

DECISION AND ORDER

Decision Issue Date Tuesday, July 03, 2018

PROCEEDING COMMENCED UNDER Section 45(12), subsection 45(1) 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**

Motion Hearing date: Monday, June 25, 2018

DECISION DELIVERED BY T. Yao

APPEARANCES

Name	Role	Representatives
Choudhry Holding Inc	Owner/Appellant	Joe Hoffman
Jonathan Benczkowski	Expert Witness	
City of Toronto		Francesco Santaguida

(Note: A participant, Lori Boudreau-Evans, was notified of the settlement and indicated that she approved of the settlement and accordingly would not be appearing at the TLAB hearing)

INTRODUCTION

Choudhry Holding Inc., the owner of an Esso gas bar in the St Clair/Victoria Park neighbourhood, seeks minor variance permission for an in-store Tim Horton's coffee bar. On June 14, 2017, the Committee of Adjustment refused to give it the necessary variances and Choudhry appealed. After the appeal came to the TLAB, the City

obtained an order from TLAB Chair Ian Lord declaring that Choudhry had already been refused permission for two of the variances. His reason was based on the legal doctrine that those matters had already been decided (*res judicata*). Only three variances were caught under the Lord decision. This settlement before me deals with the two remaining variances:

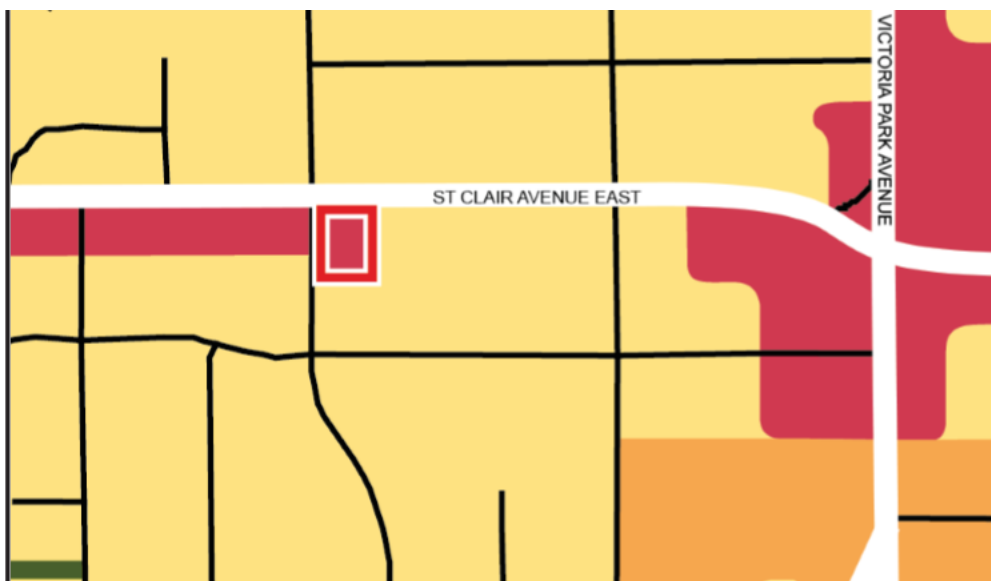
16 parking spaces, including four parking spaces in the front yard; and
expansion of the retail store from 74 to 124 m².

Because these have been vetted by the City staff, are minor and represent good planning, the City supports them, and so this case comes as a settlement. There is no dispute as to the applicable tests, the rationale or result. Despite this, I have an independent obligation to determine whether the statutory tests under the Planning Act are demonstrated, which I do find. In this assessment I qualified Mr. Jonathan Benczkowski as entitled to give opinion evidence in land use planning and who provided the sole evidence in support of the settlement.

BACKGROUND

Because this is a settlement, the following narrative does not purport to constitute a binding determination of any collateral factual or legal issue, should this matter be the subject of further litigation.

Diagram 1. OP map



The site's geographical context

Diagram 1¹ shows the site as a white outline on an extract of the Official Plan map. The property is on the south side of St Clair Avenue East, at the corner of Squires Avenue (not marked) and St Clair East. To the east is a two storey mixed-use building with parking in the front, an appliance repair service on the first floor and residential space above. Continuing east is a solid line of detached residential homes. On the other side of Squires are mixed use buildings. North and south of St Clair are stable residential areas.

No. 2915 St Clair Avenue East is designated "Mixed Use" in the Official; Plan. Under the former East York Zoning By-law 6752, it was zoned Residential R1B, and RD under current Zoning By-law 569-2013. I find there is a divergence between Official Plan and zoning intent; the Mixed Use designation contemplates a commercial use whereas residential zoning permits only detached residential buildings.

There is a further and very important caveat associated with 2915 St Clair Avenue East — it has a non-conforming use. It has been a gas station – gas bar in zoning language – since the forties and continues to be so. In Mr. Benczkowski's words: "This has always been "a gas bar and it is here to stay, given the owner's large capital investment in this use".

Committee of Adjustment (COA) decisions related to the gas bar

In 2002, Demos Aliferis requested permission "to make interior alterations for a donut shop" and "maintain the existing gas bar on the property. This was refused at both tribunals (COA1 and OMB1). According to Mr. Benczkowski, this caused Mr. Aliferis to close down the business for a number of years. In about 2012, the present owner, Choudhry, one of the largest cab owners in the City, purchased the property. The service station was in a dilapidated condition. Since taxis are on the road 24 hours a day, Choudhry's intention was to use the service bays at the rear for repair of cabs and sell gas from the front building. However, the taxi business has been in decline with the advent of Uber and Lyft and Choudhry subsequently left the business.

The building has always been composed of two parts with a party wall:

- A St Clair facing portion (top of "L"), about one and a half storeys high. It consists of two rooms, one open to the public and one used for storage.

¹ All diagrams and plans form part of this decision.

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- A rear building facing Squires Avenue, with two garage doors leading to hoists.

At the time of purchase, there were only two gas pumps. In November 2012 Choudhry successfully obtained Committee of Adjustment approval of the existing

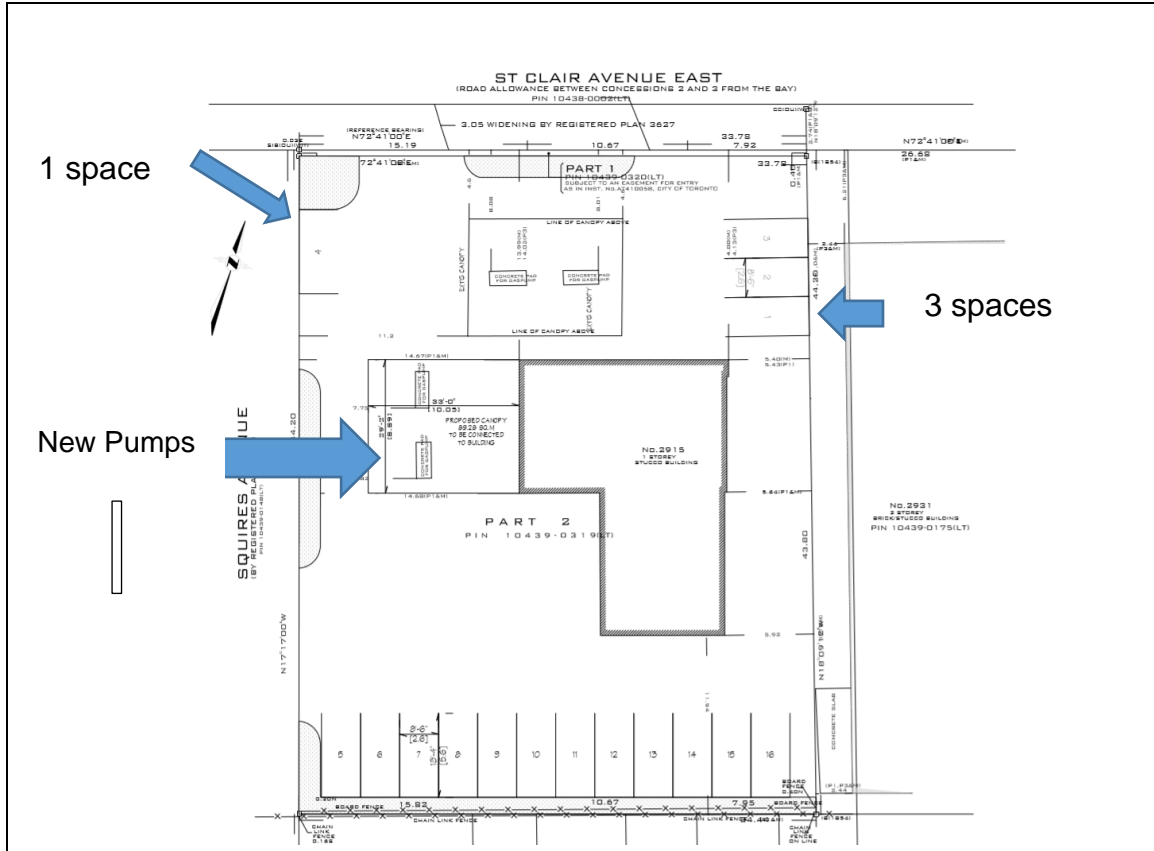


Diagram 2. Site plan submitted with application. I have inserted arrows showing “new” parking spaces and the two Squires pumps.

buildings and pumps (COA2). I assume a building permit was required to make alterations to repair its dilapidated state. The COA2 decision characterized its approval as an “extension” of a nonconforming use as a gas bar.

The next step was to replace the canopy and pumps with new ones bearing the Esso brand as well as make interior changes in the front building to create an internal Tim Horton’s coffee bar. As I understand it, Choudhry was making a complete overhaul and the contractor, not realizing the site was zoned residential, suggested, “As long as you’re going to do this much work, why don’t we install two new pumps?” The Buildings Department was notified, and a stop work order issued. The two new pumps already had CSA approval, but were locked pending zoning approval. Mr. Benczkowski said that the pumps were connected to underground tanks with over \$100,000 worth of

regular and diesel fuel, a comment that is irrelevant for planning purposes, but highly relevant for Choudhry.

This led to COA3 in which, confusingly, the Squires-side canopy and pumps are described as being “replacements”, when in fact they are new. In addition, Choudhry asked for permission to introduce a retail store and restaurant use as an “extension” of a lawful nonconforming use. The Committee refused, and Choudhry appealed to the OMB with partial success. By a decision June 2, 2015, the OMB² allowed the appeal, with certain limitations (OMB2): While the Squires pumps could stay, Choudhry had to remove its canopy. Second, while the retail store was permitted, there could be no coffee bar use. Furthermore, the retail store was limited to 74 sq. m, this being the size of the room that a customer walks into if they do not pay at the pump. Mr. Benczkowski says that not much thought seems to have been given to the 74 m² figure and Chair Lord states there was nothing to suggest “full and robust” consideration.

All the parking spaces have always existed and represent no change. Mr. Benczkowski was retained after COA3 and was Choudhry’s witness along with transportation planner Richard Pernicki at OMB2. It is his view, which I accept, that if the site plan presented to COA3 had shown the spaces, (the four front yard parking spaces are marked in Diagram 2; the remaining spaces are at the rear, the bottom of the diagram), we might not be considering this issue because it would probably have been approved by OMB2. Since he was retained after COA3, but before the appeal to the OMB, Mr. Benczkowski did not feel he could modify a drawing produced by someone else.

COA4 is the present application. For transparency Mr. Benczkowski has showed all parking spaces in Diagram 2. Only four are flagged by the zoning examiner because they are in the front yard of an “RD building”, which makes it a technical variance only. The main focus of COA4 was a renewed request for a coffee bar (made at OMB1 and OMB2), and the reinstatement of the second canopy. Chair Lord further ordered, “The balance of the appeal relief sought, inclusive of parking space relief and the retail store size limit are remitted” (to this TLAB hearing).

ANALYSIS, FINDINGS, REASONS

Minor and “desirable”

As a result of OMB2, Choudhry is restricted to selling chips, soda pop and newspapers³. That will not change. The only change will be a small amount of construction, including the removal of an interior wall (shown by the double row of

² PL140962

³ His client, while agreeing to obey the restriction, nevertheless protests the artificiality of the distinction between cold drinks, which can be sold and consumed elsewhere, and hot drinks, which cannot be sold.

dotted lines in Diagram 3, below). Storage is hardly a good use of space fronting a major street.. Mr. Benczkowski felt the current retail space was rather cramped and enlargement would assist his client to meet the test of “desirable for the appropriate use of the land”.

Mr. Benczkowski offered the rather surprising information that retail sales are the prime source of profit; the low margins on gasoline (1.1 cents a litre) make that business a break-even proposition. In the light of all the planning criteria, no exterior change, no impact on adjacent land uses, no perceptible increase in nonconforming use, the front building being located away from residential, better use of public and private infrastructure etc., he felt this variance to the 74 sq. metre limitation was minor, and I agree for those reasons.

