

ISSUE DATE:

September 7, 2012



PL111089

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/Appellant: 2187308 Ontario Inc.
Subject: Minor Variance
Variance from By-law No.: 0225-2007
Property Address/Description: 2980 Drew Rd, Unit 119
Municipality: City of Mississauga
Municipal File No.: A315/11
OMB Case No.: PL111089
OMB File No.: PL111089

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

Applicant/Appellant: 1615242 Ontario Inc.
Subject: Minor Variance
Variance from By-law No.: 0225-2007
Property Address/Description: 2980 Drew Road , Unit 117
Municipality: City of Mississauga
Municipal File No.: A316/11
OMB Case No.: PL111089
OMB File No.: PL111090

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

Applicant/ Appellant: 2188101 Ontario Inc.
Subject: Minor Variance
Variance from By-law No.: 0225-2007
Property Address/Description: 2980 Drew Road, Unit 113
Municipality: City of Mississauga
Municipal File No.: A317/11
OMB Case No.: PL111089
OMB File No.: PL111091

APPEARANCES:

Parties

Counsel

2187308 Ontario Inc., 1615242 Ontario Inc.
and 2188101 Ontario Inc.

Steven Zakem

City of Mississauga

Marsha Taggart

DECISION DELIVERED BY H. JACKSON AND ORDER OF THE BOARD

Introduction

The matter before the Ontario Municipal Board (“Board”) is for appeals pursuant to subsection 45(12) of the *Planning Act* related to lands at 2980 Drew Road in the City of Mississauga (“City”). The three companies as noted above (the “Appellants”) own and occupy units located in an industrial condominium at this location. The Appellants were jointly represented by Steven Zakem, and appealed the Committee of Adjustment decisions, dated September 11, 2011, which denied their requests for minor variances to permit an increase in the maximum permitted accessory retail sales and display gross floor area (“GFA”) associated with a wholesaling facility. The existing zoning provisions permit a maximum of 20% of the total floor area dedicated to accessory retail sales and display. The applications seek an increase in accessory retail sales and display to 50% of the total floor area at each of the three establishments. Mr. David Capper provided land use planning opinion evidence for the Appellants.

The City was represented by Marsha Taggart. Barbara Leckey provided expert opinion evidence related to zoning by-law interpretation for the City, and Marianne Cassin provided land use planning opinion evidence for the City. The City is opposed to the variances as the area is designated for business employment uses, and zoning does not permit retail sales other than as an accessory use.

Background

The subject lands are located in the Malton Community, in the northeast part of the City. As described by Mr. Capper, the subject building, 2980 Drew Road, is one of three buildings that comprise the Great Punjab Business Centre. It is an L-shaped building, with units that have frontage along Airport Road and internal to the site. The first storey of the building is occupied by various employment and service employment uses, some with accessory retail components. The second floor of the building is occupied exclusively with office uses. The property is an industrial condominium development with each unit being individually owned. Most of the parking is provided in the internal area of the site, though there is some parking in front of the units adjacent to Airport Road.

On the east side of Airport Road are low density residential uses, and on the west side of Airport Road are various retail commercial, service commercial, office, industrial and institutional uses (see Exhibit 1, Tab 4, for the designation of uses along Airport Road). The Great Punjab Business Centre lands are on the west side of Airport Road and designated Business Employment, and zoned E2-38, Employment. The three establishments that have requested the increase in floor space for retail use are on the first floor of 2980 Drew Road, and have frontage on Airport Road and internal to the site. High on Heels is located in unit 119, Taj Mahal Jewellers is located in unit 117, and Raja Fabrics is in combined units 111 to 116 (see Exhibit 1, Tab 8).

Requested variances

The requested variances are to permit an increase in the maximum permitted accessory retail sales and display gross floor area associated with a wholesaling facility. The existing zoning provisions permit a maximum of 20% of the total floor area dedicated to accessory retail sales and display. The application seeks an increase in accessory retail sales and display to 50% of the total floor area. The layout of the retail areas for each establishment is shown in Exhibit 1, Tab 14. The specifics are as follows:

1. 2187308 Ontario Inc., known as High on Heels, located in Unit 119, 2980 Drew Road, requests a minor variance for an increase in the maximum total floor area dedicated to accessory retail sales and display to 50% of

the unit area; whereas By-law 0225-2007, as amended, permits a maximum retail floor area of 20% of the unit in this instance.

2. 1615242 Ontario Inc., known as Taj Mahal Jewellers, located in Unit 117, 2980 Drew Road, requests a minor variance for an increase in the maximum total floor area dedicated to accessory retail sales and display to 50% of the unit area; whereas By-law 0225-2007, as amended, permits a maximum retail floor area of 20% of the unit in this instance.
3. 2188101 Ontario Inc., known as Raja Fabrics; located in the combined units 111 to 116, 2980 Drew Road, requests a minor variance for an increase in the maximum total floor area dedicated to accessory retail sales and display to 50% of the unit area; whereas By-law 0225-2007, as amended, permits a maximum retail floor area of 20 % of the unit in this instance.

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. If the variance fails even one of those tests, it must be refused.

Evidence and findings

Mr. Capper described the configuration of the three establishments, their location within the subject lands, and the general context of the area. He also described the proposed minor variance applications and the planning context for the applications. Photographs (Exhibits 2 and 3) and site plans and layouts (Exhibit 1, Tabs 5 and 6) assisted in the description.

Mr. Capper testified that these lands are designated as Business Employment in the City of Mississauga Official Plan (the December 2010 Office Consolidation, currently the in-force Official Plan), and are intended to accommodate a mix of business activities including but not limited to industrial uses, office uses, accessory uses, restaurants and service commercial uses. He testified that in this designation, accessory uses are generally limited to a maximum of 20% of the GFA of the permitted use, and all

accessory uses should be on the same lot and clearly subordinate to and directly related to the functioning of the permitted use. The new City of Mississauga Official Plan (September 2010) has been approved in part, and has similar regulations for these lands. Mr. Capper testified that the Appellants on these minor variance applications have appealed the new City of Mississauga Official Plan ("New Official Plan") as it relates to the whole site.

The lands are zoned E2-Employment and are subject to Exception 38 of the zoning by-law, which limits the permitted uses to exclude truck terminals, waste processing and transfer stations, and other uses that are not of issue in this application. The zoning by-law permits office uses, and business activities which include warehousing, distribution and wholesaling. The Zoning By-law permits that accessory retail sales, leasing and/or rental may be a maximum of 20% of the total GFA (Section 8.1.3.1 of the Zoning By-law; Exhibit 1, Tab 37).

Mr. Capper's opinion is that the proposed variances meet the four tests of the *Planning Act*, are consistent with the Provincial Policy Statement ("PPS"), and conform to the Growth Plan for the Greater Golden Horseshoe ("Growth Plan"). He referred to his Planning Justification report (Exhibit 1, Tab 12) to support this position.

Mr. Capper testified that the PPS has policies that promote economic development and competitiveness in Employment Areas, and the provision of additional floor area to be dedicated to retail sales and display, ancillary to the main employment use as a wholesaling facility, is consistent with the direction in the PPS to promote economic development by allowing the site to be developed with a diverse range of employment uses. He also testified that the variances requested conform to the Growth Plan, as the accessory retail uses will contribute to a wider range of economic activities which will promote a diverse economic base, as directed by the Growth Plan.

With regard to the Region of Peel Official Plan (2008 consolidation), the opinion of Mr. Capper is that because the property serves as a cultural focal point of the area, the provision of Indo-Canadian businesses and services is considered to further the integrity and physical characteristics of the Malton Community, consistent with the policies of the Regional Official Plan.

Mr. Capper testified that the proposed minor variance application will allow for an appropriate mix of employment uses that will contribute to the overall needs and function of the employment area as a whole. He testified that the proposed retail uses are a relatively minor and incidental use relative to the overall site. He testified that the combined total floor area for these three units represents 6.6% of the floor area of the entire condominium development, and therefore at 50%, the combined retail floor area of the three units represents 3.3% of the entire development. He added that the retail uses are subordinate and related to the office and service employment uses that occupy the remaining 97% of the buildings on the subject property. He testified that the retail uses will increase the existing economic base for the Malton community, and for these reasons it is Mr. Capper's opinion that the proposal conforms to the City of Mississauga Official Plan (in-force), as well as the New Official Plan.

Mr. Capper's opinion is that the variances are minor, as that there will not be any significant adverse impact resulting from the proposed development. He bases this on the fact that there will be no change to the built form of the existing building, there will be no increase in floor area, and no additional parking is required.

Mr. Capper also testified that these variances provide a desirable development for the lands, as in his opinion, the proposed increase in accessory retail sales will complement the cultural and social character of the area, and the location along Airport Road is an appropriate and desirable location and will be of benefit to residents in the area.

Ms. Leckey described to the Board her involvement with the three businesses. She testified that in 2009, occupancy permits were issued for each business, with either warehouse or warehouse/distribution as the permitted use, with a maximum 20% accessory retail sales permitted (Exhibit 4, Tab 3). The occupancy permits were issued based on the floor plans and the description of the intended use for each unit as submitted by the owners.

Ms. Leckey visited the site on April 12, 2010, to ensure that the properties were operating in compliance with the zoning by-law, as part of the approval of the property as a condominium. On the basis of the unit inspections on that date, Ms. Leckey determined that all three operations were out of compliance with respect to accessory

retail sales; therefore, she advised the owner that the 20% floor space for retail sales had to be respected for the condominium approval. Ms. Leckey visited again in May of that year, and determined that the three units were still out of compliance. On the third visit of July 27, 2010, she was satisfied that the units physically complied with the zoning by-law and as a result, the zoning portion of the condo registration was approved.

