

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 13, 2017

CASE NO(S): PL160186

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

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| Appellant: | City of Mississauga |
| Applicant: | Astra Capital Properties Inc. |
| Subject: | Minor Variance |
| Variance from By-law No.: | 0225-2007 |
| Property Address/Description: | 2213 North Sheridan Way |
| Municipality: | City of Mississauga |
| Municipal File No.: | A480/15 |
| OMB Case No.: | PL160186 |
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| OMB Case Name: | City of Mississauga v. Mississauga (City) |

Heard: November 14, 2016, March 9, 10, 28 and 29, 2017
in Mississauga, Ontario

APPEARANCES:

Parties

Counsel

Astra Capital Properties Inc.

Scott Snider
Anna Toumanians

City of Mississauga

Michal Minkowski

DECISION DELIVERED BY ANNE MILCHBERG AND ORDER OF THE BOARD

[1] The City of Mississauga ("City") has appealed the February, 2016 decision of its Committee of Adjustment ("COA") to approve a variance to permit the establishment of

a Motor Vehicle Sales and Leasing use to a maximum 8% of the total Gross Floor Area (“GFA”) of the existing building at 2213 North Sheridan Way (“the subject property”), located in Mississauga’s Sheridan Park Corporate Centre (“SPCC”). The Applicant is Astra Capital Properties Incorporated (“Astra”).

[2] The City’s Zoning By-law No. 0225-2007 (“the ZBL”), as amended, does not permit the Motor Vehicle Sales and Leasing use in an E2-6, Employment Zone, which is the zoning designation for the property.

[3] Over five days, the Board heard extensive, detailed planning evidence on this matter from two qualified Registered Professional Planners, Ted Davidson and Michael Gagnon. Mr. Davidson was retained by the City to provide evidence in support of the appeal. Mr. Gagnon was retained by Astra to provide evidence in support of the application and against the appeal.

[4] Owen Tseng, an executive officer of two subsidiaries of Astra, gave evidence in support of the appeal, focusing on the particulars of the proposed use.

[5] The Board also heard from Dr. Richard Perrier, a manager at Suncor Energy and president of the Sheridan Park Association (the “SPA”). The SPA was formed by the original occupying companies and tenants of the SPCC in 1965 “to foster and attract additional research and development investments” [Exhibit 4, Tab 19, p. 248], and it exists to this day.

[6] The SPA was added as a participant to the hearing on consent of the parties, and Dr. Perrier testified on its behalf in opposition to the proposed use.

BACKGROUND

[7] The SPCC, a 340 hectare (“ha”) industrial research and development campus established in the mid-1960s in south-west Mississauga, is home to engineering,

mining, petrochemical, digital imaging, telecommunications and other research and development firms, and in addition, a private school. Overall, there are approximately 30 buildings in the corporate centre, which is also known as the Sheridan Science and Technology Park. Evidence was provided that much of the original (1965) character of the SPCC remains today, as well as some of the original firms, though under different names.

[8] The SPCC is situated immediately north of the Queen Elizabeth Way (“QEW”) and bounded by Winston Churchill Boulevard to the west. Erin Mills Parkway is approximately 200 metres east of the Park. The southernmost road in the Park, North Sheridan Way, faces south onto the QEW, and there is a very clear view of ten or so properties on that street from the QEW [Exhibit 16].

[9] The subject property is among the string of properties that face the QEW, and it is located at the north-west corner of North Sheridan Way and Hawden Road. It has a site area of 8,847 square metres (“sq m”), and contains a 3,828 sq m building with a one-storey warehouse (2,611 sq m), a two-storey office component at the rear (642 sq m), and surface parking on the western flank. The warehouse portion is used for automobile storage. Although it is one of the smaller properties in the SPCC, evidence showed that the subject property has excellent visual exposure from the highway.

[10] Astra, the owner of the subject property, occupies the office space in the rear of the existing building along with another office tenant, Kinesik, a manufacturer of engineered floors. Most of the building, however, is devoted to automobile storage and wholesaling, run by Quantum Motor Sports (“QMS”).

[11] Astra is the parent company of both QMS and Quantum Automotive Group (“QAG”). QAG is a luxury automotive dealer group which owns and operates a Mercedes-Benz dealership in Burlington, while QMS is a related but separate wholesaling business that sells vehicle trade-ins from QAG to other car dealers or wholesalers. Since QAG can only sell Mercedes products, QMS obtains QAG’s non-

Mercedes trade-in vehicles, and warehouses and wholesales them on the subject property.