The second aspect of construction is the closing the door of one of the service bays to rationalize the rear building space. I mentioned previously that Mr. Benczkowski said that his client was now out of the taxi business. Now that he does not need the hoists for his own business, he is leasing them, first to auto repair businesses and now to anyone at all. He is on his fourth tenant in 18 months, the present tenant being a car detailer. It is a sign of changing times that there seems to be no demand for a local garage such as might have been once a fixture of “the neighbourhoods where we grew up and now raise our children”.

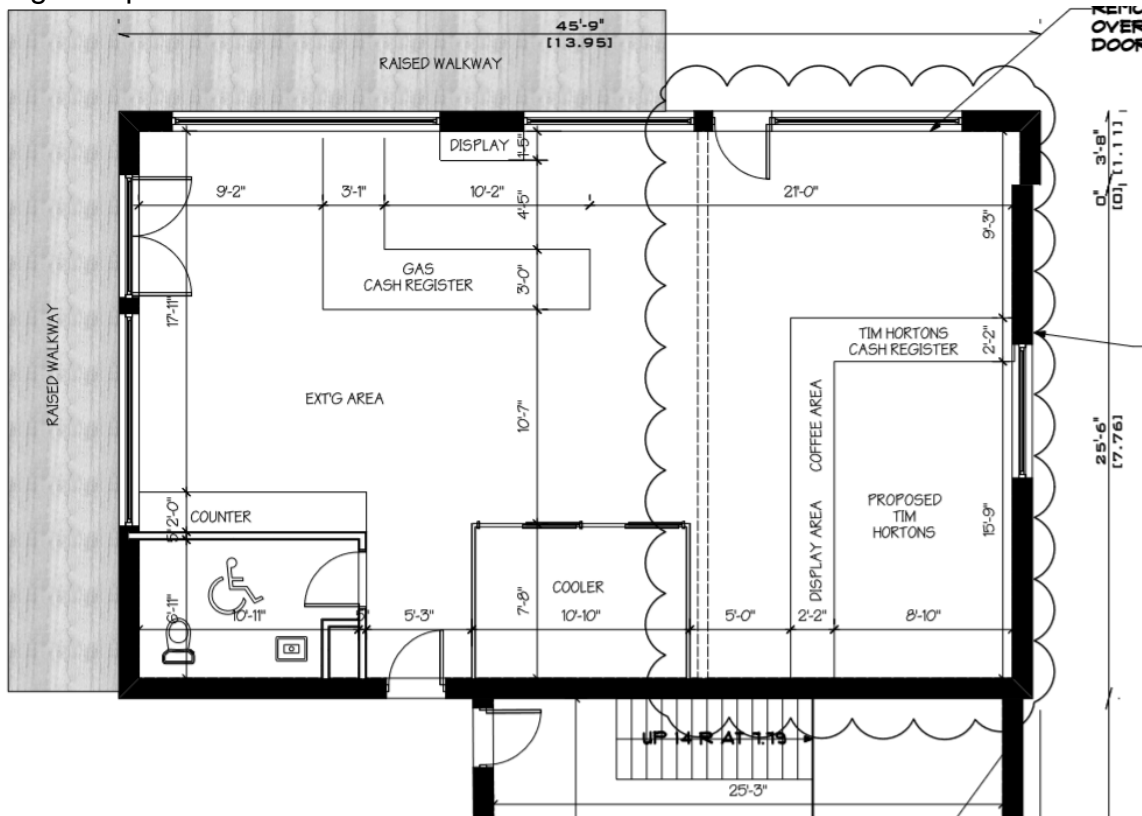


Diagram 3. Proposed construction outlined in box with scalloped line

The closing of one bay at the rear (not shown in Diagram 3) will assist in making the site more compatible with the residential neighbourhood to the south. I consider both changes cumulatively to be minor and indeed, an improvement.

A final note about the procedure to be followed when an application changes on its way to final determination at the TLAB. Diagram 3 is marked with a counter “coffee area” and “Tim Hortons cash register”, etc. These must be excised because of Chair Lord’s decision, which as Mr. Benczkowski said, “changed the application, but in the opposite direction”, that is, made it less impactful. There is no need to redraw this diagram and give fresh notice. Under authority of 45(18.1.1) of the *Planning Act*, I find these and other self-evident and necessary amendments to be minor and no further notice is necessary

The Official Plan

Section 2.3.1 states:

Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites . . . When we think of our neighbourhoods we think of more than our homes. Our trees, parks, schools, libraries, community centres, child care centres, places of worship and *local stores* are all important parts of our daily lives. Increasingly, people work in their neighbourhoods, both in home offices and in *local stores and services*. (my italics)

Mr. Benczkowski stated that the criteria for developments in Mixed Use Areas that are adjacent to Neighbourhoods are all met or are inapplicable. These are::

[that the development:]

- a) is compatible
- b) provides a gradual transition of scale and density, as necessary
- c) maintain adequate light and privacy for residents in those Neighbourhoods; and
- d) attenuate resulting traffic and parking impacts on adjacent neighbourhood streets so as not to significantly diminish the residential amenity of those Neighbourhoods.

The gas bar has been formally approved through a combination of the previous COA and OMB decisions. The parking spaces have always existed and are only being put forward though an oversight at COA3. The conditions imposed by OMB2, i.e., closing a curb cut and installation of a no left turn sign at the Squires exit have already been completed. The sole substantive relief remaining is more space to sell soft drinks etc.

I find the change in size of retail store maintains the intent of the Official Plan and is minor.

The zoning intent and conclusion

The zoning cannot be viewed through the lens of the RD zoning alone, but as a combination of the zoning plus legal nonconforming use. Mr. Benczkowski stated that the proposal as modified, i.e. a 124 m² retail store, open 24 hours a day and with no coffee bar, will provide eyes on the street and make the neighbourhood safer. It will provide convenient source for those items it sells. A local store is a common fixture of residential neighbourhoods. The fact that this is a settlement and in which the neighbour Ms. Boudreau-Evans signaled her approval indicates the lack of negative impact on the neighbourhood.

In conclusion, I find all the statutory tests for the variances at issue in this settlement have been met both individually and cumulatively.

Two remaining issues involving the legal basis of this decision

I asked counsel how they wished me to handle two issues. First, should the tests be those under s. 45(1), that is the "four tests" under the *Planning Act*, or under s. 45(2(a)(i), "extension of nonconforming use", or s. 45(2(a)(ii), "similar to nonconforming use"? Both counsel recommended that I use the "kitchen sink" approach, that is, under the umbrella of all three without more detailed parsing. I agree and authorize the variances under all three bases.

Also, I asked whether increasing the retail store size, possibly contrary to OMB2, which placed some limit on retail store size and *might* be considered subject to res judicata. Again, both counsel thought that Chair Lord, obviously aware of that issue, so it must be implicit in his order that res judicata does not apply to any part of the application that he directed to go to a hearing. I also agree and therefore find I have jurisdiction to examine the two remaining variances sought.

DECISION AND ORDER

I authorize two variances as follows:


1. The existing retail space (76 m² existing area) within the service shop at 2915 St Clair Avenue East, Toronto may be enlarged to 124 m² of retail space; and
2. 16 parking spaces may be introduced.
 - a. 4 at the front of the existing legal non-conforming building; and
 - b. 12 spaces at the rear of the existing legal non-conforming building.

on the following conditions:

1. The size of the retail store shall be a maximum of 124 square metres.

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2. The following uses are not permitted in the retail store within the service station: a restaurant, drive-in restaurant and restaurant take-out as defined in former Borough of East York By-law No. 6752, and an eating establishment, take out restaurant and dine-in eating establishment as defined in City of Toronto Zoning By-law 569-2013.
3. The Owner shall submit a landscape plan and a financial security to the satisfaction of the City.
4. Any outdoor garbage/refuse storage areas will be located, identified and appropriately screened on the landscape plan to the satisfaction of the Chief Planner and Executive Director, City Planning.
5. The “No Left Turn” sign located at the southerly entrance/exit on Squires Avenue shall be repaired and securely installed to the satisfaction of the Chief Planner and Executive Director, City Planning.
6. The north exit of the existing Squires Avenue driveway will be closed and the curb cut re-established to the satisfaction of the City.
7. The location of the retail store shall be substantially in accordance with the attached site plan dated June 12, 2018.
8. The Owner shall paint all parking spaces in accordance with the attached site plan dated June 12, 2018.
9. The Owner shall execute an agreement with the City in accordance with Section 45(9.1) of the Planning Act and shall register the agreement with priority of title on title to the Owner’s lands, all to the satisfaction of the City Solicitor.
10. All other conditions of previous minor variance approvals shall remain in full force and effect.

X 

Ted Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao