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DECISION AND ORDER

Decision Issue Date Monday, February 12, 2018

PROCEEDING COMMENCED UNDER subsection 45(12), subsection 45(2)(a)(i), subsection (45(2)(a)(ii) of the Planning Act, R.S.O. 1990, c. P.13, as amended

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**

Motion Hearing date: Thursday, February 01, 2018

DECISION DELIVERED BY Ian James Lord

APPEARANCES

Identified below

INTRODUCTION

This matter is a Motion brought by the City of Toronto ('City') to dismiss the appeal of the Applicant/Appellant on the grounds of *res judicata* and related doctrines. The City Motion is brought under the Toronto Local Appeal Body's (the 'TLAB') Rule 17, premised upon the statutory language found in s. 45(17)(a)(ii), namely, that 'the appeal is not made in good faith or is frivolous or vexatious'. The ground is also termed by the City as an 'abuse of process'.

Previously, these parties, on the return of the Motion to dismiss all or a part of the appeal and other relief, had jointly requested an adjournment to permit revised service

of the Motion and, if appropriate, a different and later hearing date, should the matter proceed.

I heard the earlier motion on November 23, 2017 and the decision was issued on November 27, 2017. In that decision it is noted that:

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

At that earlier sitting, a joint request was made and granted that: there be an adjournment for a discrete sitting on the dismissal Motion, a direction for a revised Notice of Hearing 'identifying that the section 45(12) appeal by the Appellant involves appeals under section 45(1), and section 45(2)(a)(i) and (ii) of the *Planning Act*', and additional directions.

Despite the City raising in its Notice of Reply on the original Motion that it had a concern that no appeal had been launched under section 45(1), this ground was not pressed. The validity of an appeal involving section 45(1) was not challenged.

In effect, the parties (and the TLAB on request) then proceeded on the consent basis that the appeal itself was properly constituted under section 45(12), despite no reference to section 45(1) having been made. The principle concern expressed was that a new Notice of the dismissal Motion and the potential Hearing thereafter should proceed on the basis of identifying that, for future sittings, both the minor variance and legal non-conforming use provisions, within section 45, were active, independent evidentiary jurisdictions under consideration.

To begin, it is instructive to detail the specific application made to the Toronto and East York District Panel of the City's Committee of Adjustment (COA) for permissions applicable to 2915 St. Clair Avenue East ('subject property'). By reference to the Notice of Decision mailed June 30, 2017, the COA refused applications for:

1. Permission for the addition of a '**fuel dispenser canopy**' over the two gas pumps on the west side of the subject property (Squires Avenue flankage) – as an alteration and extension to the lawful non-conforming use (service station);
2. Permission for four '**parking spaces**' located in the front yard and one of the parking spaces will abut a street;
3. Permission on a corner lot for one '**parking space**' to be located adjacent to a street;
4. Permission for a '**retail store and take-out restaurant**'.

Items 2, 3 and 4 were identified as minor variance application matters under section 45(1) whereas Item 1 was treated, as a non-conforming use matter, under section 45(2)(a)(i) and (ii). Together these four items constitute the '**Current Application**'.

The Motion proceeded based on the submissions of counsel: Mr. Santaguida for the City, and Mr. Bronskill for the owner/applicant/appellant, Choudhry Holdings Inc.

While extensive Motion exchanges were filed, only the City filed affidavit evidence. That affidavit by Derrick Wong, a Registered Professional Planner, was sworn on October 10, 2017, and was not challenged in any way. I refer to it in some detail later.

BACKGROUND

The City asserts at paragraph 23 of its originating Notice of Motion the following:

> "23. As the issues have been specifically considered and adjudicated by the OMB, their consideration as issues in the Appeal is *res judicata*, frivolous, vexatious and constitutes an abuse of process."

In this regard, I consider that the 'issues' referenced are those matters identified, above, as the Current Application. The question is, therefore, whether the doctrine of *res judicata* and its offshoots apply to those items. It is therefore instructive and necessary to take a purposive review of the earlier decisions and their determinations. This is necessary due to the opinion of Mr. Wong, as expressed in paragraph 22 of his affidavit and urged by City counsel:

> 22. "Upon review of the previous and current applications there appears to be no substantial difference in the proposal or rationale previously canvassed, vetted and determined; and it appears that the best and comprehensive case was advanced at the 2015 OMB Hearing, on exactly the same issues and requests being sought in the current appeal."

I address the *res judicata* doctrine and its development below, in subsequent sections of this decision.

The prior decisions are attached to the Affidavit of Mr. Wong. For simplicity, I list the final determinations on applications by their date and popular name, and reference the principle finding of each related to the Current Application items:

1. OMB 1 (July 29, 2002 - Decision/Order 1055, PL020201) ('**OMB 1**') – B. Aliferis and G. Eliopoulos, Applicants

    a. Full service automotive station is a legal non-conforming use.

b. Conversion of the (then) existing garage "into a '**donut shop with drive through'** facilities", pursuant to section 45(2)(a)(ii): **REFUSED**

2. COA (November 14, 2012) – an application to expand the legal non-conforming status of a gas bar and vehicle repair garage operation was granted; the enlargement was subsequently constructed. I note this for context only.