[12] Motor vehicle wholesaling, retailing and leasing are part of a highly regulated industry. QAG is registered as a wholesaler by the Ontario Motor Vehicle Industry Council ("OMVIC") [Exhibit 4, Tab 33, p.484]. As OMVIC's regulations specify that a wholesaler cannot sell vehicles directly to the public, a separate license to retail vehicles would be required if the use were to be permitted on the subject property.

THE PROPOSAL

[13] Mr. Tseng, Chief Operating Officer of both QMS and QAG, testified that QMS occasionally receives exotic or super-luxury trade-ins such as Lamborghinis and Ferraris at the Mercedes dealership in Burlington. These cars are taken to the warehouse at the subject property and wholesaled by QMS. QMS would now like the ability to retail these super-luxury cars directly from the subject property, in a separate, glazed, showcase-like room that faces the QEW, and is illuminated, signed and branded with the QMS identity.

[14] The proposed retail showroom is two-storeys in height and 575 sq m in area and would not involve any addition of GFA to the building, but would entail a redesign of existing space, along with extensive façade modifications. The façade redesign would include the addition of a large, horizontal banner sign that connects to the building façade, forms a portal over the parking area, and stretches along the entire property frontage, all viewable from the QEW [Exhibit 6, Tab 4, pages 62-65. Page 62 is attached to this decision as Appendix A].

[15] The showroom would be physically separated from the warehouse behind it by a solid wall, punctuated only by an opening through which motor vehicles to be showcased for retail sale could be moved back and forth.

ISSUES, ANALYSIS AND DISPOSITION

[16] Should the restriction against the sale of motor vehicles be varied for the subject site? This is the central issue for the Board to decide on, and the decision is based on the four tests that a minor variance must meet, pursuant to s.45(1) of the *Planning Act* (“Act”):

- Does the variance conform to the general intent of the City and Regional Official Plan (“City OP”; “Regional OP”)?
- Does the variance conform to the general intent of the zoning by-law (“ZBL”)?
- Is the variance minor (“Minor”)?
- Is the variance desirable for the appropriate development of the land in question (“Desirability”)?

City OP

[17] Under the Mississauga OP, the subject lands are deemed to be within the SPCC, a defined term which forms part of the OP’s City Structure map, and are designated as “Business Employment”.

[18] SPCC is one of four distinct “Corporate Centre Character Areas” in the city. The other three are the Airport Corporate Centre, the Gateway Corporate Centre and the Meadowvale Business Park. Section 15.5.2.1 of the OP states that, within the SPCC,

...lands designated Business Employment will **only** be used for the following uses:

- a. facilities involved with scientific and engineering research and development, including: laboratories, pilot plants and prototype production facilities;
- b. education and training facilities, but excluding a public school or private school used for elementary or secondary level education and training;
- c. data processing centres;

- d. engineering services;
- e. offices associated with science and technology uses;
- f. hotels; and
- g. **accessory commercial uses, namely, conference facilities, fitness facilities, banks and restaurants within buildings provided they do not exceed 15% of the overall floor space. [emphasis added]**

[Exhibit 3, Tab 18, p.199-201]

[19] The OP policies on the SPCC (in OP s.15.5) position it as a unique scientific, research, engineering, technology and education hub, using very clear language. Dr. Perrier, president of the SPA, testified that his association supported the OP vision of a technical community, and that the proposed retail sale of vehicles was contrary to the essence of this science and technology park.

[20] The SPCC is not a warehousing or distribution centre, though the 2006 OP permitted these uses. As of 2017, area-wide OP planning controls for the SPCC have evolved to exclude warehousing and distribution (with one site-specific exception at 2333 North Sheridan Way), and continued to exclude motor vehicle uses. Official Plan Amendment (“OPA”) No. 40, adopted by the City in 2015, was the planning instrument that did this. Astra has appealed OPA 40 on a site-specific basis [Exhibit 4, Tab 27].

[21] The SPCC is not a retail centre. Under s.15.5.2.1 (g), only a very narrow kind of retailing is permitted: conference facilities, banks, gyms and restaurants that support employees in the SPCC as a convenience. The OP limits these retail uses to 15% of the GFA of a building.

[22] Among Mr. Gagnon’s detailed arguments in favour of permitting the Motor Vehicle Sales and Leasing use on the subject lands, were the following:

- The proposal makes sense from a business perspective and, in Mr. Gagnon’s opinion, is supportable from an economic development planning perspective. Mr. Gagnon referred to relevant policies in s. 10 of the OP [Exhibit 7, Tab 20].

- The size of the proposed retail component, at 8% of the total GFA, is modest. It is less than the 15% the OP allots to retail uses such as banks, gyms, restaurants, and is around 0.3% of the total GFA of SPCC [Exhibit 4, Tab 19].

[23] Mr. Gagnon's points had merit, but the Board found that Mr. Davidson's interpretation of the use policies in City OP s. 15 overshadowed them. From Mr. Davidson's plain reading interpretation of the in-force OP policies, it was clear to the Board that Motor Vehicle Commercial uses of any kind are not permitted, not even as accessory uses, on Employment Lands within the SPCC.

[24] Prefaced by the word '**only**', OP s. 15.5.2.1(a) - (g) limit the use permissions at the SPCC to six categories, none of which is or includes motor vehicle sales.

[25] By use of the word '**namely**' in OP s. 15.5.2.1(g), more precision is introduced. The use of the word **namely** tells the reader that only certain **named** uses are permitted as accessory uses. Motor vehicle sales are not on this list. They are excluded as a use.

[26] When s. 15.5.2.1 is read in conjunction with two other applicable policies in 'Section 15 – Corporate Centres', the Board cannot but conclude that the OP's aim is one of excluding Motor Vehicle Sales and Leasing, by virtue of the clarity of the words and the repetition of the prohibition. OP s. 15.1.7 prohibits Motor Vehicle Commercial uses except for those so designated when the OP came into effect, and s. 15.1.8.2 prohibits Motor Vehicle Commercial uses on lands designated 'Business Employment'.

[27] While counsel for Astra suggested that a plain and literal reading of the OP would be too narrow and would not acknowledge the nuance or merits of the proposal, the Board has had enough exposure to and experience with OPs and their drafting and language to appreciate that these documents are usually drafted with the intention of being read literally and at face value, and being understood by members of the public.

[28] The Board finds that the OP's aim of excluding Motor Vehicle commercial uses in Corporate Centres is both clear and repetitive. It does not matter whether the proposed sale and leasing of vehicles on the subject lands is positioned as a primary use or an accessory use; the OP excludes and prohibits the use in either instance. It does not matter that the proposal to retail or lease vehicles may make business sense for Astra and may be a form of economic development; the OP excludes and prohibits the use. It does not matter that Astra might just sell three cars at a time on a retail basis, not 100, and that these are expensive, exotic cars, not old clunkers; the OP excludes and prohibits the use. Finally, it does not matter that Mr. Gagnon's inquiries of City planning staff for a rationale for the Motor Vehicle Sales prohibition did not, in his telling, yield any explanation from them. It would certainly be advisable that staff understands why the OP prohibits what it prohibits, but what mattered most to the Board is the fact that the OP excludes and prohibits the use.

[29] Because the proposed use is explicitly prohibited, the Board finds that it cannot be considered to conform to the general intent of the OP.

Regional OP

[30] In addition to testifying on the proposal's relationship to the City OP, Mr. Gagnon also turned his attention to the Regional OP, citing two policies from s. 5.6 – Employment Areas from the Regional OP. Section 5.6.1.6 sets, as an objective, “[t]o plan for, protect and preserve, *employment areas* for employment uses.” Section 5.6.2.11 is more detailed:

Support area municipalities in discouraging retail uses on employment land except for retail uses servicing the employment area and retail accessory to a permitted employment use, as defined in area municipal official plans.

[Exhibit 7, Tab 19]

[31] Mr. Gagnon's opinion was that s. 5.6.2.11 was helpful to his position. The Board finds differently. The Region states that it supports Municipal OP policies on retail uses on employment lands. The City's OP does not permit the Motor Vehicle Retail and Leasing use on the subject property, and the Region's position would align with the City's.

[32] Accordingly, the proposal does not conform to s. 5.6.2.11 of the Regional OP.

ZBL

[33] On the matter of the variance's conformity with the ZBL, both Mr. Gagnon and Mr. Davidson testified at length.

[34] For the Board, two specific clauses in 'Part 8 - Employment Zones', read together, are at the heart of its analysis and disposition: s.8.1.3.1 and s.8.2.3.6.2. Both planners reviewed these clauses.

[35] Section 8.2.3.6.2 clearly states that Motor Vehicle Sales **are not permitted** on lands zoned E2-6. E2-6 is the zoning designation for the subject property.

[36] Section 8.1.3.1, which also applies to the subject property, deals with 'Accessory Retail Sales and/or Accessory Retail Display in Employment Zones':

8.1.3.1 In an E1 to E3 zone, a maximum of 20% of the total gross floor area - non-residential of a Business Activity use contained in Table 8.2.1 of this By-law, may be used for accessory retail sales, leasing and/or rental, accessory retail display and/or installation of products, **other than motor vehicles**, provided: (0297-2013)

- (1) the accessory retail sales, leasing and/or rental, accessory retail display and/or installation are only those products which are manufactured within a manufacturing facility, repaired within a repair establishment, wholesaled within a wholesaling facility, or distributed from a warehouse/distribution facility; (0297-2013)
- (2) such area is wholly within an enclosed building, structure or part thereof; and, (0297-2013)

- (3) such area is located within the same unit as the principal permitted use. (0379-2009), (0297-2013)

8.1.3.1.1 The area within any building, structure or part thereof used for accessory retail sales and/or accessory retail display of products shall be separated from the remainder of the facility by a permanent, solid, floor-to-ceiling and wall-to-wall partition and closed doors.

[37] Plainly reading these provisions, the Board finds that the intent of ZBL is clear, and in conformity to the OP provisions: Motor Vehicle Sales and Leasing are not permitted.

[38] The Board was made aware of an instance in which the COA allowed a variance to permit Motor Vehicles Sales and Leasing in an Employment Zone [Exhibit 27]. A review of the documentation showed the variance was not granted in a Corporate Centre Character Area, and that City planning staff recommended refusal.

[39] The Board was also made aware of a series of four COA decisions that allowed the establishment of a Day Nursery and then its subsequent expansion, at 2275 Speakman Drive, located in the SPCC [Exhibit 10]. Mr. Gagnon pointed out that a Day Nursery is not on the list of permitted uses in ZBL s.8.1.3.1, and yet it was allowed by the COA in each of these instances, and was supported in some instances by City planning staff. It appeared that staff's support of the Day Nursery use was premised on the notion that the use would serve the Sheridan Park employees and surrounding area. The Day Nursery would have served SPCC employees as a convenience, but it likely also would have served clients from elsewhere.

[40] That the COA made decisions (between 2003 and 2014) to permit a Day Nursery which is not permitted – and that staff supported it – is not before this Board to second guess or retry. If anything, the substance and progression of the four COA decisions, to allow the establishment of a Day Nursery and its subsequent expansion, did the opposite of warming the Board up to the proposal now before it for a Motor Vehicle Sales and Leasing use, a use that is not permitted.

[41] Against the backdrop of OP policy changes to exclude warehousing and distribution in the SPCC (via OPA No. 40), evidence was provided that the City's Building Division issued a Zoning Certificate listing 'Warehouse and Wholesale Operation Facility' as a permitted use on the lands [Exhibit 6, Tab 3]. The warehouse and wholesale operation on the subject lands is not in dispute. That the warehouse happens to contain wholesale motor vehicles is also not in dispute. However, neither of these facts provides a sufficient planning rationale to add a prohibited use, Motor Vehicle Sales and Leasing, into the building.

[42] Because the proposed use is explicitly prohibited, it cannot be considered to conform to the general intent of the ZBL.

Minor

[43] Mr. Gagnon's professional planning opinion was that the proposed Motor Vehicle Sales and Leasing use was minor in nature because there would be no demonstrable negative impact arising from establishing the use.

[44] The Board finds that there is a significant impact, a visual one. The proposal's Exterior Concept elevation design, attached as Appendix A to this decision, looks to the Board like a large-scale, full-blown retail establishment, with product fully on view, designed to attract attention from the QEW. It does not leave the impression that this is a motor vehicle storage and wholesaling operation that happens to have three motor vehicles for retail sale at any one time.

[45] Mr. Gagnon provided, in evidence, several photographs of signage on other buildings within the SPCC to try to make the case that the proposed QMS signage, image and branding was no different from existing examples such as Shaw, Suncor and Hatch, but the Board did not see it that way at all. In the Board's estimation, the signage on the other buildings seemed much more contained and subdued.

[46] The visual impact of the proposal matters, because it seems to undercut and be at cross-purposes to the vision of the SPCC, as defined by the OP and reiterated by Dr. Perrier, that this is a science and technology park.

[47] Therefore, on the basis of impact, the Board finds that the proposal is not minor in nature.

Desirability

[48] Drawing on the other three tests for a minor variance, the Board finds that the proposal for a Motor Vehicle Sales and Leasing use is not desirable on the subject property, as this prohibited use would fly in the face of SPCC's identity as a unique scientific, research, engineering, technology and education hub in Mississauga.

Provincial Policy Statement, 2014 ("PPS")

[49] Both planners cited the same PPS policies in support of their own positions on the proposed use variance [Exhibit 3, Tab 14; also Exhibit 7, Tab 17]:

1.3.1 Planning authorities shall promote economic development and competitiveness by: a) providing for an appropriate mix and range of employment and institutional uses to meet long-term needs; b) providing opportunities for a diversified economic base, including maintaining a range and choice of suitable sites for employment uses which support a wide range of economic activities and ancillary uses, and take into account the needs of existing and future businesses; c) encouraging compact, mixed-use development that incorporates compatible employment uses to support liveable and resilient communities; and d) ensuring the necessary infrastructure is provided to support current and projected needs.

1.3.2.1 Planning authorities shall plan for, protect and preserve employment areas for current and future uses and ensure that the necessary infrastructure is provided to support current and projected needs.

[50] However, the Board finds that there is insufficient supporting evidence before it to draw a conclusion as to whether or not the proposal is consistent with these provisions of the PPS.

CONCLUSION AND ORDER

[51] 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 none of the four tests have been satisfied.

[52] Accordingly, the Board orders that the appeal is allowed and the variance is not authorized.

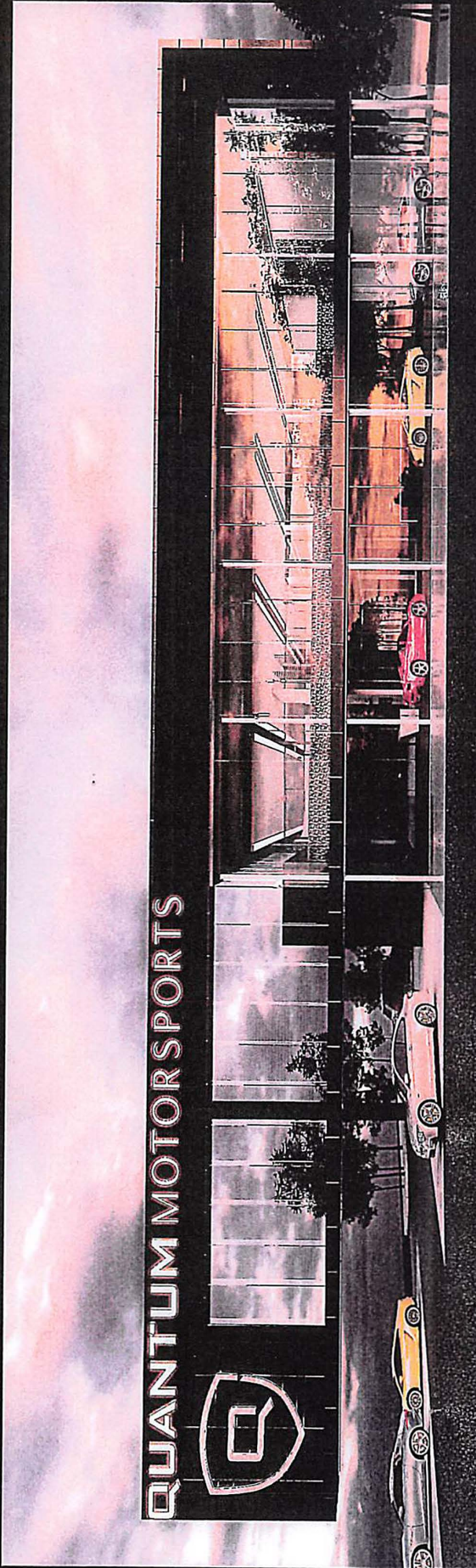
“Anne Milchberg”

ANNE MILCHBERG
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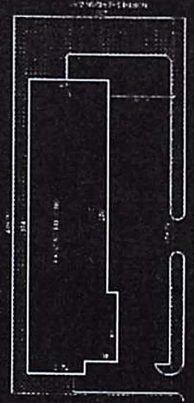
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QUANTUM MOTORSPORTS



THE QUANTUM EXPERIENCE



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