Ms. Leckey visited again in February 15, 2012, to determine the existing site conditions. She testified that at the time of that visit, all three units were again out of compliance with respect to accessory retail sales. She testified that walls restricting the area for retail were not constructed as laid out in site plans, and doors were open that allowed unrestricted access from areas designated for retail from the remainder of the unit. Ms. Leckey testified that it was her observation that the entirety of the three subject units were being used as retail and hence were out of compliance with the Zoning By-law. Counsel for the Appellant pointed out that whether the site is in compliance is not relevant to the approval of the minor variance.

Ms. Leckey explained to the Board that the accessory retail sales or retail display will “function” as retail, but it is meant and intended by the by-law to support the permitted use. She also stressed that the 20% is calculated on a unit basis, not as an aggregate for the entire site and that the accessory use must be subordinate to the permitted use and must be devoted to the permitted use.

Marianne Cassin provided expert land use planning opinion evidence for the City. She was also present at the site visit of February 15, 2012, and testified that her observation of the property of 2980 Drew Road, at the time of the visit, was that it “resembles a retail plaza”. Ms. Cassin described the layout of the three units with the use of numerous photos (Exhibit 4, Tab 12), and testified that it was her opinion that retail use was apparent throughout the three units at that time. She also testified that she observed, during this visit, five additional units in the development operating as retail stores (see Exhibit 4, Tab 13) and a personal service establishment (Exhibit 4, Tab 13-F) that is also not a permitted use.

Ms. Cassin testified that the City Official Plan embodies the principles of the PPS and the Growth Plan, in particular policies that provide for an appropriate mix and range of employment uses (including industrial, commercial and institutional uses) to meet long-term needs; and planning for, protecting and preserving employment areas for current and future uses. It is her opinion that these policies are achieved through the Official Plan and are in place to protect lands for specific uses. As the subject lands are identified for employment uses, Ms. Cassin testified the current use of these three units as retail is not in conformity with the Growth Plan and is not consistent with the PPS.

The lands are within the area designated as Business Employment in the Official Plan. The objective as noted in section 2.3.2.6 of the Official Plan is to provide for a wide range of employment activities including industrial, office and limited accessory retail commercial uses. As noted in the Official Plan, accessory uses will generally be limited to a maximum of 20% of the total GFA; and all accessory uses shall be on the same lot and clearly subordinate to and directly related to the function of the permitted use. It is her opinion that at 50% GFA, the retail use is no longer subordinate to the permitted use of wholesaling or warehousing. As well, she testified that the primary permitted use of wholesaling or warehousing was not evident. Ms. Cassin's opinion is that since the variance is requesting 50% GFA, this is no longer a subordinate use, and since there is no clear primary use, the requested variances don't meet the intent and purpose of either the in-force official plan or the New Official Plan.

It is her opinion that these units are principally being used as non-employment uses or as a retail facility, and that this represents conversion of employment to non-employment uses and therefore is not in conformity with the PPS and not consistent with the Growth Plan policies.

With regards to the zoning by-law, Ms. Cassin finds similarly that the intent and purpose of the zoning by-law is not met by the requested variances, as the retail use does not fit as an "accessory" at 50% GFA.

With regards to the test for desirable, Ms. Cassin's opinion is that the intent of the official plan is to limit the amount of accessory commercial space and to limit this to related uses, in order to avoid the establishment of retail stores in areas designated for

employment uses. Ms. Cassin testified that the Malton area has many areas designated for retail commercial uses, and this is not one of them. She testified that the focus for retail commercial development for the Malton Residential Area is centered on Goreway Drive. The increase in retail space in these three units may lead to an increase in retail space in other units in the condominium complex, and by her observation, this has already occurred. It is her opinion that the increase in retail space would undermine the employment use designation in the official plan and may undermine existing retail centres in other locations as well as limiting existing employment sites.

In her view the increase from 20% GFA for permitted accessory use to 50% is excessive. As well, in her opinion it is not minor given that the proposed uses would no longer be accessory but now equal to the principal use. Under cross examination, Ms. Cassin agreed that there is no impact from the subject variances, however, there is a potential for a cumulative effect of additional variance requests for retail uses throughout the site, and this must be considered as these approvals will provide precedent.

The parties described the situation of Guardian drugstore, located in the complex. The Committee of Adjustment granted a minor variance for this business to operate a 100% retail pharmacy within a mixed use industrial building. The Appellants contend that this approval is a greater departure from the Official Plan and the Zoning By-law, as it is a use at 100% retail and therefore provides precedent for granting accessory retail at greater than 20%. The City responded by indicating that the situation differs in that in this case the variance was for a new use, that being a pharmacy, and that when this approval was granted the Committee of Adjustment considered the unique conditions of that application in that the pharmacy has direct access to the lobby and is adjacent to the medical and dental office uses. The Board is not bound by the decision made by the Committee of Adjustment in the Guardian drugstore situation, as each matter is determined on its own merits.

Findings

The Board finds the clear intent of the Official Plan and the Zoning By-law is to limit the amount of retail activity within this area. As testified by Ms. Cassin, other areas, such as the area centred on Goreway Drive, are intended to be the areas for retail uses for this community, rather than this area. She also testified that though Mr. Capper described Airport Road as having a “main street” function for this community, it is not so designated in the Official Plan. The Official Plan is very clear and unambiguous in stating that retail uses are meant only to be accessory in this area.

The primary use of these three businesses has been described by the Appellants as wholesale use, but it has also been described as warehousing and distribution by the owners in their occupancy permit applications. In any case, the accessory use of retailing must be subordinate to the primary use.

The minor variance requests are essentially to regularize the existing situation, with minor modifications. In order to authorize these minor variance requests, the Board is required to accept the premise that the activities at the three businesses are primarily wholesale operations with a subordinate retail component. There was compelling evidence presented at the hearing that indicated that the Appellants are operating the three facilities as retail operations, though counsel for the Appellants suggested that what the compliance officer and planner observed during their site visit of February 12, 2012, could have been aspects of a wholesale operation. Ms. Leckey, who has 20 plus years of experience in zoning by-law administration and compliance for the City, testified that these operations have the appearance of retail operations. This opinion was supported with numerous photos presented by Ms. Cassin in Exhibit 4, Tab 12.

The Board’s duty in this matter is to determine whether the requested variances meet the four tests of the *Planning Act*, and not to determine whether the operations are in compliance with the zoning by-law. As an outcome of this, if the Board determines that the current primary use at the three units is a retail use, then the requested variances do not meet the intent and purpose of the Official Plan or the Zoning By-law, which only permit retail use as an accessory to a permitted primary use.

The Board relies upon the opinion of Ms. Leckey and Ms. Cassin who both testified that the operations are retail. Mr. Capper has testified that these are wholesale facilities, however he bases this on the one or two site visits that he had, and on the claims of the owners. The doubt that counsel for the Appellants wishes to sow by suggesting that what was observed is some alternative kind of wholesaling is not supported by sufficient evidence from the Appellant, such as lists of other retail clients that these businesses supply. The purpose of a wholesale operation is to distribute to other commercial business users, including other wholesalers (see Exhibit 1 Tab 37); whereas a retail store is a structure where goods are offered for sale to consumers. There was insufficient evidence presented at the hearing that would support the assertion that wholesale activities are the primary use occurring at any of the three businesses.

The Board cannot find that the primary function of these three establishments is as wholesale operations, with retail as a subordinate use, faced with the testimony of Ms. Leckey and Ms. Cassin, and the evidence. The Board finds that the variances fail the test for meeting the general intent and purpose of the official plan and the general intent and purpose of the zoning by-law, as both clearly do not intend that this area support retail uses, other than as an accessory use.

At 50% GFA for retail, this does not support the mix of employment uses and preserve these uses for the future. It encourages retail, in a location that is not intended for retail. The Board is not persuaded by the Appellants' view that the proposed retail uses are a relatively minor and incidental use relative to the overall site. In addition, the evidence shows it is likely that approval of the requested variances will lead to further requests for additional retail uses within the condominium complex.

Mr. Zakem has suggested that the additional amount of retail space will not jeopardize the employment use of the lands – “a job is a job”, but this is in relation to the PPS and Growth Plan and does not respond to the intent and purpose of the Official Plan that specifies retail commercial uses should be elsewhere.

The Board does not find that the issue of conversion needs to be addressed for the evaluation of whether the minor variances meet the four tests of the *Planning Act*.

The Board finds that the requested variances do not result in a desirable and appropriate development of the lands, as the official plan clearly designates areas for retail commercial uses, in locations other than this area, which is designated for employment uses.

As was mentioned in the hearing, the Appellants have appealed the New Official Plan in regards to the designation of these lands. This is a more appropriate vehicle for determining whether retail commercial uses are appropriate for this area, rather than a request for minor variances.

Decision and order

The Board finds on the evidence that the requested variances do not conform to the general intent and purpose of either the City of Mississauga official plan or the zoning by-law. The Board finds that the proposed development is not desirable for the appropriate development of the subject property and that the requested variances are not minor.

The Board Orders that the appeals are dismissed and the variances are not authorized.

So Orders the Board.

“H. Jackson”

H. JACKSON
MEMBER