the intent and purpose of the Zoning By-law, it was Ms Segreti's testimony that outdoor patios are not permitted as of right. She testified that the intent of Council is not to prohibit patios, but to evaluate each on a case by case basis, especially for patios in close proximity to residential areas. It was Ms Segreti's opinion that the temporary nature of the approval in 2005 was for the purpose of evaluating the compatibility of the patio with the surrounding residential use. She said that the many complaints of the residents indicate that the presence of the outdoor patio is not compatible with the surrounding residential use, and therefore the patio in this location does not maintain the intent and purpose of the Zoning By-law.

In evaluating whether the outdoor patio is desirable, Ms Segreti reviewed previous approvals dating back to 1985. Since that time, there have been five renewals for the restaurant without objections. In 2005, Ms Segreti testified that the operation changed from a family-type restaurant to a bar-type restaurant, and that at this time the establishment of the outdoor patio was permitted. Since this change, there have been numerous concerns from residents and attention from Peel police, and By-law Enforcement. The operation of the patio has exacerbated the noise and impact problems on the residents. Based on the experience of the operation of the patio, it is not compatible with the surrounding neighbourhood, it causes unacceptable impacts, and therefore in her opinion it is not desirable.

The variance to permit operation of the patio is not minor, as the impacts of the use are not minor, as testified by Ms Segreti. The presence of the patio extends the licensed restaurant to the outdoors into the late evening, and this causes significant impact to the residents. As well, the residents' concern regarding noise and safety negatively impact the stability of the residential neighbourhood, and this is not minor.

## **Findings**

The COA Decision authorized variances to continue to permit the existing restaurant within units "A" and "B" of the subject commercial plaza being within 60.0 m of a residential zone and to continue to permit an accessory outdoor patio for a temporary period of two years. The City appeared at this hearing in opposition to the

variance permitting the outdoor patio; however the City did not oppose the variance required for the restaurant being within 60.00 m of a residential zone.

The Board did not hear any evidence from the Applicant or the Appellant as they did not attend the hearing. In the absence of evidence from these parties, the Board relies on the evidence and opinion provided by the City.

#### Variance for the Outdoor Patio

The Board has reviewed the evidence provided by the City and finds that a variance to permit the continued establishment of an outdoor patio at this location does not meet the four tests of the *Planning Act*.

The Board finds that the intent and purpose of the Official Plan is not met, as the outdoor patio is not compatible with the surrounding residential uses resulting from the noise emanating from the patio, and does not fit the character of the neighbourhood. There is no evidence of measures taken by the Applicant to mitigate the noise by screening, landscaping, or even just keeping the door to the restaurant closed, notwithstanding the intervention by By-law Enforcement, the police or the complaints of residents.

Similarly, the Board finds that the intent and purpose of the Zoning By-law is not met. The intent of the Zoning By-law is not to permit outdoor patios except on a case by case basis, where the use is compatible with the surrounding uses as determined by the Committee of Adjustment. Based on the testimony of Ms Segreti, the outdoor use of the patio causes undue negative impacts on the residents. It is clear by the evidence provided that the establishment of a patio in this location is not compatible with the surrounding residential use, based on the negative impacts to the residents.

The Board finds that a variance to continue to permit the establishment of an outdoor patio at this location is not desirable for the appropriate development of the property, based on the testimony provided by Ms Segreti. She indicated that there had been no objections by the residents to the continued approval of the restaurant up until

2005, when the outdoor patio was approved and the restaurant changed to a bar-type of restaurant. The establishment of the outdoor patio use is not a desirable development, as it is not compatible with residential use and has caused undue negative impacts to the residents.

The Board similarly finds the variance is not minor, as there are significant impacts to the residents due to noise and safety, and to the stability of the neighbourhood.

Variance for the Restaurant Being within 60 m of a Residential Zone

The Board has reviewed the appeal letter and Exhibit 1 filed in this proceeding in relation to the variance requested to permit the restaurant being within 60.0 m of a residential zone. A restaurant has operated at this site since the early 1980's, and since that time, it has continued to receive temporary permissions. The City has not presented evidence in opposition to the variance required for the continued permission for the restaurant. Given the length of time that the restaurant has been in operation, the lack of opposition from the City, and there being no evidence to refute the request for the variance from the 60.0 m separation distance, the Board finds that the variance required to permit the restaurant being within 60.0 m of a residential zone for a temporary period of two years meets the four tests of the *Planning Act*. The application for the variance to the 60.0 m separation distance meets the general intent of the Official Plan and Zoning By-law, is appropriate development and is minor in this circumstance. The Board is satisfied that the variance for the restaurant being within 60 m of a residential zone may be authorized.

**Decision**

The Board finds that a variance to permit the continued establishment of an outdoor patio at this location does not meet the four tests of the *Planning Act*. This variance is denied.



Based on the oral expert testimony of the City, in particular the lack of opposition by the City to this variance, and from a review of the exhibits and documents, the Board finds that the variance required for the restaurant being within 60.0 m of a residential zone for a temporary period of two years meets the four tests of the *Planning Act*. The Board authorizes this variance.

### **Order**

The appeal is allowed in part. The appeal of the variance to allow the continued patio permission is allowed. The variance to permit the establishment of an outdoor patio is denied.

The Appeal of the variance to permit the existing restaurant use within units “A” and “B” of the subject commercial plaza being within 60.0 m (196.85 ft) of a residential zone is dismissed. The variance to permit the existing restaurant for a temporary period of two years (to July 31, 2013) subject to the condition, as set out below, is authorized.

- Condition: The Applicant agrees to operate in accordance with the terms of the Compliance Plan with respect to the Liquor Licence approval.

“H. Jackson”

H. JACKSON  
MEMBER