Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: August 10, 2018 **CASE NO(S).:** PL161207

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Applicant and Appellant:	Morguard Corporation
Subject:	Minor Variance
Variance from By-law No.:	0225-2007
Property Address/Description:	2251 North Sheridan Way
Municipality:	City of Mississauga
Municipal File No.:	A 435/16
OMB Case No.:	PL161207
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OMB Case Name:	Morguard Corporation v. Mississauga (City)

Heard: November 10 and December 8, 2017 in Mississauga, Ontario

APPEARANCES:

Parties	**Counsel**
Morguard Corporation	Mary Flynn-Guglietti
City of Mississauga	Lia Magi

DECISION DELIVERED BY ANNE MILCHBERG AND ORDER OF THE TRIBUNAL

[1] Morguard Corporation ("Applicant", "Appellant", "Morguard") has appealed the October, 2016 decision of the City of Mississauga ("City") Committee of Adjustment

("CoA") to refuse a variance application for a *parking lot* at 2251 North Sheridan Way ("the subject property", "the subject lands", "the site"). The variance application was an effort to legalize the placement of approximately 206 vehicles on the subject property on a temporary basis, a use that the Appellant has characterized as a *parking lot,* a defined term. Cars have been on the site since December 2015, and the Appellant applied for a minor variance to permit a "parking lot" after receiving a Notice of Contravention from the City in July 2016.

[2] The relief requested by the Appellant is as follows:

- To permit a temporary *parking lot* use on the lands ("Variance 1").

- To permit a *parking lot* use having a surface treatment of 15 centimetres ('cm") compacted crusher run limestone, whereas the City's Zoning By-law ("ZBL") requires a 15 cm stable surface of asphalt, concrete, pervious materials or other hard-surfaced materials ("Variance 2").

[3] The Board heard expert planning opinion evidence from two qualified Registered Professional Planners, Jim Levac and Ted Davidson. Mr. Levac, retained by the Appellant, provided evidence in support of the proposal. Mr. Davidson, retained by the City, provided evidence against it.

[4] Testimony was also provided by:

- Brian Athey, Vice President of Development for Morguard Corporation, who provided details on the proposed use;

- Ross Spreadbury, a Municipal By-law Enforcement Officer employed by the City, who provided information on three site visits he undertook; and

- Barbara Leckey, a ZBL expert who was formerly employed by the City as a Zoning Administrator and Manager.

BACKGROUND

[5] The 1.25 hectare ("ha") subject property is located at the north-west corner of North Sheridan Way and Hawden Road, in the Sheridan Park Corporate Centre ("SPCC"), a large industrial, engineering, telecommunications, educational and research and development campus in south-west Mississauga. There are no buildings on the site.

[6] The SPCC is situated immediately north of the Queen Elizabeth Way ("QEW") and bounded by Winston Churchill Boulevard to the west and North Sheridan Way to the south. North Sheridan Way faces south onto the QEW, and evidence was given that part of the subject property is visible from the QEW.

[7] Mr. Athey testified that his employer, Morguard, purchased the subject property in 1997, and tried, unsuccessfully, to lease it between 2008 and 2015. Morguard established the so-called *parking lot* on the lands in late December 2015, after receiving a permit for an Erosion and Sediment Control Plan from the City.

[8] Since December 2015, the so-called *parking lot* has been used on a continuous basis to store unlicensed vehicles for Meadowvale Ford, a car dealership located around 11 kilometres away from the subject property. The dealership, which is owned by Morguard's Chief Executive Officer, requires a certain inventory of vehicles for their business, and the so-called *parking lo*t is used for excess inventory. A letter from the dealership [Exhibit 2, Tab 16] estimated that the dealership sold between 140-200 vehicles per month. Mr. Athey noted that "inflow and outflow is not an exact science, but cars stay put for less than 14 days before they are moved to the dealership."

ANALYSIS AND DISPOSITION

Issues

[9] The major issue raised by the City was clear. Though Morguard characterized the use as a *parking lot* in its CoA application and before the Tribunal, the City contended that the true use was *outdoor storage,* a defined term. Furthermore, the City contended that *outdoor storage* is not permitted in the SPCC, while the Appellant's position was that it should be allowed in this instance if the Tribunal finds it be *outdoor storage* rather than a *parking lot*.

[10] The difference in position between the City and the Appellant raises two questions that require findings on the part of the Tribunal:

- Is the use on the subject property a *parking lot* or *outdoor storage*?

- If it is *outdoor storage*, is that a permitted stand-alone use on the subject property?

Parking lot or *outdoor storage?*

[11] It was Mr. Levac's claim that the placement of 206 cars on the subject property did not make it an *outdoor storage* area, as he asserted that cars are parked for less than 14 days on the lands.

[12] Mr. Levac opined that the proposal is a *parking lot*. Flowing from that assertion, the intent and purpose of the Mississauga Official Plan ("OP") was maintained, in his view, because a *parking lot* is not specifically prohibited in the OP, and a small temporary *parking lot* would not offend OP policies. Moreover, in Official Plan

Amendment ("OPA") No. 40, a policy focusing on the Sheridan Park Corporate Centre (but under appeal), there nothing specifically prohibiting *parking lots*.

[13] In addition, Mr. Levac testified, the City's in-force ZBL No. 0225-2007 permits the *parking lot* use in an E2-7 Employment Zone, which is the in-force zoning designation for the subject lands. The subject property had been rezoned to E2-5 under ZBL No. 97-2016, but this is under appeal, so the E2-7 zoning is the applicable designation. Mr. Levac characterized the *parking lot* use as permitted, and posited that there really was no need for Variance 1. In his view, the only valid request was for Variance 2, which sought relief from the asphalt or concrete surfacing requirement. The Tribunal found Mr. Levac's position curious, because it was Mr. Levac who had applied for both variances. If a *parking lot* were permitted, why would he apply for a variance for one, and why would Morguard have received a Notice of Contravention before the CoA application?

[14] In Mr. Levac's opinion, the proposal was minor because there was no demonstrable impact arising from the "parking lot", and a temporary parking lot would not destabilize the long-term planned function of the SPCC. He advised the Tribunal that any potential visual impact viewable from the QEW, Hawden Road, and the abutting property to the north would be screened and beautified with landscaping along the periphery of the subject lands [Exhibit 11]. Some of the screening elements are already in place, Mr. Levac testified: a five-metres high berm currently exists along the frontage facing North Sheridan Way and the QEW.

[15] The City's ZBL defines *parking lot* as:

> …a parking area or parking structure on a lot or portion thereof where motor vehicles less than or equal to 3,000 kg in weight are parked on a temporary basis **for a period of not more than 14 days** and a fee may or may not be charged. [Exhibit 5, Tab 19; emphasis added]

[16] Mr. Spreadbury, the Municipal By-law Enforcement Officer, testified that he visited the subject property three times to observe operations on-site, and to determine whether vehicles were being parked for a period of more than 14 days.

[17] On May 26, 2016, he familiarized himself with the layout of vehicles and drive aisles on the subject property. He noted that vehicles were queued up in the drive aisles, stopping up the on-site circulation, and that the entire lot was fenced like a compound, with a usually- locked gate. He gained access to the property when the gate had been left open.

[18] On June 29,' 2016, Mr. Spreadbury returned to the site through an open gate to continue observing the operations. He placed a nickel on the top of a tire of a random vehicle parked in the lot [Photographs 1 and 2, Exhibit 9], a routine method that inspectors use to determine whether a car has been moved. He noted that vehicles were still queued in the driving aisles. Though he observed some car jockeying within the subject property, there appeared to be no movement of vehicles into or from the property.

[19] On July 14, 2016, Mr. Spreadbury returned to the site to see if the nickel he had placed on the random vehicle's tire top was still there. It was, and the vehicle had not been moved [Photographs 3 and 4, Exhibit 9].

[20] As a result, on July 15, 2016, the City served Morguard with a Notice of Contravention on the basis that the *parking lot* was actually an *outdoor storage* use, which was not permitted. Morguard was made aware that the City did not consider the use to be a *parking lot*, and yet it filed an application for Minor Variance to the CoA for a temporary *parking lot*.

[21] Mr. Spreadbury's evidence demonstrated that vehicles are placed on the subject lands for periods greater than 14 days. In contrast, the Appellant could not establish

with certainty that vehicles are only kept on the subject lands for 14 days or less. Therefore, the Tribunal finds that the use does not meet the ZBL definition of *parking lot*.

[22] There were other evidentiary ‘red flags’ indicating that the operation is not a *parking lot* as defined by the ZBL.

[23] First of all, Mr. Athey confirmed that none of the vehicles on the subject lands were licensed or in use, and that the property was secured and for the exclusive use of Meadowvale Ford. Thus, this was not a place where members of the public placed their in-use cars for periods of time in conjunction with their employment, or to visit businesses or to obtain services.

