

DECISION AND ORDER

Decision Issue Date Monday, October 30, 2017

PROCEEDING COMMENCED UNDER subsection 45 (1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): DAWNIK INVESTMENTS INC

Applicant: E.S.T. DESIGN CONSULTANTS INC.

Subject(s): 45(1)

Property Address/Description: 1780 AVENUE RD

Committee of Adjustment Case File Number: 17 140875 NNY 16 MV

TLAB Case File Number: **17 194079 S45 16 TLAB**

Hearing date: Thursday, October 19, 2017

DECISION DELIVERED BY Ian Lord

INTRODUCTION

This is an appeal in respect of 1780 Avenue Road (the 'subject property') in the City of Toronto (City) from a decision of the North York Panel of the City's Committee of Adjustment (the "Committee") refusing two variances to the former North York zoning by-law, By-law 7625.

The variances sought are identified in Attachment 1 hereto and forming part of this decision. They engage relief requested from the parking and loading standards set by By-law 7625.

BACKGROUND

The subject property is located at the southwest corner of Avenue Road and Melrose Avenue, a signalized intersection. The subject property fronts on Avenue Road, a major north/south arterial link in the City's grid network; a driveway for sheltered parking spaces access is from Melrose Avenue, an abutting local street continuing east and west of Avenue Road. The subject property received the benefit of an earlier variance approval at the time for proposed office, retail and restaurant uses, including parking and loading relief.

The building, a former Canada Post facility, has remained vacant for a period and the owner is anxious to bring it into productive use. The owner proposes to use the facility, for a 'day nursery' use a licensed facility authorized to accommodate up to 134 children, from infants to pre-school age. No license or associated conditions of approval, if any, were provided. It is the day nursery use that generates the use request for variances to By-law 7625. No variances of any kind are required for the day nursery use to be accommodated on-site under the new City harmonized zoning, By-law 569-2013. As well, no building additions or enlargements are proposed for the subject property, other than internal renovations to organize the space productively for the proposed day nursery use and associated improvements, namely, to effect the provision of two children's play areas, external to the building on its west and north sides.

The owner proposes to lease the property to a day nursery operator entity. Representatives of both (i.e., owner and nursery operator) were present and gave limited testimony.

MATTERS IN ISSUE

While a number of persons were present, apart from the Applicant/Appellant, no other Party or Participant had elected status nor filed statements in accordance with the Rules of the TLAB. The City did not take a position nor send a representative. Some correspondence from City officials formed part of the evidence as referenced below and as found in the posted filings.

This Member advised that a site inspection had been conducted as well as a familiarization with the posted filings.

The record of documents from the Committee Hearing was posted and available on the TLAB website. They formed part of the pre-filings, as is incumbent on the Committee Secretary in forwarding its appeal file.

The Appellant's planner correctly provided summary advice as to the Committee's deliberations, at which he was present. He recited that the Committee had identified the principle concern to be the potential for traffic disruption and public safety on both Avenue Road and Melrose Avenue, particularly during the morning and afternoon peak traffic periods. From the evidence and the record, this issue showed as the concern of ratepayer submissions and the Committee, although the latter did not articulate its particular reasons for refusal.

No ratepayer representation was present on the appeal, as above recited.

The issue, however, was requested to be and was addressed in some detail involving testimony from the four witnesses who testified on the Applicant/Appellants behalf. Its relevance stems from the reduction in the parking and loading facilities requested. The reduction in parking, if authorized, effectively would reduce the otherwise required capacity under the North York zoning by-law for the subject property to accommodate the parking and movement of vehicles on-site; namely, the dropping off of children and supplies to the day nursery facility.

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan of the Greater Golden Horseshoe for the subject area ('Growth Plan').

Minor Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- are desirable for the appropriate development or use of the land; and
- are minor.

EVIDENCE

In support of the application and the appeal, Ms. Piurko, counsel for the owner called Mr. David Riley who was qualified to give professional land use planning evidence.

Although an additional witness statement and affidavit had been pre-filed by a transportation planning consulting firm on the subject matter of parking and loading and was relied upon by Mr. Riley, the decision was made not to call viva-voce evidence from its author, Mr. Raymond Maitlall.

I allowed Mr. Riley's evidence on the Maitlall Report and use of his witness statement (Ex. 13), not for the proof of their content, but as documents referenced and relied upon by the planner's evidence in applying the applicable tests for a minor variance application. An expert is entitled to rely on evidence reviewed after applying

own judgment to the veracity, scope and relevance of its content. I accepted Mr. Riley's assessment that this had indeed been the process of consideration. In this circumstance, that consideration had been completed and no witness, party or participant had signaled the slightest interest in putting the conclusions of the parking and loading analysis used, or its employment by the planner, in question.

I accepted the Appellant's decision to release Mr. Maitlall (who was not present) and that his material be accepted for its content, as relied upon by the Applicants planner, Mr. Riley.

Mr. Riley provided a Witness Statement, Ex. 1, canvassing the variances, their origin, the policy context, source of the zoning variance considerations and his opinion evidence on the application of the four tests under the Act.

In describing the intentions of the operator, Mr. Riley identified on the site plans, Ex.5 (Appellants Document Book, Tab 4), the distribution of uses interior and attendant the site, including access and egress points related to the intake of day nursery occupants. Seminal to his evidence were several assertions:

- First, in a policy and use permission sense, a day nursery as a type of community facility and, as well, was a specified use that was both encouraged and permitted in the 'Avenues' designation and applicable zone categories of both by-laws
- Second, the two variances required are only from By-law 7625, not the new City zoning By-law, being the more recent expression of Council's intent. By-law 569-2013, with lesser parking and loading standards, was described as being in furtherance of reducing vehicle dependency in favour of alternative modes of transportation: walking; cycling; transit; carpooling, all as evidenced by more generous parking and loading provisions for development; third, no by-law provision required a 'lay-by' or 'drop off' provision for the day nursery permitted use, but, de facto, a lay-by facility of sorts exists on Avenue Road in front of the subject property.

Mr. Riley acknowledged in his evidence that the majority of drop off deliveries of children will occur at the Avenue Road central evidence and that, currently, the existing lay-by is open to any member of the public on a metered 'pay-for-parking' basis.

Regarding the policy documents, the Witness Statement, Ex.1, stands uncontested. With respect to the official Plan, the planner noted the encouragement for the designated 'Avenue' to receive directed growth. He noted the Avenue Study provided no contrary direction and in reviewing the applicable criteria for development in this designated Mixed Use Area, he noted support for the day nursery project in s. 4.5.1 criteria respecting policies 4.5.2.1 f), g), h), i) and j), dealing with such matters as recognizing the day nursery use as a community asset, access to nearby transit (bus stops in close proximity), good site access and an adequate parking supply (nearby lots) and the location of services. He opined that the policies support the use and the use would contribute positively to the application of the criteria and their policy objectives.

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For some of these conclusions, part of the opinion relied upon or emanated from the report and witness statement, Ex.11, of Raymond Maitlall, described above. Those opinions concluded that the provision on site of six parking stalls met the maximum permitted under the City's new by-law. In turn, Council's most recent enactment required no loading space provision. The witness Riley then echoed the conclusion that the requested variances were contemporary and appropriate, noting that day nursery occupants by their age and nature did not necessitate long term parking demands. Mr. Riley described the loading demand to be 'light', to be conducted by the Operator's staff by cars and light vans that 'could be controlled to off peak hours'.

This was later confirmed by the operator, Ms. Kompaniyets.

Mr. Riley referenced correspondence from City Buildings confirming the permitted use recognition. He recited as well that Transportation Services had no objections to the on-site parking reduction proposed from that required in the North York by-law, nor any recommendation for the need to impose payment in lieu of parking. Presumably, this recognized that under the new Toronto by-law, compliance with the maximum required parking was proposed, at six spaces.

