

ISSUE DATE:

April 25, 2012



PL120142

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: Ali Real Estate Trust
Subject: Minor Variance
Variance from By-law No.: 0225-2007
Property Address/Description: 5135 Creekbank Road
Municipality: City of Mississauga
Municipal File No.: A 369/11
OMB Case No.: PL120142
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APPEARANCES:

Parties

Ali Real Estate Trust

Canpro Investments Ltd.

City of Mississauga

Counsel

R. Al-Sukhni

B. Kussner

A. Wilson-Peebles

**MEMORANDUM OF ORAL DECISION DELIVERED BY R. ROSSI ON
APRIL 17, 2012 AND ORDER OF THE BOARD**

Ali Real Estate Trust ("Appellant") is appealing the decision of the Committee of Adjustment of the City of Mississauga that denied an application for a minor variance to permit a flea market to operate on the subject property.

Mr. Al-Sukhni represented Ali Real Estate Trust. Opposing parties included the City of Mississauga ("City"), represented by Ms. Wilson-Peebles and Canpro Investments Ltd. ("Canpro"), a business neighbour of the Appellant and represented by Mr. Kussner.

Mr. Al-Sukhni told the Board that the proposed flea market would only operate on Saturdays and Sundays when offices are closed and when there is less traffic in the area. He said he is trying to bring business to the area and he was asking the City to

provide him with two to three years so that he can try to develop the space to comply with its “requirements.” That was the extent of the Appellant’s evidence as spoken by Mr. Sukhni to the Board Member.

The only planner to appear as a witness at this hearing was City planner Stephanie Segreti, who was qualified to provide her professional land use planning evidence and expert opinion in opposition to the appeal. Ancillary planning evidence comprised the substance of Canpro’s letter of objection to the Committee and was part of the City’s documents package (Exhibit 1, Tab 4). The Board notes that all of the planning evidence before it, both through the *viva voce* evidence of Ms. Segreti and the documents provided by the City and Canpro, provided comprehensive evidence and supporting rationales for why the variance should be refused.

Specifically, Ms. Segreti was the only witness to address the variance and the only person to assess the variance in the context of the four tests found in subsection 45(1) of the *Planning Act*. Her review of the Official Plan policies and zoning by-law performance standards was entirely thorough and the Appellant’s Agent asked no questions of her nor challenged her evidence and opinion.

The subject lands are situated on Creekbank Road in the Northeast Employment District (as identified in the Mississauga Plan). The subject property is located northeast of the intersection of Creekbank Road and Eglinton Avenue East. The property to the south is Bell Canada’s Mississauga headquarters building. Bell Canada leases 445 spaces from the Appellant for employee parking. This ten-year registered lease agreement expires in 2014.

The subject property has a lot area of 4.18 hectares (10.34 acres) and frontage of 175.52 metres (557.85 feet) along Creekbank Road. The Appellant has a vacant, single-storey building approximately 10,070 square metres (108,392 square feet) in size on this site. The building was built in 1978 with subsequent additions made. There is an expansive asphalt parking area with portions of it gated off.

Both the Mississauga Official Plan and the New Mississauga Official Plan (under appeal) designate the subject property and adjacent lands as Business Employment. A flea market is not a permitted use on these lands. While accessory uses are permitted, these must be of a type in the context of supporting the specific uses contemplated on

these lands, which are typically industrial, manufacturing, assembling, processing, fabricating, research and development, sales and service, warehousing, distributing and wholesaling (Exhibit 1, Tab 9B). Neither plan includes “flea market” as a permitted accessory use on Business Employment lands. Moreover, accessory uses are limited to a maximum of 20% of the total Gross Floor Area (GFA) of the space and must be “clearly subordinate to and directly related to the functioning of the permitted use” (policy 3.3.2.5, Mississauga Plan, Exhibit 1, Tab 9B). Ms. Segreti told the Board that the proposed use is neither associated with or ancillary to the permitted uses under the Business Employment District. Rather, “flea market” is a commercial use as defined under the Plan’s General Commercial Policies (page 56).

The intent of the in-force and under-appeal Plans is to limit the range of accessory uses on Business Employment lands in order to preserve and protect the planned function. Retail uses such as a flea market are not contemplated on these lands. Ms. Segreti added that approval of the variance would create conversion of Employment lands as identified in Policy 2.2.6.5 of the Growth Plan and this action would require a municipal comprehensive review. She called this case a major land use change that requires an amendment to the Official Plan and corresponding studies to inform and justify a change in design to this very large site. As the proposed flea market would be a stand-alone retail commercial operation atop Business Employment lands and by virtue of the unchallenged evidence above, the Board finds persuasive Ms. Segreti’s planning evidence and opinion that the proposed variance does not meet the general intent and purpose of the in-force Official Plan and notes that the same effect results when considered in the context of the under-appeal Plan.

Zoning By-law No. 0225-2007 designates the subject lands and lands around it as “E2” Employment lands. This by-law identifies the permitted uses and zone regulations for these lands and like the Official Plan a flea market is not on the list of permitted uses (page 80). The same regulations that are found in the Plan also apply in the By-law. Ms. Segreti noted the Appellant’s drawings (pages 9-10) for the proposed flea market use within the large vacant building. Approximately 88% of the existing building has been proposed to serve as an expansive trade area with a small food court. Given the regulations that accessory uses are limited to a maximum of 20% of the total GFA of the space and must be subordinate to and directly related to the functioning of the permitted use, the planner opined that the variance does not maintain the general intent and

purpose of the zoning by-law. Ms. Segreti cautioned that a rezoning application would be required for this site to propose adding this use. She added that upon closer scrutiny, planning staff opine that other variances might be required: one for the accessory food court use (which would act as an accessory use to a non-permitted use) and a parking variance. Specific parking ratios would be assessed per use and applied to the overall lot's existing 563 spaces. Ms. Segreti opined that the Appellant would need to provide 490 parking spaces, whereas 445 of these are already committed to a registered lease agreement with Bell Canada. In that regard, the parking deficiency would require a significant variance as well. The Board finds persuasive the planner's evidence that the proposed variance for use does not maintain the general intent and use of the zoning by-law.

Ms. Segreti opined that the proposed variance is not desirable for the appropriate development of the subject lands. She explained that even if this use operated only on weekends, its days and hours of operation as proposed do not support the local employment function of the land and do not serve the needs of adjacent and surrounding business uses and workers, providing instead a regional draw. She opined that this impact the planned function of the Business Employment lands because the use is not related to or ancillary to Employment uses. Not only is the use incompatible with the prevailing Employment and Office uses surrounding the site, but the proposed use also represents an underutilization of the Prime and Prestige Employment uses found throughout the Northeast Employment District and threatens the applicable policies and existing designated and zoned retail areas that already do serve the district. She added that in fact, the Northeast Employment District has commercially zoned areas within it that permit the flea market use and she cited an existing flea market located only 1.1 kilometres away from the site.

The City's intent is to limit retail uses in order to preserve higher-order industrial and employment uses by restricting retail uses to ancillary ones that support the local employment base. Ms. Segreti opined that the size, scale and use are not appropriate for the site and area and the Board finds persuasive her evidence that the variance is not desirable for the appropriate development of the subject lands.

Lastly, Ms. Segreti opined that the variance is not minor by virtue of the nature and magnitude of the use in a space this size. In her opinion, the variance represents a

substantial change to planned function of the Employment area due to its size and scale, with 88% of the building proposed to be used, thereby exceeding the accessory use regulation of 20% even if this was a permitted use. She reiterated that it is not minor because the proposal requires both amendments to the Official Plan and the zoning by-law and because it has substantial implications for Employment uses both locally and across the City. Finally, it cannot be minor because it does not meet the requirements of both the Provincial Policy Statement and the Growth Plan which direct among other things that employment lands are to be preserved and protected for current and future uses. The Board finds persuasive Ms. Segreti's evidence that the proposed variance is not minor.

Mr. Kussner outlined Canpro's concerns and provided a copy of this Party's letter to the Board, which outlines its substantive planning concerns with the proposed variance. Canpro is a prominent employer in the area and it owns several sites and lands within the immediate vicinity of the subject property. As Mr. Kussner argued, once an entity tries to introduce a use that is far afield from the policy regime, this serves to undermine the planned function. Without any evidence whatsoever from the Appellant or the Agent, the Board finds this argument to carry significant weight in the case at hand.

The Appellant has failed to make a planning case for the proposed use. Only the City brought a planning witness to speak to the variance and Ms. Segreti's evidence, as outlined above, was entirely thorough and supported by planning rationale and evidence. The Board determines that the proposed variance does not represent good planning. It finds persuasive the professional land use planning evidence and expert opinion of the City Planner for the reasons stated that the variance fails all four tests of subsection 45(1) of the *Planning Act* and should be refused.

THE BOARD ORDERS that the appeal is dismissed and the minor variance is not authorized.

So Orders the Board.

"R. Rossi"

R. ROSSI
MEMBER