3. OMB 2 (June 2, 2015 – PL140962) ('**OMB 2**') – Choudhry Holdings Inc., Applicants

   a. **'Fuel dispenser canopy'** on the west side of the existing building pursuant to section 45(2)(a)(i) and (ii): **REFUSED** AS CONDITION 1).

   b. Add two additional fuel dispensers on the west side of the existing building pursuant to section 45(2)(a)(i) and (ii): **APPROVED** AS CONDITION 5).

      Introduce a '**retail store'** within the (then) existing building pursuant to section 45(1) as an **'ancillary use limited to 76 m2'** and not to contain a '**Restaurant**', '**Drive-in Restaurant**', '**Restaurant Take-Out**', '**Eating Establishment**', '**Dine-in Eating Establishment**': **APPROVED** AS CONDITIONS 6) AND 7)**.**

As described further, below, I find from my review as a fact that OMB 2 was a decision on the merits arrived at through a contested hearing based on relevant evidentiary considerations identified by the parties. As attested to by Mr. Wong (Affidavit paragraph 14), no review or appeal was taken from the OMB 2 decision and order.

MATTERS IN ISSUE

The Motion materials raise the following questions for determination:

1. Does the doctrine of *res judicata* (and its associated doctrines) apply to administrative tribunals including the TLAB?

2. Are the items in the Current Applications, or any of them, matters to which the doctrines apply so as to warrant dismissal?

3. Are there exculpating or other considerations in law or public policy applicable?

4. Is the Motion appropriate or should the matters raised be remitted to a Hearing on the merits?

JURISDICTION

The Current Application raises the two somewhat discrete provisions of the *Planning Act* that are identified in the Motion Response to be relevant. They are set out here for reference and not, of course, at this stage as the basis for their application in a Hearing on the merits, should that occur.

> 45. (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.
>
> (2) In addition to its powers under subsection (1), the committee, upon any such application,
>
> (a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,
>
> (i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or
>
> (ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee;…

It is appropriate to make some observation on these provisions as they were ascribed different applications in argument.

Applying the “plain and ordinary meaning” principle of statutory interpretation, these two subsections of section 45 deal with discrete and different circumstances.

Section 45(1) prescribes what are commonly referenced as the ‘four tests’ by which consideration is given to requested revisions to in-force zoning by-laws. Those “tests” are applicable to both the variation of the use and the regulations, or “performance standards”, established in the zoning by-law. The commonly referenced

phraseology is a “minor variance” application to vary provisions under zoning applicable to a site.

Section 45(2) (i) and (ii) addresses the protection given in section 34 (9) of the *Planning Act* and considerations for changes for a use lawfully existing on the date of the passing of a zoning by-law, so long as the use has continued. The subsections present some qualifying language for application where those uses may be sought to be expanded or enlarged or altered. That language is thought to be applicable only to the protected use and not the regulations applicable to the site, established in the zoning by-law. (See: *City of Toronto v. San Joaquin Investments Ltd et. al.* (1978) 18 O.R. (2nd) 730).

In the case of the powers granted by the *Planning Act* subsumed under both subsections 45(1) and (2), the discretionary decision made on applications includes assessment as to whether the relief requested constitutes ‘good planning’ and is in the public interest. While the subsection considerations themselves are not identical and cannot be given the same interpretation (given their differing scope of application and the relevance or otherwise of in-force zoning), the essential disposition must satisfy the decision maker that the principles of good community planning are met. In short, under both subsections, I consider that decision making on applications under both sections involves the ultimate application and adherence to planning principles and the public interest.

Both subsections of the *Planning* Act are subject to the balance of the general provisions in section 45 in the exercise of decision making on applications for relief, including the imposition of “conditions” (section 45(9)), appeal rights and, as per the Motion herein, grounds for dismissal (section 45(17)).

Turning directly to the Motion, as can be credited to senior counsel, there was no disagreement as to the applicable law respecting the doctrine of *res judicata* (and its offshoots), or the defenses to its application.

I extract, below, the relevant considerations urged upon me by both counsel, in furtherance of their respective interests.

By way of overview, the doctrine of *res judicata* is nested in other terminology that both describes similarities and distinctions worthy of consideration in coming to a resolution as to their application. It goes without saying, as urged upon me by Mr. Bronskill, that a Motion to deprive an owner of a right to a hearing on an application can have the most severe implications. As such, it needs to be approached with an abundance of caution, and consistent with principles of fairness and the perspective within which, in this case, the *Planning Act*, operates.

The balancing considerations are, of course, the injury that can occur: in duplicative litigation; to the integrity of the administrative process; to the desirability of finality in decision making on questions of facts and law; and to the importance of precluding of litigation on similar subject matter.

The jurisprudence identifies differing terminology to invoke and address these considerations:

a) *Res judicata*;

b) Issue or 'cause of action' estoppel

c) Abuse of process

For the purposes of my consideration, recognizing there are distinctions between these concepts and their application, in the most part I refer to these, collectively, as the "doctrine".

In argument I was directed to the following references as guidance, without dissent from Mr. Bronskill, (wherein the underlining is my emphasis) as setting out the definitions and relevant considerations to the application of the doctrine:

On the description of the purpose of the doctrine and the methodology of its consideration, Mr. Santaguida directed me to: *Danyluk v. Ainsworth Technologies Inc*. [2001] 2 S.C.R. 460, at paragraph:

> 24. Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.
>
> 25. The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> 33. The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If

successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

As to the application of the doctrine to administrative law, there was no dispute that the TLAB was a tribunal of competent jurisdiction to hear the Motion and decide on the applicability of the doctrine to the issues raised in the Motion. Several examples of the discussion and application of the doctrine in administrative law settings were identified, again without dissent.

In *Lofaro v. Toronto (City) Committee of Adjustment* [2002] O.M.B.D. No. 209, the OMB set out guides to the application of the principle in the context of that administrative tribunal. Within the limited jurisdiction ascribed to it, the TLAB stands in the same shoes as the OMB, although principles of precedent are not applicable or governing between tribunals, as in the case of judicial determinations. Again, underlining emphasis is mine:

"14. The Board has considered the cases filed and discussed by both Counsel at the Motion Hearing. Recitation of each case would (serve) no useful purpose. Rather, the Board, having read the cases, has extracted the relevant principles from the decisions to assist in disposing of this Motion. These principles include:

1) the power under Section 45(17) to dismiss the appeal without holding a hearing is discretionary;

2) it is in the public interest that there be an end to continual litigation in appropriate circumstances - this will avoid multiplicity of proceedings and leads to certainty in the outcome of matters;

3) the City and the abutting residents should not be subjected to proceedings more than once for substantially the same relief, otherwise there can be an abuse of process;

4) the concept of res judicata can apply to planning appeals where there has been no change in the applicable law/planning instruments or where the basic facts remain unchanged from one appeal to the next;

5) the Board must consider whether the current application/appeal is substantially different from a previous application/appeal heard by the Board;

6) has anything changed since the time of the prior hearing by the Board to warrant a new hearing - this could include, without being an exhaustive list, a change in abutting residents and their positions on the application/appeal, a change in the owner of the subject property, a substantial lapse of time between applications, or a change in the planning regime applicable to the property;

7) the concepts of abuse of process and res judicata fall within the general rubric of frivolous or vexatious' under Section 45(17) of the Planning Act.;

8) the Board can presume the best case for relief from the zoning by-law was advanced by the applicant at the previous hearing and should consider whether all or part of the current relief sought could have been granted at the prior appeal."

I accept that these observations set forth criteria for consideration of the Motion, the resolution of which is ultimately a discretionary decision based on the evidence and argument presented.

In this case, a special date was set for that event and by agreement of the parties, the materials in furtherance of it were identified by the Motion specific exchanges. Not forgotten, it continued to be the position of the respondent, that the issues raised in the Motion were better suited for a Hearing and determination on the merits. That argument was raised at the Motion but was included principally as an alternative option and as a component for consideration in the exercise of the TLAB's discretion.

Again, both counsel agreed on the applicable principles of the doctrine, the distribution of onus and the grounds upon which the application of the doctrine can be averted. As such, I accept these principles as an example of the relevant framework from which to assess and judge the Motion and response.

In *Toronto (City) Official Plan Redesignate Land Amendment (Re)* [2005] O.M.B.D. No. 58; 49 O.M.B.R. 375, the following text is instructive (again, emphasis by underlining is mine) at paragraph:

"11. In order to avoid the application of the doctrine of res judicata, and to ensure that there is not a multiplicity of hearings on the same matter, the applicant has the onus to demonstrate one or all of the following:

* The relief being requested is different from that requested in a previous hearing.

* There have been changes in the planning regime and/or in the planning policies applicable to the site and relevant to the Board's consideration, since the previous hearing and decision.

* There has been a significant change in the physical context of the lands which is relevant and which was not contemplated by the Board in the previous hearing and decision.

* There has been a significant change in circumstances relevant to the land use planning principles considered and applied by the Board in the previous hearing and decision.

* The issues to be adjudicated are significantly different than those considered by the Board in the previous hearing and decision…

16. The Board also finds that the fact that five years have now elapsed since the 2000 decision is not relevant. The Board notes that the current applications were made just two years after the Board decision. In any event, Board decisions do not inherently become stale-dated. Board decisions may become inapplicable or deserving of reconsideration should the types of changes itemized by this Board be shown to have occurred. Such changes will alter the nature and character of the debate before the Board, and therefore do not constitute a re-litigation of the same issues."

And while I have grouped the doctrine terminology under which the relief of section 45 (17) (1)(c) of the *Planning Act* is sought by the City, I note that a more lenient approach exists over an adherence to a strict burden of proof placed on each component, has been acknowledged by the courts, below, in discussing the doctrine's parameters (emphasis underlined is mine).

In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79* [2003] 3 S.C.R. 77, it is stated at paragraph:

42. The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also Demeter (H.C.), supra, at p. 264, and Hunter, supra, at p. 536.)

43. Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see Blencoe, supra), or whether it prevents a civil party from using the courts for an improper purpose (see Hunter, supra, and Demeter, supra), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44. The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

'The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.'

51. Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52. In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and unless should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in Danyluk, supra, at para. 80.

53. The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (Danyluk, supra, at para. 51; Franco, supra, at para. 55)."

It is on the basis of these considerations that I examine the submissions of the Parties on each of the items in the Current Application.

EVIDENCE

On behalf of the City in support of the request for dismissal of the appeal, Mr. Santaguida made several points identifying the qualifying similarity between the 2015 OMB ('OMB 2', above) decision and the Current Application:

a) the Appellant Applicant land owner is the same;

b) the planning support witness is the same;

c) the counsel is the same;

d) the parties are the same;

e) the Official Plan and zoning instruments applicable are the same;

f) the relief requested by the Applicant Appellant is the same insofar as it addresses the following uses:

    i. fuel dispenser canopy

    ii. retail store and take-out restaurant; and

g) the absence of change in site conditions, planning principles or area character.

In providing and referencing many of the extracts quoted above from his Book of Authorities, Mr. Santaguida argued the criteria for cause of action estoppel and issue estoppel were met, specifically in relation to the uses of "fuel dispenser canopy" for the Squires Avenue frontage proposed, "retail store" and, more particularly, "take-out restaurant", proposed in the Current Application.

He urged the relatively recent disposition in OMB 2, some 2 -3 years ago, that was not sought to be reviewed or appealed, warranted confirmation by dismissal of the Current Applications in the interests of supporting finality, the maintenance of confidence in and the integrity of the administrative law system, and the avoidance of duplicative, repetitive and costly proceedings. He pointedly took issue with the Applicant/Appellant on the nature of the OMB 2 decision, stating it was derived from a resolution of opposing interests, contrary professional evidence, and full administrative litigation. He argued that OMB 2 was neither a settlement nor consent disposition but rather was a determination by the panel in the normal course of administrative law litigation.

He submitted that the relief that the City requests flows from the application of the doctrine cited, applicable to the Motion under section 45(17)(c). He urged that the application of the doctrine would be proper and a bar to the Current Applications.

He acknowledged that ancillary retail was permitted on the site but made no representations as to how its constituent uses might evolve, except for the prohibition on a “take-out restaurant”.

He addressed, as well, how he thought the doctrine applied to the allowed ancillary retail store use and the limitation on its size. He characterized that as an element of the decision, whether arising from the minor variance request to permit the use or as an element of the extension of enlargement of a historical permitted legal non-conforming service station use. He characterized that foundation as being a “distinction without a difference” as the OMB 2 adjudication considered both and it made its decision on the merits. He noted that the equivalent to a “take-out restaurant” was refused in OMB 1 under section 45 (2) and that refusal was repeated again in OMB 2, arguably under both subsections, including section 45 (1).

He made no distinction between the “use” and “regulatory” aspects of OMB 2 related to the retail use.

Mr. Santaguida said there were no extenuating circumstances warranting exception to the application of the doctrine, there being no evidence of fraud, dishonesty, new evidence or unfairness. He warned that the TLAB should resist being placed in the role of an appellate body to decisions of the OMB and that re-litigation was not warranted.

He made no clear representations respecting the “parking” aspects of the Current Applications other than by way of rejoinder to suggest that that relief was or must have been tied to the anticipated uses and improvements proposed.

He acknowledged that the Motion raised the application of the doctrine as an abuse of process challenging the statutory right to apply for relief but noted the purpose of the *res judicata* and related expressions is to introduce the importance of finality and respect and to maintain credibility and legitimacy in decisions.

Mr. Bronskill, provided welcomed assistance to the deliberations on the motion in that and took no issue with the statement of the case law related to the doctrine. His focus employed the jurisprudence cited on the grounds upon which the application of the doctrine is avoided, suggesting he needed to demonstrate the applicability of but one.

He acknowledged having no jurisprudence of his own and no evidence by way of affidavit or cross-examination to challenge Mr. Wong.

Mr. Bronskill’s submissions were fourfold, relying on the *Re Redesignate Land Amendment,* above, statement of how the application of the doctrine can be avoided:

1. The relief sought in the Current Applications is different than that previously requested.

In this regard, he observed that OMB 1 was premised on relief sought under section 45(2) of the *Planning Act*; that the relief there, requesting a "donut shop", differed by way of applicable tests under the legal non-conforming use powers, to the relief sought in the Current Applications under section 45 (1), the minor variance power.

His argument was that the determination in OMB 1, on different tests, could not be employed to bar relief in the Current Application for a "retail store and take-out restaurant" under section 45 (1), as the statutory considerations are different and they were not considered.

With respect to OMB 2, he asserted that for both the "fuel dispenser canopy" and the "retail store and take-out restaurant" uses applied for in the Current Application, that their prohibition by way of the approval of a condition is not the same as the refusal of an application.

He suggested strongly that OMB 2, although it did say 'no' to the "fuel dispenser canopy", it did not do so on a finding that such would be an inappropriate alteration or extension of a legal non-conforming use or that it could not meet the test of section 45(2) of the *Planning Act.*

2. Where there have been changes to the planning regime or applicable policies.

On this exculpatory ground, Mr. Bronskill raised two elements. He stated the 2002 decision, OMB 1, was made under the old Official Plan of the former area municipality. Second, that the OMB, Mr. Boxma, had indicated, at paragraph 8 of OMB 1, that there was a need for updating zoning. In particular, Mr. Bronskill argued that the current designation is Mixed Use and for over 16 years the direction by the OMB suggesting the need for updated zoning had still not been acted upon. He reiterated Mr. Boxma's finding in 2002 that the only option open to a landowner was to proceed *ad hoc* on a site specific basis, where 'as-of-right' permission did not exist.

3. There are physical changes to the subject site or the physical context within which it finds itself.

Mr. Bronskill urged that there has been change. He cites changes to the *Planning Act* and to the passage of time. He notes that (more than) two years have elapsed since the site specific variances were established - time enough, he submitted, to permit an assessment as to whether the conditions remain warranted, necessary and reasonable. Each property has the statutory right to make applications; he argued that the right to a hearing on the merits should not be curtailed where a sufficient time interval has passed to warrant review. He equated the "condition" placed in OMB 2 to be part of the zoning regime and that there was no statutory restriction applicable to prevent requesting that such conditions be changed. After two years had passed, he suggested that previous conditions cannot be binding forever, such as to preclude a right of reconsideration.

4. Whether the issues to be adjudicated are significantly different.

On this exemption ground, Mr. Bronskill returned to 2002, referencing the donut shop finding and the fact that the now Mixed Use designation in the Official Plan, being different, generated different issues for a hearing.

In 2014, he added that the issues were different; again premised on the argument above, that a finding implemented by a condition differs. He suggested that the conditions imposed in OMB 2 were not the result of evidence upon which relevant criteria for evaluation were engaged, but because those conditions were agreed to on request. He suggested that the only evidence the Board had was a recommendation to approve the conditions, not to settle them based upon evidence as to their merits.

Moreover, he argued that the issues on the appeal will be the merits of the uses as a primary, not ancillary use – a matter not canvassed under section 45(1) and its tests, in 2014-15.

In summary, Mr. Bronskill quite properly pointed out that the City's Motion was drastic: foreclosing a statutory right to apply and have a hearing on the merits in the circumstance of applications that differed, he said, by statutory regime, substance, issues, and applicable tests.

He noted that the Current Application and appeal on parking relief could not be addressed under the doctrine as those variances had never been raised before and no prior decision exists in relation to them.

He suggested a hearing on the merits was the best place to put to rest the merits of the uses without putting at risk the litigation convention that the acceptance of conditions, or settlement provisions could remove future statutory rights of reconsideration. In his view, the City had failed to establish four of the criteria for exemption from application of the doctrine and the Motion should fail.

In his reply, Mr. Santaguida reasserted his submissions that the merits of the appropriateness of the disputed uses were addressed in OMB 2 at paragraphs 16 and 25, that OMB 2 was not a settlement and at best the parties "scoped" some issues; and finally, that the parking variances were ancillary to the requested uses, a mere adjunct and that the appeal brings back the same issues under the same jurisdiction.

ANALYSIS, FINDINGS, REASONS

It is perhaps instructive to make a number of factual findings.

There can be no argument that a retail store on the subject site is a permitted use. That permission was determined and granted in OMB 2, provided the use is ancillary and limited to 76 m2 in area.

I find on the evidence as well, that the use of a "take-out restaurant", as requested before the COA in the Current Application, is subsumed within the definitions employed in OMB 2 of: "drive-in restaurant; restaurant take-out; eating establishment;

dine-in eating establishment". These were addressed as being excluded from the retail store permission, in OMB 2.

Parenthetically, I note, as well, the unchallenged opinion of Mr. Wong, at paragraph 8 of his affidavit, that a "donut shop", refused in the OMB 1 decision, is the equivalent of a "take-out restaurant" in the Current Application. I recite this simply for the background that the site has historically sought and been refused the use permission of a "take-out restaurant" over a protracted period.

The identification of "Issues", above, provides a framework to approach the submissions of opposing counsel:

1. **Does the doctrine of *res judicata* (and its associated doctrines) apply to administrative tribunals including the TLAB?**

There was no dispute, as indicated earlier, that the doctrine can be applicable to the subject matter before a quasi-judicial administrative tribunal, such as the TLAB. The jurisprudence referenced above is testament to both the fact of the application and use of the doctrine, in the case of the Ontario Municipal Board.

There is also no disagreement that the criteria required to establish the application of the doctrine, as well as the reasons for its inapplicability, remain unaltered, for administrative tribunals.

By virtue of the *City of Toronto Act* the TLAB replaced, the Ontario Municipal Board in respect of the powers vested under section 45 of the *Planning Act.*

The doctrine is available to be pursued as applicable to a matter before the TLAB.

2. **Are the items in the Current Applications, or any of them, matters to which the doctrines apply so as to warrant dismissal?**

The Current Application, detailed in the Introduction, identifies the four variances sought in the appeal under section 45(12).

Of these, two can be dealt with expeditiously. In the Notice of the Decision from the COA, variance requests 2 and 3 relate to "parking space" regulation. These were refused by the COA.

There is nothing in the record filed or in the affidavit of Mr. Wong, let alone in any decision, that raises the suggestion that the issue of "parking space" was ever previously addressed. Mr. Santaguida suggests I draw the assumption that the current request for parking space relief is the derivative of one, or both, of the other use variance permissions sought, "fuel dispenser canopy" or "retail store and take-out restaurant".

Mr. Wong does not address that connection. There may well be a rationale stemming from current operations that motivates the applicants' request for "parking space" relief. In my view, rather than speculate, that matter can only be properly dealt

with through a hearing on the merits, if the parties so require. I am not prepared to attempt to extend the application of the doctrine of *res judicata* to a subject matter never before raised on the speculation it may be related to uses that have a previous history of being addressed.

The Variance 1 request, the permission for a "fuel dispenser canopy" as a use of land to be located over the Squires Avenue flankage fuel pumps, and Variance 4, the recognition and permission for of a free-standing "retail store and take-out restaurant", without size limitation, can, in my view, be considered together.

A *prima facia* case for the application of the doctrine has been made by the City.

Both uses were the subject matter of OMB 2. Their permission were distinctly put in issue and directly determined in OMB 2. The same question as to their permission as to a use of land on the subject property raised in the Current Applications was asked and answered. OMB 2 was final and the parties then are the same parties now, in the same person and their privies, as then.

In my view, the onus of the first threshold step of establishing the pre-conditions to the operation of the doctrine of *res judicata,* issue estoppel, has been met by the City (See: *Danyluk,* above).

The second step, whether as a matter of discretion, fairness and the public interest issue estoppel should be applied to these uses, in part or whole, has some nuances. They require a detailed review of the grounds asserted above by Mr. Bronskill, having been passed the onus, to demonstrate avoidance of the application of the doctrine.

3. Are there exculpating or other considerations in law or public policy applicable?

The submissions on the application of exculpation factors are reviewed above under the Evidence.

On Mr. Bronskill's first point, that the relief requested in the Current Applications is different, some observations are warranted.

First, I am reluctant to place strong reliance on the application of the doctrine of *res judicata* by reference to OMB 1. While I agree with Mr. Wong that a "donut shop" is a "retail store and take-out restaurant" in current terms, that decision is dated, involved different owners, counsel and witnesses and was arguably premised exclusively on relief sought in relation to the legal non-conforming use status of the gas bar/service station.

Mr. Bronskill suggested the City reference to OMB 1 justified the fact of different relief now being sought. I disagree; OMB 1 is not the prior decision in issue.

The use and jurisdictional distinctions are not present, as between OMB 2 and the Current Applications where, in both instances, elements of both aspects of section 45 jurisdiction are under consideration.

There are, as well, two distinct branches to Mr. Bronskill's submission: different statutory tests under section 45(1) and (2); and, that the imposition of "conditions" is not the same as a finding on an application.

With respect to the first, while I agree that the statute directs and allows for specific considerations as between applications arising under those separate powers, ultimately the tests applicable are directory towards an ultimate decision that is discretionary and is assuaged and premised upon applicable principles of good community planning and an assessment of the public interest. I canvassed this above, under Jurisdiction. Indeed, their ultimate similarity in terms of adjudication is augmented, in more recent times in that the legislature has grafted on to the wording of these two subsections a series of additional considerations, also common to both: regard to the decision of first instance; consistency with the Provincial Policy Statements and conformity to the Growth Plan, to cite the common considerations.

These are considerations common to both OMB 2 and the Current Applications.

As such, on this ground, I find that the relief requested is not materially different even if I were able to accept as I did, above, that the application jurisdictions themselves under consideration in OMB 2 and the Current Applications could be considered different. The uses are the same: "fuel dispenser canopy" and "retail store and take-out restaurant" and the planning considerations that would be brought to bear, while perhaps different *en route*, are ultimately similar in concluding on the issue of appropriateness. In OMB 2, the Board made a final determination on these uses.

I see no reason to employ the additional latitude afforded by the doctrine of abuse of process, above described, arising from the encumbrances of the *res judicata* doctrine, but if need be, I would have employed it (see: *C.U.P.E., Local 79*, above cited).

These two uses were determined on planning grounds to be inappropriate on the subject property and that decision, in the absence of other considerations, should be respected. The relief requested is not significantly different by virtue of the originating jurisdictions. Indeed, they appear on the evidence to be the same.

With respect to the second branch, the role of "conditions", while I agree with Mr. Bronskill that the approval of a condition is not the same thing as the refusal of an application, the result can be the same. In OMB 2, the panel refused, by way of condition, uses identified as a "fuel dispenser canopy" and, within the retail store, a "restaurant" in its various descriptions, as permission on the subject property. Even if those uses had not been applied for (as a prelude to OMB 2), the fact that there was contentious litigation and that the conditions of prohibition were consented to, precludes any weight to be given to the distinction. Indeed, the words of OMB 2 state that the owner's planner supported the imposition of these prohibitions as "appropriate and acceptable".

I do not believe a hearing is warranted to explain why the same advisor now supports a change of position; certainly nothing was supplied by the responding party or

referenced in support of the Motion Reply that would assist with that consideration or warrant a different conclusion.

Again, I have read OMB 2 closely to determine whether it could be characterized as a mediated or consent disposition and settlement, or the resolution by the OMB of opposing parties and their respective cases. I agree with the submission of Mr. Santaguida that OMB 2 was an independent decision of that tribunal that resolved opposing cases by parties adverse in interest. This was the case even though elements of the evidence before that tribunal were supported in whole or part, or in the alternative, by the opposing witnesses. A purposive reading of OMB 2 demonstrates the adversarial nature of the proceeding throughout. From that, I find that nothing turns on the form of the decision or the use of "conditions" under section 45 (9) of the *Planning Act* as the manner in which the Board's determination is expressed. In other words, to the extent that OMB 2 varied applicable zoning, it did so by use of the legitimate, effective tools available to it, including conditions - with the resultant Order, in its various components, having the same force of law, undifferentiated in their effectiveness and enforceability.

For the reasons above expressed, I find that the prohibition expressed by way of condition in OMB 2 on the uses of a "fuel dispenser canopy" and a "retail store and take-out restaurant" effectively meet the criteria of the same issues being requested to be re-litigated.

In my view, the responding party has not met the onus on this exemption ground of demonstrating that the relief being requested is different from that requested in the previous hearing.

There were three other suggested avoidance criteria that were argued to have been met.

With respect to Mr. Bronskill's second submission respecting changed circumstances, I respectfully disagree. The findings, decision and order respecting a "fuel dispenser canopy" on the west side and the exclusion of "take-out restaurant" occurred in OMB 2. Then, in 2014-15, as now, the designation remains Mixed Use and the zone permissions remain unchanged, at Residential uses only. There was no evidence that updates to the Provincial Policy Statements or the Growth Plan for the Greater Golden Horseshoe played any role in changed circumstances. While the zoning by-law update is clearly overdue, the matter before the TLAB is not a rezoning application but the consideration the section 45 (12) appeal that the parties agreed was properly instituted. The site conditions and personages are the same.

I find no changed circumstances as relevant to events between OMB 2 and the current appeal.

I find that there are no changes to the planning regime in respect of these two uses that warrants invoking an exemption from the doctrine.

The third exemption ground argued was whether there has been significant change in the physical context of the lands. None were demonstrated.

I agree with Mr. Bronskill's submission that intervening in a property owner's right to exercise the statutory right to make an application for planning approval should not lightly be interfered with. In this case, interference is supported by a strong set of relatively recent facts that in respect of these two uses, their re-litigation would be inappropriate. I asked Mr. Santaguida whether his position would have been different, had the application on appeal been for a rezoning, respecting uses or regulations, under s. 34 of the *Planning Act* and not s. 45(12). His answer was, at best, ambivalent, suggesting that in the world of land use planning approvals, there may be different routes for consideration and that the result may not be the same, iron clad and indivisible. I asked Mr. Bronskill whether he had authority for the proposition that the planning process was a living entity not capable of being fixed to past decisions, contrary to the argument advanced by the City, in this circumstance. He said he had no authorities and produced none. In any event, there is no need to address that question of the rezoning route, as it is not before me.

I note that in the *Re Official Plan Redesignate Land Amendment* decision, above referenced and at paragraph 16, the Ontario Municipal Board found that as a ground for exemption to the doctrine, the fact that five years had elapsed since the earlier decision, was not relevant. This is, of course, not binding on the TLAB. However, it is instructive that nothing was asserted to have occurred in the two plus year hiatus in this case, that might justify that overriding weight be given simply to the statutory right to make an application – in this case for the same uses.

Contrary to the submission made by Mr. Bronskill on his fourth suggested ground, different issues for adjudication, OMB 2 is very clear that the issue of a retail store applied for under section 45 was very much an issue decided. The Board allowed a retail store as an ancillary use, limited in size and restricted by eliminating a number of specific uses, restaurants, described as similar in kind but under different zoning use definitions.

As OMB 2 is reviewed above, I find that that decision found, on the merits, that a "fuel dispenser canopy" over the Squires Avenue fuel pumps, on the evidence, should not be allowed. This determination was openly arrived at under the jurisdiction which section 45 (2) provided on the appeal. Whether there were elevation plans before the Board in 2015, as there were in 2002, is not determinative; there was lay evidence on impact as well as profession land use planning opinion evidence from two or more planners supporting and recommending the prohibition conclusion that the Board reached.

I make the same finding for that aspect of a retail store use that the Board addressed in OMB 2, by prohibition condition: "take-out restaurant".

There was nothing raised in the evidence or submissions that would suggest that the issues to be adjudicated are significantly different than those considered by the Board in the previous hearing and decision, OMB 2.

In this ground for exculpation I do draw a distinction between the principle elements of the zoning by-law: the uses, as opposed to the regulations, which can govern the placement and character of permitted uses on the subject property.

In OMB 2, in allowing a "retail store" use, the Board did two additional things: it curtailed the scope of the retail store use, to exclude a "take-out restaurant" in all its known definitions. It also dealt with the regulation: the amount of space that the retail store use could occupy in the existing building. In finding that a "retail store" is a common component of a service station use, OMB 2 allowed the use arguably both as an extension or similar use to the legal non-conforming protected use of a service station/gas bar, and as a minor variance permission for a new use, with circumscription.

There is nothing to indicate in OMB 2, that the limitation on size received "full and robust" consideration. Indeed, the enlarged premises, permitted in 2012 were, at best, only recently constructed. Perhaps the stakes were too minor to dispute a retail size limitation in the circumstance. In any event, I am uncomfortable with the unfairness that may be occasioned by removing the right, on appeal, to consider the permitted size dimension of the permitted retail use, for purposes other than a "take-out restaurant".

As noted earlier, legal non-conforming use protection extends to the use, which OMB 2 determined to extend to a limited "retail store", However, the establishment of a size stipulation can be seen as a regulation arguably not part of the legal non-conforming use ambit, but more properly anchored as a minor variance condition.

OMB 2, as stated, contains precious little advice on the rationale for the regulatory condition of 76 m2 of retail store space.

While I am satisfied for the above reasons that the use issue was properly and fully addressed in OMB 2 ("fuel dispenser canopy: PROHIBITED; take-out food store: PROHIBITED; 'retail store': PERMITTED") and should not be relitigated, I am satisfied that the regulation limiting the size of the retail store is a condition that may have seen changed circumstances or constitute a different issue for adjudication, in the intervening years.

I see no harm to the integrity of the adjudicative function in permitting that aspect to be considered on its merits, if the parties so wish.

In my appreciation of the representations by counsel, the real interest of the parties related to the use aspects, and not the regulatory regime. I do not see that element, the size of the retail store space and permitting its examination, as a matter going to the dimension of potentially undermining the integrity of the judicial system.

4. Is the Motion appropriate or should the matters raised be remitted to a Hearing on the merits?

The Motion was argued on consent following a joint petition by the parties for a separate sitting. In his submissions, Mr. Bronskill argued, as a component of the

disposition that he requested, that the matters raised in the Motion for dismissal be remitted to the hearing on the merits for fuller and more complete evidentiary exposure.

However, the issues were joined for separate consideration and fully argued.

I have concluded that the City's Motion was appropriate leading to a canvass of considerations to which the doctrine of *res judicata,* (issue estoppel and abuse of process) are applicable and should be sustained. That said, there are elements of the Motion that I have found untenable and for which a fair and impartial hearing is an appropriate entitlement.

As a caveat, even if I am wrong on the application of authorities and the related doctrines as they should apply to distinctions between section 45 (1) and (2), I find that the acknowledged institution of a valid appeal under s. 45(12) is sufficient to permit the consideration and dispositions made herein (of the s. 45(17)(a)(ii) ground for dismissal), based on a comparative analysis of the real concerns for duplication between OMB 2 and the Current Applications.

DECISION AND ORDER

The City Motion is allowed in part; the requested uses of a "fuel dispenser canopy" on the Squires Avenue frontage and a "retail store and take-out restaurant" at 2915 St. Clair Avenue East are dismissed from the appeal.

The balance of the appeal relief sought, inclusive of parking space relief and the retail store size limit are remitted to a hearing at the election of the Applicant/Appellant.

The hearing appointment scheduled for February 28, 2018 is cancelled and attendance is not required.

A new Notice of Hearing with the specification of any refined relief sought will be issued by the TLAB following consultation with counsel on three alternative dates.

Should the matter not proceed further, the TLAB is to be notified forthwith.

If difficulties arise in the application of this decision, the TLAB may be addressed on request with notice to the parties and participants.

I am not seized.

X

Ian Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord