

DECISION AND ORDER

Decision Issue Date Wednesday, October 10, 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): 1435037 ONTARIO LIMITED

Applicant: MPLAN INC

Property Address/Description: 3550 VICTORIA PARK AVE

Committee of Adjustment Case File Number: 18 118841 NNY 24 MV

TLAB Case File Number: **18 163748 S45 24 TLAB**

Hearing date: Wednesday, October 03, 2018

DECISION DELIVERED BY T. YAO

APPEARANCES

| Name | Role | Representative |
|-------------------------|----------------|----------------|
| 1435037 Ontario Limited | Appellant | Joshua Chitiz |
| Michael Manett | Expert Witness | |

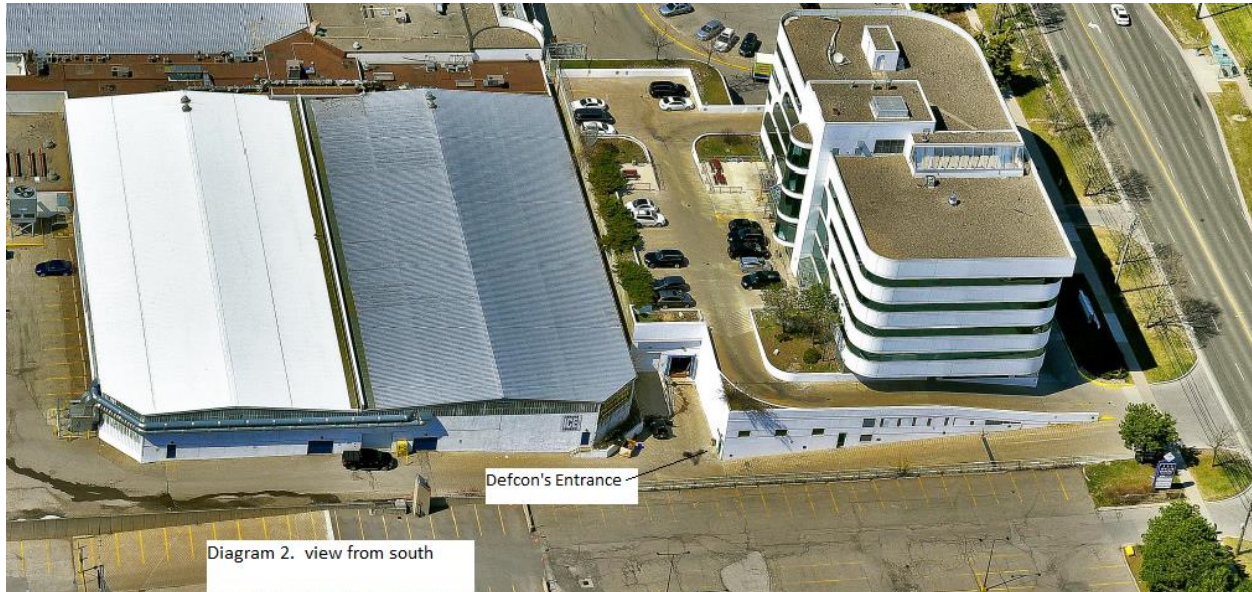
INTRODUCTION

1435037 Ontario Limited ("Dundas Real Estate") owns a mixed-use business complex at 3550 Victoria Park Ave, at the corner of Tempo and Victoria Park, one block north of McNicoll. It has a tenant Defcon, which wishes to legalize its paintball business conducted there.

BACKGROUND



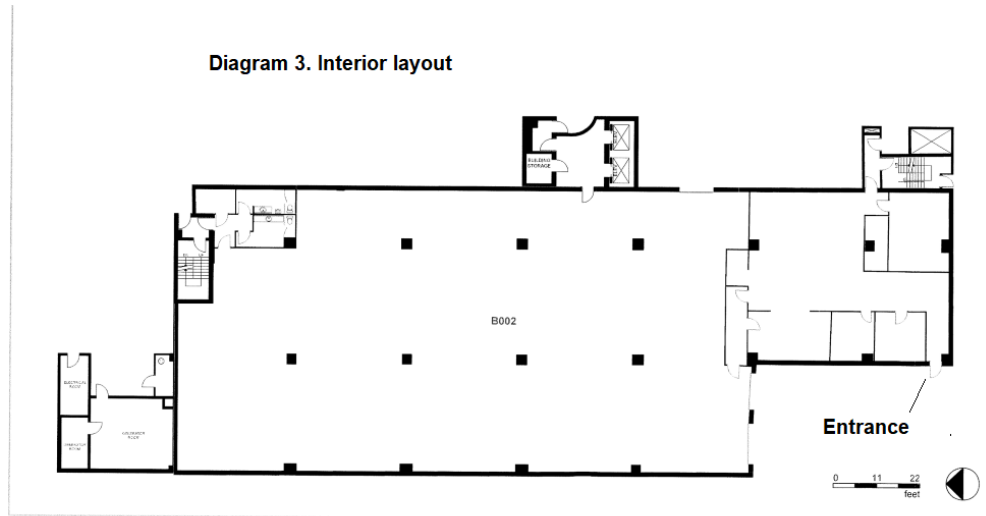
The lands consist of a mid-rise tower and two skating rinks surrounded by extensive surface parking. The photo below shows two rinks to the left (Canlan skating facility), the office building and Victoria Park Ave. being the road to the right.



Defcon's space is called a "basement", but in fact it is windowless ground floor beneath the podium leading to the main entrance of the office tower. Defcon's own

entrance door is one level below, at the southwest corner of this podium (Diagram 1). The tower contains some basement parking and Defcon's "basement" is leftover space adjacent to this parking.

Defcon's premises are shown below.



The entrance door in Diagram 3 leads to a reception area. Beyond the reception area is unfinished space of 1271 sq. m² (13,680 sq. ft) where the paintball activities are carried out.

Defcon began its operation in 2011. In 2012, the City advised that a paintball use was not permitted in an MO(3) zone, and so Dundas Real Estate Real Estate retained Mr. Manett in June 2012. Mr. Manett applied for a minor variance in February 2, 2018, to add "Commercial Recreation" to the list of permitted uses.

The Committee of Adjustment granted this minor variance in 2018 but put a 5-year limit on this approval, to end in May 2023. Dundas Real Estate Real Estate appealed this decision, requesting approval without any limitation.

I wish to comment on the 6-year delay in this application. Defcon has continued to operate, despite of lack of zoning permission, which I do not condone. There is another side to explain this delay. Dundas Real Estate did not have any construction drawings and in order to bring this application to the Committee of Adjustment spent money to create drawings for the whole of the tower, representing a large sunk cost. It seems likely that there is concern about repeating this every five years or so.

The second reason why Dundas Real Estate may not wish to re-apply is that employment lands policies are getting stricter. Defcon's plan examination came before 2016, the approval date for OPA 231, which will be discussed on page 5. The City's

fitness centre polices for Employment lands are being “fine-tuned” and it may be that 2018 represents a window that will be longer available in 2023, if the City policies on recreational commercial type uses become increasingly strict.

MATTERS IN ISSUE

The variances must meet the four tests under s. 45(1) of the *Planning Act*, namely 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

This was an unopposed appeal. The sole evidence was from Michael Manett, the owner's planner, whom I qualified as able to give opinion evidence on land use planning.

The zoning

The property is zoned MO(3). The baseline **MO** zone (Industrial-Office Business Park) permits the following:

Manufacturing

Various office uses

Various commercial (hotel, restaurant, commercial gallery, **fitness centre, commercial school**)¹

Various automotive uses (car rental, service station)

Various educational uses (adult education, commercial school)

¹ The planning report leading to OPA 231 stated: “One further change has been made to the permitted uses in *General Employment Areas* from the version discussed at the September 19, 2013 Open House. Recreation and entertainment uses had been proposed to be permitted in *General Employment Areas* through the enactment of a zoning by-law amendment where an environmental study on the impact of the proposed facility reviewed the impact of on the functioning of industry in the vicinity and vice versa. The only recreation and entertainment uses now proposed to be permitted in *General Employment Areas* are fitness centres and ice arenas.”

Various institutional uses (adult education, health science research laboratory, public library)
Service and Service Shops

MO is further modified by a site-specific exception, called "**MO(3)**". Section 64.34(3)(a) MO(3) of North York Zoning By-law 7625 says "no commercial uses except business offices, professional offices, restaurants and financial institutions and no automotive uses are permitted in the west side of Victoria Park..." The next clause (b) says "retail stores, personal service shops and service shops are permitted in parcel 2."

Dundas Real Estate seeks an additional use of "Commercial Recreation", which is defined as:

1.19.2 Commercial Recreation means the use of land, building or structure for the operation of recreational facilities open to the public for gain, and without limiting the generality of this definition includes miniature golf, driving range, billiard parlour, bowling alley, bocce court, playground, baseball batting cages, baseball diamond, ice rink, **or similar uses**; but does not include golf course, fitness centre or pinball and video games arcade.

Pausing at this point, I make the finding that a paintball facility is a similar and would be permitted if this additional use is permitted. Second, I find that while MO permits a fitness centre and commercial recreational does not include "fitness centre", the net result if commercial recreational is permitted is that a fitness centre is permitted.

I was not provided with an entire copy of North York Zoning By-law 7625, which is the governing zoning. The industrial zoning in this area is not superseded by Toronto harmonized by-law 569-2013.) Commercial Recreation is not permitted in M1 but is permitted in M2 and M3. (Roughly speaking, M1 to M3 correspond to light, medium and heavy industry.)

The ice rinks are not listed as permitted uses, because the North York zoning considers this use to be "commercial school (ice arena)" and a "commercial school" is permitted under the MO zoning. Dundas Real Estate inferred that because ice rinks were permitted, a similar use such as paintball would also be permitted. I speculate it was this understanding on Dundas Real Estate's part that led to the lease to Defcon.

The Official Plan policies

To recapitulate the chronology:

| | |
|--------------|---|
| 2012 | discovery that a paintball use is not permitted, causing Mr. Manett to be retained. |
| June 3, 2016 | zoning notice |

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- Dec. 20, 2016 OMB approval of OPA 231
- Feb. 2, 2018 application to the Committee of Adjustment
- May 23, 2018 Committee of Adjustment decision authorizing commercial recreation use, to expire in May, 2023.
- Oct 3, 2018 TLAB hearing

The February 2, 2018 application to the Committee of Adjustment) is significant because this application now becomes subject to OPA 231, which introduced more restrictive policies for Employment lands, where this property is located. Unlike typical official plan policies, OPA 231 is extremely specific about which uses it will permit as indicated in the boxes below.

| Table 1. uses permitted in General Employment Areas | |
|--|---|
| | Uses permitted by OPA 231 |
| Section 4.3.1 <i>Core Employment Areas</i> | manufacturing, processing, warehousing, wholesaling, distribution, storage, transportation facilities, vehicle repair and services, offices , . . . |
| 4.6.2 | Additional ancillary uses are permitted provided they are ancillary to and intended to serve the <i>Core Employment Area</i> in which they are located: hotels, parks, small-scale restaurants, catering facilities, and small-scale service uses such as courier services, banks and copy shops |
| 4.6.3. General Employment Area | In addition to all uses permitted in <i>Core Employment Area</i> , retail and service uses, restaurants, fitness centres and ice arenas may also be established. |

ANALYSIS, FINDINGS, REASONS

The Official Plan intent

OPA 231 begins with policies applying to all Employment lands that provide a “check list” for a minor variance application like this. Policy 1 states:

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Employment Areas, . . . are comprised of both *Core Employment Areas* and *General Employment Areas*,. . . *Employment Areas* are areas designated in this Plan for clusters of business and economic activities including, but **not limited to**, manufacturing, warehousing, offices, and associated retail and ancillary facilities.

Accordingly, even if a new use is not enumerated, it is not limited to traditional employment uses. OPA 231 designates the Dundas Real Estate lands as “General Employment Areas”, which are generally located on the periphery of Employment areas on major roads. Victoria Park is a major road.

Policy 2 goes on to state that Employment areas will be used “exclusively” for “business and economic activities” and “Commercial Recreation” falls into that category. The next section Policy 2 is prefaced by the words:

Employment Areas will be used exclusively for business and economic **activities in order to**;

This preamble is followed by specific policies 2(a) to 2(l)

2 (a) Retain sufficient availability of lands, for both current and future needs for industrial functions such as **manufacturing and warehousing** which are permitted only within *Employment Areas* and *Regeneration Areas*;

2 (b) Protect and preserve *Employment Areas* for current and future **business and economic** activities;

Section 2(a) speaks to retaining sufficient availability of land for industrial functions: Policy 2(b) is similar to 2(a). There is one roll up door and a loading dock visible from the parking lot. Mr. Manett said that this space is in the “basement” of an office tower and was unusable for any purpose, and that Defcon had been the first and only tenant since the building was erected in the ‘80s or ‘90s. Based on the limited information I was given, I accept that the land is available for future needs for industrial functions and future business activities, should Defcon cease operations.

Policies 2(c), 2(k) and 2(l) deal with employment. It says these areas should:

2(c) Provide for and contribute to a broad range of stable full-time **employment** is opportunities;

2(k) Contribute to a balance between **jobs** and housing to reduce the need for long-distance commuting and encourage travel by transit, walking and cycling; and

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2(l) Provide **work opportunities** for residents of nearby neighbourhoods.

Mr. Manett said that Defcon provides 12 to 16 jobs. It is served by the 24A Victoria Park bus line. Even though this is in the middle of an Employment area, there are residential buildings within walking and cycling distance. The policies also seek to:

2(d) Provide opportunities for new office buildings, particularly in business parks along the Don Valley corridor and/or within walking distance to higher order transit;

The site is in a business park along the Don Valley corridor. The policies also seek to:

2(f) Maintain and grow the City's business tax base;

Defcon pays business tax. The next sections have to do with visibility:

2(i) Provide prominent, accessible and visible locations and a wide choice of appropriate sites for potential new businesses;

2(h) Maintain the market attractiveness of the Employment Areas for employment uses;

The site is certainly prominent accessible and visible. Since the paintball use has no open storage, it is one of the more "attractive" uses. The policies also seek to:

2(j) Continue to contribute to Toronto's diverse economic base and support export-oriented wealth creating employment;

Mr. Manett states that paintball games are used for teambuilding and organization strengthening. While it is not itself an "export", and I would not overstate this, it may be by appealing to business organizations, it might "continue to contribute" to Toronto's economic base.

2(e) Provide a stable and productive operating environment for existing and new businesses by preventing the establishment of sensitive land uses in Employment Areas;

Defcon is not a sensitive land use. I find that this is the strongest argument in favour of the minor variance. A sensitive land use such as residential or a day care centre would impede the long termed planned function of these lands for Employment uses.

In conclusion, the overall intent of OPA 231 is to preserve Employment lands for manufacturing and related uses, including offices and ice area, which the By-law

interprets as commercial school. There is a specific connection in the wording of 4.6.3 permitting the establishment of "retail and service uses, restaurants, fitness centres and ice arenas". An ice arena occupies a large part of the site and is a major use (4676 m² GFA). Without specific evidence from the City to the contrary and in view of the compliance with s. 4.6.3, I find that the **general** intent of the Official Plan is maintained.

The zoning intent

To summarize:

| Table 2. comparison of permissions for fitness centres, ice arenas and paintball facilities are treated in OP and zoning | | | | |
|---|---------------------|-------------------------|------------------------------------|------------------------------------|
| | s. 4.6.3 of OPA 231 | Commercial Recreational | MO | MO(3) |
| Fitness centres | Yes | No, not included | Yes (please see list on p 4) | yes |
| Ice Arenas | Yes | Yes if "similar" | Yes because of "commercial school" | Yes because of "commercial school" |
| Paintball facilities | No | Yes if "similar" | No | No |

Adam Pressick, City planner, recommended this application be turned down because of OPA 231 (letter to the Committee of Adjustment of April 24, 2018):

General Employment Areas under OPA 231 are generally located on the periphery of Employment Areas on major roads. Retail stores, service shops and restaurants are permitted in these areas, as they are intended to primarily serve workers in the Employment Area, and not the broader community. **Permitted uses in the General Employment Areas designation under OPA 231 do not include commercial recreational uses.** As such, it is the opinion of planning staff that the minor variance to permit a commercial recreational use at the subject property is not in keeping with the intent and purpose of the OPA 231 and therefore it is recommended that the application be refused.

Mr. Manett said Mr. Pressick was wrong but I am of the view that this is not a "yes or no" question. Table 2 show a small class of commercial recreational uses are permitted throughout, notably the ice arena. I find a paintball facility is like an ice arena in that it is a group commercial recreational facility.

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In my opinion, the intent of the zoning by-law is to permit clean office and office related uses in the more publicly accessible spaces in the office tower. This is not publicly accessible but an adjunct to the basement parking lot. Therefore, I find the four tests are met for the following reasons:

There should be some leeway in the minor variance process for an adjustment to the list of permitted uses when they are confined to a small portion of a building that would otherwise be unusable space;

If this space were not used, it would be contrary to higher level Policy documents that require efficient use of infrastructure, such as the bus line that goes right by the property.

Defcon is a business use, and has been paying business taxes, a specific policy of OPA 231;

The zoning permits offices, restaurants, service shops, a fitness centre and ice arena.

To have the space be vacant when it can coexist with the office tower and ice rink is not good public policy, nor desirable for appropriate development of the land.

Accordingly, I find the statutory tests are met.

DECISION AND ORDER

I authorize “commercial recreation” as a permitted use for the portion of the building in Diagram 3 at 3550 Victoria Park Ave., Toronto. While it is probably not necessary to say this, I consider the appeal displaces the Committee of Adjustment decision of May 23, 2018 so it is not necessary to set it aside. Furthermore, the authorization as commercial recreation does not limit the use to a paintball facility for the reasons set out above.

X



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