Absent from Mr. Riley's evidence and indeed that of the traffic consultant, Mr. Maitlall, was any detailed consideration of the expected majority mode of child care delivery to the site, its receiving functions, the duration of drop off or available controls to preclude disruption of the arterial traffic stream on Avenue Road, on Melrose Avenue or the operation of the signalized intersection, immediately north of the building.

Mr. Riley did address the change variances requested to By-law 7625, the desirability of the project supporting the change and the absence of any identified impact, which he stated to be the thrust of the test as to whether the variances are 'minor'. He was of the clear opinion that in view of the policy and zone provisions addressing support for the use, his own investigations and assessment and his use of the parking and loading study that the proposal was desirable and appropriate, having no adverse impacts on the surroundings. As such, he concluded the variances for six parking spaces and no loading space were desirable, minor, and in keeping with both the policy and regulatory intent and purpose applicable to the subject property, individually and collectively. He recommended the appeal be allowed as good planning, facilitating a community use, in a good location that is transit accessible.

Possibly largely at the panel's request, the Appellant elected to call three more witnesses to describe the intended operation of the day nursery and its vehicular demand management strategy by and for the users of the facility, both on and off the site. None of these witnesses had supplied Witness Statements in accordance with TLAB Rules.

Mr. Nick Stanoulis spoke as a representative of the owner corporation, above noted, to provide certain factual site information. He had observed site characteristics regularly for over a year, since acquisition. He acknowledged, later confirmed by the intended operator, that site drop offs would commence with the site's operating business hours, between 7:30 am and 6 pm, Monday to Friday. He advised that retail and operating businesses reflect no business or activities generally before 10 am.

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Further, that use of the parking controlled lay-bys (there are three on the Avenue Road frontage, between Melrose and St. Germain) was light to non-existent before 10 am. He reiterated that the neighbor to the south has no objections to the variances, confirming the advice from Mr. Riley and the supporting documentation, Ex. 14. While he could not speak to northbound traffic, Mr. Stanoulis noted ongoing discussion with City representatives on the ability to facilitate drop offs from the Melrose Avenue side of the subject property.

This latter aspect was developed by the witnesses Renata Kompaniyets and Mathew Fish, representatives of the intended operator, Alphabet Inc.

Ms. Kompaniyets has experience with operating a licensed 82 child capacity day nursery at 115 Merton Street, off Yonge Street, south of Davisville. She described that the operational activity there was expected to be similar for the subject property: arrivals commencing at 7:30 am, peaking near 8:30 am and reducing in intensity near 9 am; pick-ups are commonly 4:30 pm to 6 pm, closing time. She expected 50% of the users would come by vehicle, the rest by public transit or as pedestrians. She described an area need and waiting list. For the subject site, she anticipated that the delivery of infants would be directed and required to use the parking spaces under the rear of the building and that approximately 20% would enter from that lower entrance driveway. The balance would be picking up and dropping off at the Avenue Road main entrance.

She noted an anticipated delivery and pick up interval where vehicles could be left unattended, for check-in and registration (all pre-booked) for 5 to 7 minutes. She confirmed on-going discussions with City Transportation and working co-operatively to address pick-up and delivery options. She noted that the subject property was a perfect building for the intended use.

Mathew Fish, engaged in the business with Ms. Kompaniyets, was called to describe the status of discussions. Regrettably, he lacked names, titles or accurate employer references but suggested that there exists co-operative liaison through the Ward 16 Councillors' Office. These discussions included the potential for short term parking and lay-by space on Melrose Avenue, west of the subject property, and possible exclusive use permission (on evidenced demand), for some or all of Avenue Road lay-bys, potentially applicable to peak hours of operation. He advised of an application process, a possible cost element and a signage issue currently existing on Melrose – all part of ongoing discussions.

Mr. Gary Langdon, 115 Felbrigg Avenue, was allowed on consent to address the panel on a 'factual issue' related to parking permission on Melrose Avenue and his observation as of a date in April 11, 2016. He noted that parking was not allowed but stopping for 10 minutes was permitted, not for an hour as had been stated earlier in the hearing.

Ms. Piurko offered brief closing remarks to the effect that on the evidence the proposal is appropriate, indeed, without adverse impact, all on the evidence of Mr. Riley. She noted the City had no objections and there was no one appearing in opposition. She reiterated that under the adopted regime of the new Toronto zoning by-

law, no application would have been necessary to the Committee, let alone an appeal to the TLAB. She urged that as the applicable tests were met on the professional planning evidence, and that the request for approval should be (expeditiously) granted.

ANALYSIS, FINDINGS, REASONS

On all the evidence, this panel finds a compelling rationale that supports the use of the subject property for the purpose proposed, a day nursery. Not only did the planning evidence support the recognition of the use but its suitability was extolled by each witness who spoke to that issue. Moreover, it is compelling that the only roadblock to the permission is the potentially temporary existence of By-law 7625, which addresses a performance standard for parking based both on the area of the day nursery use and also the number of infants, toddlers and pre-school children in attendance or permitted under license. Thus the 'bones' of the applicable zoning control requested to be varied goes to the essence of the use and the parking and loading facility required to permit it to function.

The request is to reduce the required spaces from 31, generated by the parking standard formula, to six spaces provided - and to eliminate the need for any loading facility. The existing loading facility in or attendant the existing building would be removed.

It would be a tautology to say that infants, toddlers and pre-school children do not generate a parking demand and that a day nursery, by its nature, does not generate a need for short or long term parking, in the traditional sense of commercial uses. While there are some 20-30 staff on site on the filings and evidence, there is satisfactory evidence that their parking needs, if any, can be controlled off-site – and facilities exist for that purpose.

I therefore agree, for the reasons well enunciated by Mr. Riley, that relief should be considered for this site, perhaps to the degree sought by the application and appeal.

Of significance to this conclusion, however, was the absence of assessment or the calling of operational evidence on the facility. The planner did not address in any detail the issue of access, potential for traffic disruption, the assessment or degree of impact or the scale of short-term parking demand generated by a facility of this nature.

It is plain that the intended use is dealing with a sensitive and vulnerable set of circumstances simultaneously: the delivery of children, largely by private vehicle, to a primary access portal adjacent to a major arterial. Avenue Road serves thousands of travelers and there is the potential for conflict in a manner vectored directly at the am and pm peak hours of traffic movement. The operator was frank in acknowledging that for the 50% of users of the subject property coming by private vehicle, the majority will use the Avenue Road entrance and will require the abandonment of the vehicle, for a period of 5 to 7 minutes while the drop off and registration transfer (or pick up) is perfected. The operator does not come out of the building to receive the child: the transfer takes place inside. In such circumstances, it cannot be allowed that any vehicle

occupies space in the travelled lane of the arterial or serious risk of injury to persons and property can ensue.

Fortunately, the subject property benefits from several positive attributes. On the Avenue Road frontage there are several accessible lay-bys where vehicles can pull out of the traffic stream, if space is available. Currently, these spaces are available to the public at large on a metered time/payment basis. They are not available as-of-right to the operator.

Equally beneficial is the fact that Avenue Road and Melrose Avenue is a signalized, controlled intersection. This affords disciplined movement for vehicular traffic.

The subject property has available on-site five or six available sheltered parking spaces accessed from Melrose Avenue affording short term parking, infant delivery and some on-site turning and movement relief. The operator indicated a traffic management plan had been derived internally, but this was not shared with the panel nor was it described as having any review status with the City Transportation Services personnel, with which discussions are, on the evidence, ongoing.

There were somewhat vague locational references to Melrose Avenue being able to provide a drop off or lay-by facility and the potential for the existing Avenue Road lay-bys to function on an exclusive basis, as demand is demonstrated by need.

In my view, the attributes of the site mitigate in favour of approving the requested variances, but not without a combined effort to ensure minimal compromise to the safety of the community, the users of the facility, safe vehicular movement and no interruption to the traffic flow resource represented by the arterial. I am not satisfied these aspects have been pursued, engaged, advanced or resolved in a satisfactory way. No demand/management plan was disclosed. No witness, consensus or agreement was testified to, disclosed or provided that existed with the road authority. No satisfactory assessment was provided to suggest that measures were agreed and in hand to mitigate the apparent risk of intervention, conflict, injury or disruption to traffic flow.

The day nursery use at this location, on the evidence of Mr. Riley, is appropriate and should be allowed to proceed with the variances in hand. However, a period is needed - with the certainty of the use permission being fully compliant with all applicable regulations - to ensure that appropriate, responsible, timely and purposeful consideration is given as to the operational mechanics of the site. The operator acknowledged that a demand management plan existed and discussions have advanced with City representatives, perhaps on a phased implementation basis. It is surprising that Mr. Riley did not investigate or at least become more knowledgeable on this proposal, given the primacy of the public interest components of public safety and role of Avenue Road, adjacent the site. A reading of the traffic and loading study, Ex. 11, Tab 18, provides no assessment of traffic or intersection impact and no real discussion on remedial measures available or proposed to deal with day nursery deliveries and retrieval of infants, toddlers and preschool aged children. Mr. Riley did advise the panel that he felt the existence of the lay-by and the wide sidewalk on the Avenue Road frontage provided a safe pedestrian environment. And he noted that

there were ongoing discussions with Staff on options to devote reserve times and areas for pick up and drop off, including parking prohibitions. There was, however, no indication he had been involved in such discussions or indeed had made any investigation or intimate familiarity with their content. He did not relay any inquiries he had made and was unable to provide any information, statistical assessment or advice on expected arrivals, their timing, mode or distribution of access/egress, some of which was later made available from the operator.

The reduction in the number of parking and loading space that is sought by the application and appeal would eliminate the need to provide on-site space for the movement of vehicles. The obvious questions follow:

- Will there be adverse impact on the functioning of the street network?
- Are there measures available and in hand to alleviate the possibility of undue adverse impact? Impacts can extend beyond the users of the facility, to neighbouring businesses, intersection operation and to the users of the arterial and local street grid.

In order to avoid crises management on opening and in ongoing operations, I think it incumbent on the Applicant/Appellant to identify a definitive plan to address the interface of child delivery and pick up movements during periods of, at a minimum, the morning and evening peak hours of traffic movement on Avenue Road. Mere discussions, in my view, are inadequate given the larger considerations of potential public safety and traffic congestion at this significant intersection. This issue was said to have been identified early and by the Committee and was an important driver as to its refusal of the variances. It is difficult to accept that the subsequent evidence tendered on this appeal largely sought to ignore a fulsome discussion and plan - to ensure the matter was a controllable issue.

In this circumstance, I find this level of investigation and response to the issue to be vague and inadequate, despite the good faith efforts made by counsel calling three added witnesses to provide an update on related matters.

I am imposing a condition that the operational management issues be addressed, now, to the satisfaction of the owner, the operator and the road authority.

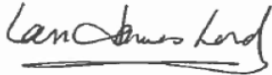
DECISION AND ORDER

The appeal is allowed and the variances requested as detailed in Attachment 1 are approved, subject to the following conditions, namely that:

1. This approval applies to the subject property for so long as it is used as a day nursery; should the use change, the subject property shall be subject to applicable law at the time of the change of use;
2. The owner or its designate shall provide for and to the satisfaction of, prior to occupancy of the subject property as a day nursery, a traffic demand management plan on such terms and conditions as may be agreed for the handling of arrivals and departures by vehicle of children to and from the

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subject property (including the use of available parking on and off-site), the Director of Transportation Planning Services, North York Division, or designate, and sufficient to address the safety of pedestrians and the movement of vehicles with a minimum of disruption to traffic flow on the adjacent road network. In the event of difficulty, the TLAB may be spoken to.



X

Ian Lord

Chair, Toronto Local Appeal Body

Signed by: Ian Lord

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. Section 26(7), By-law No. 7625

The minimum required number of parking spaces is 31.

The existing number of parking spaces is 6.

2. Section 6A(16)(a), By-law No. 7625

The minimum required number of loading spaces is 1.

The proposed number of loading spaces is 0.