[24] In addition, the Tribunal made note of a letter from Meadowvale Ford [Exhibit 2, Tab 16] which stated that the dealership sold between 140 - 200 cars a month. To the Tribunal, this revealed a substantial imbalance between the inventory volume on the subject property (206 planned-for vehicles plus all the queued up vehicles lining the driving aisles) and the dealership’s monthly sales volume. Quite simply, the 206-plus vehicles on site were not going to turn over every 14 days given the monthly sales volume cited by the dealership. Many vehicles would have to linger for a longer period of time.

Is outdoor storage permitted?

[25] The Tribunal does find that the use is properly characterized as *outdoor storage*, which the ZBL defines as: “an area not enclosed by roof and walls that is used for the storage of goods, including motor vehicles” [Exhibit 5, Tab 19].

[26] The evidence showed that the subject property is being used for storage of inventory, not unlike a retailer’s back-of-house stock-room or warehouse, and the ZBL

definition specifically includes motor vehicles as a form of goods being stored. The Tribunal finds that the *parking lot* characterization of the use on the subject lands is a stretch and a fiction, and that the applied-for use is actually a proxy for *outdoor storage*.

[27] Under cross-examination, Mr. Levac conceded that *outdoor storage* is only permitted in E3 zones, and that it is prohibited in E2 zones, which includes the subject property. The Tribunal finds accordingly.

The Four Tests

[28] The Tribunal considered the Application for two minor variances pursuant to s. 45(1) of the *Planning Act* ("Act"), which sets out four tests that a minor variance must meet ("four tests"):

- Do the variances maintain the general intent and purpose of the Official Plan ("OP Test")?

- Do the variances maintain the general intent and purpose of the Zoning By-law ("ZBL Test")?

- Are the variances minor?

- Are the variances desirable for the appropriate development of the land? ("Desirability Test").

[29] Based on the Tribunal's finding that applied-for use is actually a proxy for *outdoor storage*, the Tribunal analyzed the two variances in this way:

- To permit a temporary ~~parking lot~~ *outdoor storage* use on the lands ("Variance 1").

- To permit a ~~parking lot~~ *outdoor storage* use having a surface treatment of 15 cm compacted crusher run limestone, whereas the City's ZBL requires a 15 cm stable surface of asphalt, concrete, pervious materials or other hard-surfaced materials ("Variance 2").

OP Test

[30] Under the City's OP, the subject property is deemed to be within the SPCC, a defined term which forms part of the OP's City Structure map, and it is designated as "Business Employment".

[31] 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.
>
> [Exhibit 2, Tab 23; emphasis added]

[32] The use of the word "only" in s. 15.5.2.1 limits the use permissions on Business Employment lands to six categories, none of which is "outdoor storage". The Tribunal finds that it is not necessary for an OP Policy or a ZBL to explicitly describe a use as being prohibited when other exclusionary language is used. The word "only" confers

exclusivity to a use list, and is sufficient to exclude uses not on that list. Thus, the Tribunal finds, outdoor storage is prohibited.

[33] Mr. Davidson testified that the limitations on use were deliberate to ensure that the SPCC remains a prestigious research and development centre. As for whether stand-alone outdoor storage could possibly be considered (as a stretch) as an ancillary or accessory use pursuant to Policy 15.5.2.1.g., the use is not on the list of named permitted accessory uses, nor is it located within a building.

[34] As outdoor storage is not permitted, neither of the two variances would meet the purpose and intent of the OP, which sets out the vision for the SPCC.

[35] In submissions, Counsel for the Appellant argued that because the proposed placement of cars on the subject lands was intended to be temporary, the long-term vision for the SPCC would not be affected, and the long-term employment lands policies would not be offended.

[36] The Tribunal finds otherwise. First, the variance application to the CoA set no time limit for the requested use [Exhibit 2, Tab 14]. Second, under cross-examination, Mr. Athey could not answer the question put to him by Ms. Magi as to whether Morguard would be seeking to extend the use after three years. For the Tribunal, this leaves a cloud of doubt over the temporary nature of the proposal; approving it would be akin to allowing a large foot through a crack in a door. If the use were to drag on, it might well have a destabilizing effect on the SPCC, the vision of which is bolstered by strict land use controls over what is permitted and what is not permitted.

ZBL Test

[37] As Mr. Levac testified, stand-alone *outdoor storage* is not permitted in E2 zones, which includes the subject property. As with the OP, the ZBL did not explicitly describe

the use as being prohibited but it did employ another exclusionary technique, a chart that showed outdoor storage as permitted in E3 zones only, but not in any other Employment zone [Exhibit 2, Tab 12].

[38] This was not an error of omission; it was deliberate, and completely consistent with OP policies on Employment lands and on the SPCC, as Mr. Davidson testified. If a use is considered and excluded from a zone, and the contextual OP policies also specifically exclude that use, it is effectively a prohibition in the Tribunal's view. Thus, the Tribunal finds, *outdoor storage* is prohibited in an E2 zone, and on the subject property. Accordingly, the Tribunal finds that the two variances fail the ZBL test.

[39] However, Mr. Levac's position on *outdoor storage* was that it had been permitted elsewhere in the SPCC and should be permitted on the subject lands. To this, Mr. Davidson provided counter-evidence that although there was a small amount of *outdoor storage* on a couple of properties in the SPCC, it was ancillary to the existing businesses, limited in area, and had been permitted by site-specific by-law many years ago. That is different from stand-alone *outdoor storage* which covers an entire property.

Minor Test

[40] Allowing something which is prohibited and contrary to the planning policy context is not a minor matter, and the Tribunal finds that the proposed variances are not minor for that reason. That being said, the Tribunal also looked at potential impacts in arriving at its finding.

[41] Mr. Levac testified that the placement of 206 cars on the subject lands on a temporary basis had no associated adverse impact, and no destabilizing impact on the long-term planned function of the SPCC based on the temporary nature.

[42] Aside from the matter of visual impact of the cars when viewed from off-site, which the Appellant offered to screen with landscaping, no traditional adverse impacts like traffic, noise or nuisances were identified in evidence by either Mr. Levac or Mr. Davidson.

[43] However, as the Tribunal noted in its disposition on the ZBL test, there is cloud of doubt over the temporary nature of the proposal, and if the use were to drag on, it might well have a destabilizing effect on the SPCC. Accordingly, the Tribunal cannot find that the *outdoor storage* use is minor.

[44] Failure of the Minor Test is applied to both variances, as both relate to *outdoor storage.*

Desirability Test

[45] The SPCC is prestige employment land, one of only four City OP-designated Corporate Centres within Mississauga. In Mr. Davidson's view, the proposed storage of cars on the subject property was not an appropriate, sufficiently intense use of this prestige centre, or of employment lands.

[46] It was Mr. Davidson's planning opinion that the proposal to store cars on the subject lands was contrary not only to the City OP, but to the Provincial Policy Statement, 2014 ("PPS 2014"), Growth Plan for the Greater Golden Horseshoe, 2017 ("GGH"), and Region of Peel OP, which are all aimed at protecting employment lands for employment uses.

[47] The Tribunal accepts Mr. Davidson's opinion that, although the stored cars have some associated employment, it is unlikely that temporary *outdoor storage* offers the employment intensity of the kinds of uses that the SPCC welcomes, like a research

facility, and on that basis, it is not desirable or appropriate for the development of the subject lands, even if temporary.

[48] Failure of the Desirability Test is applied to both variances, as both relate to *outdoor storage.*

Provincial Policy Statement, 2014

[49] The Tribunal notes that there was insufficient evidence to make a finding on whether the proposal is consistent with the PPS.

Doucette v. Waterloo

[50] In submissions, counsel for the Appellant raised the case of *Fred Doucette Holdings Ltd v. Waterloo (City)*, 1997 Carswell Ont 2765 as a rationale for allowing a use that is not permitted, highlighting portions of paragraphs 19 and 20 of that decision as follows:

> 19 … Indeed, one need go no further than the terms of the statute to reach the conclusion that a minor variance may result in altering the permitted use. Section 45 expressly contemplates a “variance from the provisions of the by-law, in respect of the ….use” of the land. Any decision of a committee of adjustment permitting a variation in the use of the land authorizes a use not permitted by the existing by-law. The question, in my view, is not helpfully described as whether a "new use" has been authorized, but rather whether the use permitted by the decision can be described as a "minor variance" in light of the by-law and other factors specified by s. 45.
>
> 20 … [no] precise definition of minor variance is possible. Indeed, in my view, the predominant theme from that emerges is the need to maintain a flexible approach always relating the assessment of the significance of the variance to the surrounding circumstances and to the terms of the existing by-law.

[51] The matter before this Tribunal was for the introduction of an *outdoor storage* use which was not only not permitted by the OP and ZBL, but was counter to the vision of the SPCC, had uncertainty of duration and the potential to destabilize the SPCC over

time. In that context, and on that basis, while hearing the planning merits and thinking flexibly about the proposal, the Tribunal has made its findings.

CONCLUSIONS AND ORDER

[52] 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 Tribunal finds that none of the four tests have been satisfied for either of the variances.

[53] The Tribunal orders that the appeal is dismissed and the variances are not authorized.

"Anne Milchberg"

ANNE MILCHBERG
MEMBER