

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 5, 2015

CASE NO(S): PL150370

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Jessica Hart
Applicant:	Kee Group Inc.
Subject:	Minor Variance
Variance from By-law No.:	0225-2007, as amended
Property Address/Description:	512 Bristol Road West
Municipality:	City of Mississauga
Municipal File No.:	"A" 170/15
OMB Case No.:	PL150370
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OMB Case Name:	Hart v. Mississauga (City)

Heard: August 6, 2015 in Mississauga, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Jessica Hart

Self-represented

Kee Group Inc.

Frank Peeris

City of Mississauga

Andrew Biggart*

**DECISION DELIVERED BY ANNE MILCHBERG AND SUSAN de AVELLAR
SCHILLER AND ORDER OF THE BOARD**

[1] Jessica Hart ("Appellant") has appealed the April 2015 decision of the Committee of Adjustment ("CoA") of the City of Mississauga ("City") to approve three minor

variances for an existing restaurant in a strip plaza at 512 Bristol Road West, in Mississauga (the “subject property”). The variance application for the restaurant, the Bristol Bar and Grill, had been made by Kee Group Inc., owner of the plaza (“Applicant”) in order to allow the restaurant to continue to exist in the plaza.

[2] Party status was requested by and granted to the City. The City’s position was one of support for the appeal.

[3] The Board heard planning evidence on this matter from two qualified Registered Professional Planners, Franco Romano and Mark Rogers. Mr. Romano was retained by the City to provide evidence in support of the appeal. Mr. Rogers was retained by the Kee Group Inc. to provide evidence in support of the application and against the appeal.

[4] The Board also heard from the Appellant, Ms. Hart, who lives directly across the street from the subject property. Ms. Hart was self-represented in these proceedings and wished to address the Board with her concerns. Under these circumstances, and on consent, the Board agreed to have Ms. Hart provide evidence as well as have an opportunity, if she wished, to question witnesses and make submissions.

PROPOSAL AND CONTEXT

[5] The subject property is the Bristol Bar and Grill, a 270 square metre (“m²”) restaurant in a 1,800 m² multi-tenant convenience commercial strip plaza at the south-west corner of Bristol Road West and McLaughlin Road in Mississauga. The restaurant also has a large, 40 m² outdoor patio that fronts onto McLaughlin Road, and a roll-up window on its façade overlooking the outdoor patio. The roll-up window connects the outdoor patio to the indoor bar and televisions (“TV”).

[6] The plaza, which was built in 1999, is surrounded by residential development, consisting primarily of townhouses and single detached dwellings (Exhibit 4, Map 1).

[7] Mr. Romano described the surrounding area as a stable residential neighbourhood, with none of the characteristics of a mixed-use or commercial corridor. He testified that the adjacent residential properties were located less than 4 metres (“m”) from the subject property’s lot lines, and at maximum, 30 m.

[8] Under the City’s Official Plan (“OP”), the plaza is designated as “Convenience Commercial”, which permits restaurants. Pursuant to Zoning By-law (“ZBL”) No. 0225-2007, as amended, the plaza and the Bristol Bar and Grill within it are currently zoned “C1 – special section 15”. In this location, a restaurant is a permitted use as long as it is located at least 60 m from the nearest residential lot line.

VARIANCES SOUGHT

[9] The purpose of the Applicant’s variance request before the Board would have the effect of renewing three variances that expired on September 30, 2014, for the Bristol Bar and Grill:

- a. a restaurant to be located within 60.00 m (200.00 feet (“ft.”) of a residential zone; whereas By-law No. 0225-2007, as amended, requires that any building or structure containing a restaurant use must be a minimum of 60.00 m (200.00 ft.) from the closest lot line of a residential zone in this instance;
- b. parking to be provided at a rate of 4.30 spaces per 100.00 m² (1,076.42 square feet) gross floor area for the restaurant use; whereas By-law No. 0225-2007, as amended, requires parking to be provided at a rate of 16.00 spaces per 100.00 m² gross floor area; and
- c. providing no additional parking spaces for persons with disabilities; whereas By-law No. 0225-2007, as amended, requires four parking spaces [by the Applicant’s assessment] for persons with disabilities in this instance.

[10] The Board notes that, in distinction to the prior CoA approvals that were temporary (for five year terms), **these variances have been requested on a**

permanent basis.

COMMITTEE OF ADJUSTMENT HISTORY

[11] Two different restaurants in the same retail space within the commercial convenience plaza have benefited, since 1999, from continuations to temporary variances from the ZBL, each with five year life spans.

[12] The plaza was developed in 1999, with a site specific by-law that required:

- a maximum total gross leasable area for restaurants of 10% of the total gross leasable area of all buildings and structures (180 m²); and
- the provision of parking at a rate of 16.0 spaces per 100 m² of gross floor area (“GFA”) of restaurant.

[13] Mr. Rogers testified that the Applicant’s first application for variances for the subject property occurred in 1999. The family restaurant Lucy’s Seafood, the original tenant in the restaurant space, benefited from variances for a temporary period of five years (until 2004), allowing:

- a maximum total gross leasable area for restaurants of 15% (270 m²); and
- parking at a rate of 4.3 spaces per 100 m² GFA of restaurant.

[14] That approval was made personal to Lucy’s Seafood and no other entity.

[15] In 2004, after the temporary variances expired, the Applicant applied to the CoA to request a continuation of the 1999 approval. Temporary approval for five years was obtained, to 2009, and again, it was specific to Lucy’s Seafood and no other entity.

[16] In 2009, the Applicant applied again for variances. By this time, however,

enabling By-law No. 5500, as amended by Section 1985, had been replaced by By-law No. 0225-2007, and the tenant had changed from Lucy's Seafood Restaurant to the Bristol Bar and Grill.

[17] As before, parking was proposed to be provided at a rate of 4.30 spaces per 100.00 m² GFA, whereas By-law No. 0225-2007, as amended, required parking to be provided at a rate of 16.00 spaces per 100.00 m² GFA.

[18] The other two required variances were new. One sought a full exemption from the new by-law requirement that restaurants be located a minimum of 60.00 m from the closest lot line of a residential zone. The other proposed the provision of no additional parking spaces for persons with disabilities, whereas By-law No. 0225-2007, as amended, required four handicapped parking spaces.

[19] The CoA approved the Applicant's 2009 variance application for a five year period terminating September 30, 2014, specific to the Bristol Bar and Grill.

ISSUES AND ANALYSIS

[20] The Board considered the Kee Group Inc.'s application for minor variance and its appeal pursuant to s. 45(1) of the *Planning Act* ("Act"), which sets out four tests that a minor variance must meet.

1. Do the proposed variances maintain the general intent and purpose of the OP?

[21] Both the Applicant's Planner, Mr. Rogers, and the City's Planner, Mr. Romano, testified that the proposal maintains the general intent and purpose of the OP. The OP does not regulate parking numbers or the types of parking spaces, and a restaurant is a permitted use.

2. Do the proposed variances maintain the general intent and purpose of the Zoning By-law?

a. Separating distance between a restaurant and a residential zone

[22] The proposed variance would permit a 3.395 m separating distance between the restaurant and the nearest residential lot line, whereas By-law No. 0225-2007, as amended, requires a minimum of 60.00 m.

[23] The purpose of a regulated separating distance is to avoid and mitigate conflicts between two different uses – in this case, a restaurant and residential dwelling units. Restaurants can generate traffic, light, noise, odours, garbage and pests, all impacts which must be managed with respect to adjacent uses.

[24] Ms. Hart, the Appellant, testified that she moved into a townhouse directly across the street from the commercial convenience plaza in 2003, and had chosen this location because it was quiet and family-oriented. In 2003, the restaurant tenant in the plaza was Lucy's Seafood, a busy family-patronized establishment. Ms. Hart testified that, even with a patio that was packed with customers, Lucy's Seafood made no noise. She had no issue with the establishment until September 2009, when Lucy's Seafood was converted into the Bristol Bar and Grill.

[25] In Ms. Hart's observation, the customer base changed dramatically when the business was changed into a bar. The sound of customers on the patio got louder as evenings progressed; there were many bar fights; and vehicles revved in the parking lot and raced around the neighbourhood. Ms. Hart found that the bass and amplified volume of disc jockeys, live bands and open-mike karaoke were not contained within the restaurant, and frequently woke her family. Hoping it would resolve itself, she testified that she chose not to take action for a number of months.

[26] However, in February 2010, after loud music awoke Ms. Hart's small children, she walked over to the bar and asked them to turn the volume and bass down. She

also invited the bar owner to visit her home to experience the bass vibration in her walls from the bar.

[27] In April 2010, without any improvement in the situation, Ms. Hart made her first of a number of complaints to the City's By-law enforcement group, and started logging the noise incidents, as suggested by City staff.

[28] Ms. Hart testified that, every week or two weeks, she was compelled to call the restaurant owner to complain about noise. In response, the restaurant would apologize and promise to turn down the music and TV and attempt to control its patrons. However, the noise problem would recur and Ms. Hart would again have to contact the restaurant. This went on for over four years.

[29] From Ms. Hart's testimony, it appeared that the City's noise control officials provided limited input into the matter, except to suggest that Ms. Hart and the Bristol Bar and Grill try to resolve their differences through a neighbourhood conflict resolution service. Consequently, Ms. Hart and the restaurant owners entered into mediation, and in March 2014, they signed a Memorandum of Understanding ("MOU") in which the restaurant owners agreed to reduce the volume and bass of music after 11 p.m., ensure that the TV volume was kept reasonably low, and ensure that bar fights were avoided. Ms. Hart's undertaking in the MOU was to phone the owners or visit the restaurant if the volume of music or TV was (in her words) "out of control".

[30] The restaurant did not adhere to the commitments it made in the MOU, and Ms. Hart continued to document many incidents of non-compliance well into 2015. She advised the Board that she filed the appeal reluctantly - and as a last resort - to obtain peace and quiet.

[31] Ms. Hart's testimony was uncontroverted by the Applicant.

[32] Given that the noise generated from the restaurant was an intractable issue, reducing the separating distance from 60 m to 3.395 m would, in the Board's view,

contravene the general intent and purpose of the zoning by-law.

b. Parking

[33] With respect to the variance request that parking be provided at a rate of 4.30 spaces per 100.00 m² GFA for the restaurant use, rather than at a rate of 16.00 spaces per 100 m² as required by the by-law, Mr. Rogers' position was that this would be an acceptable continuation of the status quo: four parking spaces would be supplied instead of the required 16.

[34] With testimony from both Mr. Rogers and Mr. Romano, it was made clear to the Board that By-law No. 0225-2007 would require 112 (non-handicapped) parking spaces for the entire commercial convenience plaza. Given that 82 parking spaces are currently supplied and the requested variance would not add any parking to the overall supply, the entire plaza would permanently have a shortfall of 30 non-handicapped parking spaces overall (based on current standards) if the variance were to be granted.

[35] Mr. Rogers provided no traffic or parking study to the Board to demonstrate how or why the requested parking variance meets the general intent and purpose of the parking standards set out in the ZBL. No rationale was provided as to why the status quo was worthy of being maintained on a permanent basis, or how it respected the intent of the codified standards.

c. Handicapped parking

[36] The proposed variance provides for zero handicapped parking spaces, on a permanent basis.

[37] Under cross-examination, the Applicant's planner, Mr. Rogers, conceded that, pursuant to By-law No. 0225-2007, the number of parking spaces that would be required for persons with disabilities was actually five, not four.

[38] Added to the non-handicapped requirement for 112 spaces, the overall parking shortfall at the plaza would jump to 35 spaces.

[39] In Mr. Rogers' opinion, supplying no handicapped parking spaces would be a perfectly acceptable continuation of the status quo. However, appreciating that handicapped standards exist for good reason, the Board does not share the Applicant's view that providing zero parking spaces for persons with disabilities meets the intent and purpose of the ZBL.

3. Is the proposal desirable for the appropriate development of the land?

[40] It was Mr. Rogers' opinion that the proposal should be allowed because it had already been allowed in 1999, 2004 and 2009. In contrast, Mr. Romano opined that the change of tenancy and introduction of a bar in 2009 begot an open invitation for land use conflicts. This was evidenced by Ms. Hart's uncontroverted observations.

[41] What the Board finds interesting is that all prior CoA approvals were given for temporary five year periods, and were specific or "personal" to the tenant named. The CoA never took the position that these variances were acceptable in perpetuity, or with any tenant that came along. The Bristol Bar and Grill assumed tenancy in 2009 and, on the uncontroverted evidence of Ms. Hart, began to produce undesirable land use impacts on the neighbourhood ever since it opened up for business. Therefore, the Board finds that renewing these variances would not be desirable for the appropriate development of the land.

4. Are the variances minor?

[42] In the Board's view, providing zero handicapped spaces is not minor, nor is a separating distance of 3.395 m where there are documented, repetitive, seemingly intractable noise problems arising from the restaurant's operation.

[43] As for the parking variance request, the Applicant provided no traffic or parking

study to the Board to demonstrate that supplying four spaces instead of 16 did not have negative impacts.

PROVINCIAL POLICY STATEMENT (“PPS”)

[44] None of the parties provided testimony on whether the proposed variances conform to the PPS. However, the Act requires that decisions affecting planning matters shall be consistent with policy statements issued under the Act.

[45] On the matter of the Appellant’s proposal to provide zero handicapped parking spaces, the Board will emphasize this PPS provision:

1.1.1 Healthy, livable and safe communities are sustained by:

- f) improving accessibility for persons with disabilities and older persons by identifying, preventing and removing land use barriers which restrict their full participation in society.

[46] Policies in the PPS are minimum standards. With zero handicapped parking spaces proposed by one of the variances, it is clear to the Board that the requested variance failed to be consistent with the policy, or to meet even a minimum standard of consistency.

CONCLUSION

[47] For a variance application to fail, all that is required is that one test under s. 45(1) of the Act is not met. In this case, the Board finds that three of the four tests have not been satisfied.

[48] In addition to the failure on three tests, the Board finds that one of the proposed variances is inconsistent with the PPS.

ORDER

[49] Accordingly, the Board orders that the appeal is allowed and the variances are not authorized.

“Anne Milchberg”

ANNE MILCHBERG
MEMBER

“Susan de Avellar Schiller”

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

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Ontario Municipal Board

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