

DECISION AND ORDER

Decision Issue Date Monday, November 27, 2017

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

Appellant(s): CHOUDHRY HOLDING INC

Applicant: JONATHAN BENCZKOWSKI

Property Address/Description: 2915 ST CLAIR AVE E

Committee of Adjustment Case File Number: 17 116748 STE 31 MV

TLAB Case File Number: 17 188179 S45 31 TLAB

Hearing date: Thursday, November 23, 2017

DECISION DELIVERED BY: Ian James Lord

INTRODUCTION

The subject matter of this appeal relates to permissions sought for 2915 St. Clair Avenue East (the 'subject property') that were refused by the Toronto and East York Panel of the Committee of Adjustment ('COA') of the City of Toronto ('City') on June 20, 2017.

The subject property is used for a service station/gas bar use, with service bays and ancillary convenience retail.

At the COA, relief was sought to alter the existing lawful non-conforming service station by constructing a canopy above the existing two gas pumps located on the west side of the building and expanding the existing retail store by converting an interior service bay for a take-out eating establishment and retail store.

The application also requested associated parking space relief variances, in number and location, and the permission for a retail store and take-out eating establishment, all related to the new City By-law 569-2013 (under appeal) and the in-force By-law 6752.

The Appellant appealed the applications under section 45(12) of the Planning Act, indicating that the appeal was in respect of those parts or types of the application made under s.45(2)(a)(i) and (ii).

BACKGROUND

The subject property had on three previous occasions been before the COA, twice involving appeals to the Ontario Municipal Board. This is a fourth Committee application, on appeal.

Aspects of the history of these applications and the ensuing administrative litigation are contained in the COA filings on the appeal to the Toronto Local Appeal Body ('TLAB') and, as well, can be found in the filings and Motion materials of the parties.

By Notice of Motion dated October 10, 2017, the City brought a Motion determined returnable on the Notice of Hearing date of November 23, 2017. The Motion was for the purpose of dismissing all or part of the appeal and an order to adjourn the hearing of the appeal.

The Appellant provided cross motion responding materials to which the City, in turn, replied. As it turned out, this material, recorded as posted on the TLAB website did not require access or consideration, at this stage.

Both parties counsel attended on the return of the Motion with a joint request that the Motion, cross Motion and the Hearing be rescheduled.

MATTERS IN ISSUE

Whether the adjournment request, the Motion, the Cross Motion, the Hearing or any of them should be put off in the face of a convened Notice of Hearing date, was the matter at hand.

No notice had been supplied to TLAB on the request despite TLAB Practice Direction 2, 'Default Format of Specific Motion Hearings', which provides, *inter alia*, that adjournment motions by default shall be in writing.

JURISDICTION

Under its Rules, Rule 2, the TLAB has the authority to modify their application in circumstances that warrant relief in the interests of a just, fair and more expeditious determination of the matters under appeal.

The joint request of the parties was heard orally.

EVIDENCE

The Parties made a joint submission. Mr. Bronskill, counsel for the Appellant, described the origin of agreement being the failure of the Appellants agent to fully complete the TLAB Form 1, 'Notice of Appeal' by specifying that the relief under appeal involved both components of the application before the COA arising under sections 45(1) and 45(2) (a) (i) and (ii) of the Planning Act.

The appeal was properly launched under s. 45(12), inclusive of all matters. However, Form 1 directs that the person completing the Form identify the type of appeal, essentially indicating whether it is a variance appeal or involves aspects related to a legal non-conforming use, or both types.

Form 1 does not specify whether this latter information is directory or mandatory.

In any event, the parties are in agreement that the agents' failure to indicate that the appeal involved aspects under s.45(1) of the Act, caused the Notice of Hearing that was subsequently issued by TLAB to reference only matters under s.45(2)(a)(i),(ii).

This issue/question as to the jurisdiction under which the appeal is to be constituted took on relevance as part of the Motion materials. These included the City's identification of no appeal under s.45(1) and the Appellant's response to the City's Motion to Dismiss, related to distinguishing the source of the appeal, under s.45(1) as a grounds to respond to elements of the City Motion.

Both the City and the Appellant identified and agreed that the s.45 (1) jurisdiction had not been specified in the Notice of Hearing and that neither the Motion nor the filings pursuant to the hearing itself had contemplated dealing with the nuances and evidentiary implications of the tests relevant to s. 45 (1).

The parties had agreed that the matter was one that could be corrected by way of a new TLAB Notice, identifying the s. 45(12) appeal to be of a type engaging both the minor variance power (s. 45(1)) and the legal non-conforming use aspects (s.45(2)(a)(i),(ii)). A new Notice would identify that and properly permit both the Motion and the Notice of Hearing to be put on a firmer foundation.

The result was a joint request to:

- a) Adjourn the Motion to a fixed date of a half day appointment; and
- b) Adjourn the Notice of Hearing to a later fixed date, which, if required, would be without prejudice to the City or any participant to file additional materials by a date certain, identified in the revised Notice of Hearing.

In both cases, the Notice would indicate that the type of appeal engaged minor variance and legal non-conforming use aspects.

ANALYSIS, FINDINGS, REASONS

The parties have acted responsibly to ensure both the matters in the Motion and the ultimate Hearing, if required, are properly framed and that no one can be misled by the singular original reference to only the non-conforming use aspects of the appeal.

A purposive reading of Form 1 requires that an appellant indicate, on separate Form 1 filings, as necessary, whether the appeal involves the TLAB jurisdiction under s.45 (12), or under s. 53 of the Act. Within that, it directs the person completing the form applicable to a s.45 (12) appeal, to indicate whether it is a requested variance matter, engages legal non-conforming use aspects, or both.

A similar indication request as to subject types is made available in the Form for appeals under s.53.

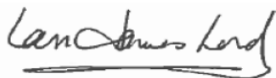
The purpose of this direction appears in the Rules to be twofold: to ensure the Notice of Hearing properly describes the jurisdictional considerations being invoked and, secondly, informs the Hearing Officer, and others, of the differential tests that may be applicable to the relief being sought.

I agree with the submissions of both counsel that the agents' inadvertence in completing Form 1 in this instance was material to a fulsome issuance of an informed Notice of Hearing, but not to effecting the appeal itself. I further agree that the clear path to proper consideration of the matters is to issue a new, corrected Notice of Hearing. A revision to the Notice of Appeal, Form 1 is not required in this instance and resort to Rule 8 for its completion is unnecessary if a corrective Notice of Hearing is issued.

DECISION AND ORDER

The Motion by the City, Cross Motion by the Appellant and the Hearing of the matter, all scheduled for November 23, 2017, are adjourned on the following basis:

1. TLAB Staff will provide three (3) dates in 2018 to counsel for the City of Toronto to settle a half-day Motion Date for the hearing of the Motion and Cross Motion;
2. TLAB will issue a Revised Notice of Hearing identifying that the s.45(12) appeal by the Appellant involves types of appeal under s.45(1) and s. 45(2)(a)(i), (ii) of the Planning Act, and shall specify both the Motion date agreed to by the parties, and a subsequent Hearing Date.
3. The Revised Notice of Hearing specifying the Motion date and the date for the Hearing shall be without prejudice to the City and any Participant filing additional response material on the Motion and the Hearing within 10 days of the date of the Revised Notice of Hearing, but related only to the s.45(1) aspects of the Cross Motion and appeal. In all other respects, the exchanges to date continue and form part of the filings of the appeal.



X

I. Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord