

DECISION AND ORDER

Decision Issue Date Friday, March 15, 2019

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): KRONIC RELIEF INC

Applicant: THE BIGLIERI GROUP LTD

Property Address/Description: 1160 BIRCHMOUNT RD

Committee of Adjustment Case File Number: 17 250240 ESC 37 MV

TLAB Case File Number: **18 256530 S45 37 TLAB**

Hearing date: Tuesday, March 05, 2019

NAME	ROLE	REPRESENTATIVE
Kronic Relief Inc (Steven Conville)	Tenant and Occupant	Meaghan McDermid
Michael Testaguzza	Expert Witness	
City of Toronto	Party	Ben Baena
Roderick Hines	Expert Witness	

DECISION DELIVERED BY TED YAO

Kronic Relief Inc ("Kronic") applied for minor variances from separation distance requirements for a marihuana production facility. This is not a dispensary that is open to the public; rather it resembles a production facility which makes a product from scratch, stores it securely and ships it to online customers.

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On November 8, 2018, the Committee of Adjustment refused the variances, and Kronic appealed. Thus this matter comes before the TLAB.

The TLAB hearing has resulted in a settlement with signed Minutes of Settlement (Appendix 1¹). A settlement when one of the parties is the City of Toronto as a public body with decision-making is entitled to a great deal of deference but does not displace my independent duty to come to an opinion under s. 45(1). I conclude that the settlement should be approved and implemented.

Table 1 below sets out the variances sought and the relevant zoning by-laws.

Table 1. Variances sought for the whole of the building at 1160 Birchmount Rd			
		Required	Proposed
Variances from new City-wide harmonized By-law 569-2013			
1	Distance from residential and residential apartment zones and lots;	70 m	Less than 70 m.
2	Distance from private school	70 m	Less than 70 m. Proposed facility will be located in the same building as two private schools
Variances from former Scarborough By-law 24982			
3	Distance from various residential zones	70 m	Less than 70 m.
4	Distance from private school (i.e., permission to locate in a building where a private school is located)	70 m	Less than 70 m. Proposed facility will be located in the same building as two private schools

Because appeals against the City-wide by-law have **not** been exhausted, the zoning plan examiner has considered the application with reference to two zoning by-laws;

- the current one, City-wide Zoning By-law 569-2013; and
- the former Scarborough Employment District zoning by law 24982 (Wexford). By-law 24982 is a by-law covering all employment districts in the former city of Scarborough. The bracketed word “Wexford” contains specific performance standards for Wexford, which is the east side of Birchmount, south of Eglinton.

¹ The parties use a different spelling of “marijuana” in the Minutes.

MATTERS IN ISSUE

I must be satisfied that the applications meet provincial policy and the four tests under s. 45(1) of the *Planning Act*. The tests are whether the variances:

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

Because this land use is explicitly permitted by both Official Plan and zoning, this is a straightforward decision. The only point where I hesitated was the separation distance to the schools and the condition that future expansion of the facility, should this occur, should be limited. The City's Employment policies require that Employment lands be reserved for Employment uses and protected from intrusion of sensitive land uses.

As a settlement, this case has no precedential value since any findings of fact are for the limited purpose of ensuring that the settlement is not contrary to the *Planning Act*.

EVIDENCE

I heard from Michael Testaguzza whom I qualified as a witness able to give opinion evidence in land use planning. I heard from Kronik's director (Steven Conville). I also relied on the written reports of the City's planning witness, Roderick Hines, who attended the hearing, but did not testify formally.

ANALYSIS, FINDINGS, REASONS

This is a recently created land use, but nonetheless falls squarely in the manufacturing, processing, warehousing and distribution functions envisioned by Council for lands zoned and designated Employment under the Official Plan.

The application to Health Canada

In 2014, federal law and Toronto zoning both permitted the development of a Medical Marijuana Production Facility. The federal law was *the Marijuana for Medical Purposes Regulations*, announced by Health Canada June 20, 2013. Local zoning permissions were contained in By-law 403-2014 (amending the current City-wide by-law), and 409-2014 (amending the former Scarborough By-law 24982), both adopted on May 8, 2014.

After a Supreme Court of Canada decision that allowed individuals to possess marijuana derivatives for their own use, the federal government replaced the *Marijuana for Medical Purposes Regulations* with a new Regulation to permit licensed growers to produce cannabis oil and fresh marijuana in addition to dried marijuana². Kronic applied in 2014 under the regime prior to the Supreme Court decision. About 17 months of this five-year process was taken up by the local approval. Because of the lengthy licensing process, Kronic opted to stay in the *Marijuana for Medical Purposes Regulations* “track” to keep its place in the queue. Although the final product will be of a quality pure enough for medical marijuana, it will also be sold to recreational consumers.

There are three other notable aspects of the federal licensing process besides its length. The first is that it is lock-step; for example, Kronic was required to enter a signed lease and obtain permission of the landlord as an initial first step and has been paying rent for an empty space since 2014.

Secondly, there is significant federal supervision once operation begins; the municipality and the public can be assured that the rules will be followed. The security arrangements are particularly onerous; the facility will have round-the-clock on-site security, with a total of 69 cameras, and the walls must be made of cinder block with poured concrete, (what Mr. Conville called “basically a bomb shelter”). Kronic must reinforce its slab foundation to prevent tunneling underneath the building and have heat detectors to ensure that thieves cannot cut into the walls with plasma torches. This is a daunting process that only the most reputable and deep pocketed entrepreneurs will want to attempt. But clearly, entrepreneurs are to be encouraged by Toronto’s Official Plan policies for Employment lands.

Third, federal legislation has progressively been the subject of change since 2014. For example, Mr. Conville noted that a private citizen can now cultivate up to four marijuana plants for personal use; and there is no separation distance requirement for these plants from other sensitive land uses.

The economic benefits

Mr. Testaguzza (Kronic’s planner), stated that Kronic was making an investment of 5 million dollars and expects to create from 50 to 75 jobs.

No Emissions

² *Access to Marijuana for Medical Purposes Regulations*. Source: Annual Compliance and Enforcement Report 2015-2016, National Compliance and Enforcement Section, Office of Medical Cannabis, Health Canada

Unlike most industrial and processing operations, there will be no emissions of any kind. Air is to be purified before being released; according to Mr. Conville outgoing air will be purer than incoming air.

The site

Kronic will carry on business at Unit 6, 1160 Birchmount, the southernmost of three irregularly shaped buildings between Modern and Crouse. The building contains 14 units, arranged in roughly two rows, one facing north and one facing south, with the two end units facing east on Birchmount. (Please see Picture 1, page 5).

The two end units, (with the greatest accessibility and visibility), are the two schools that trigger the need for variance #2. On the east side of Birchmount is the residential area triggering variance #1. Between Kronic's unit and the school are two Employment use units; the one immediately abutting the school contains a metal manufacturing use³; the other is vacant.

Unusually for an industrial site, there is extensive landscaping. The Birchmount frontage has a hedge and row of deciduous trees; there is a 3.5 m landscaped front yard with a tot lot in front of one of the schools. The zoning requires only a 1.5 m strip for schools, assuming they are located in a zone that permits their use.

Separation distances

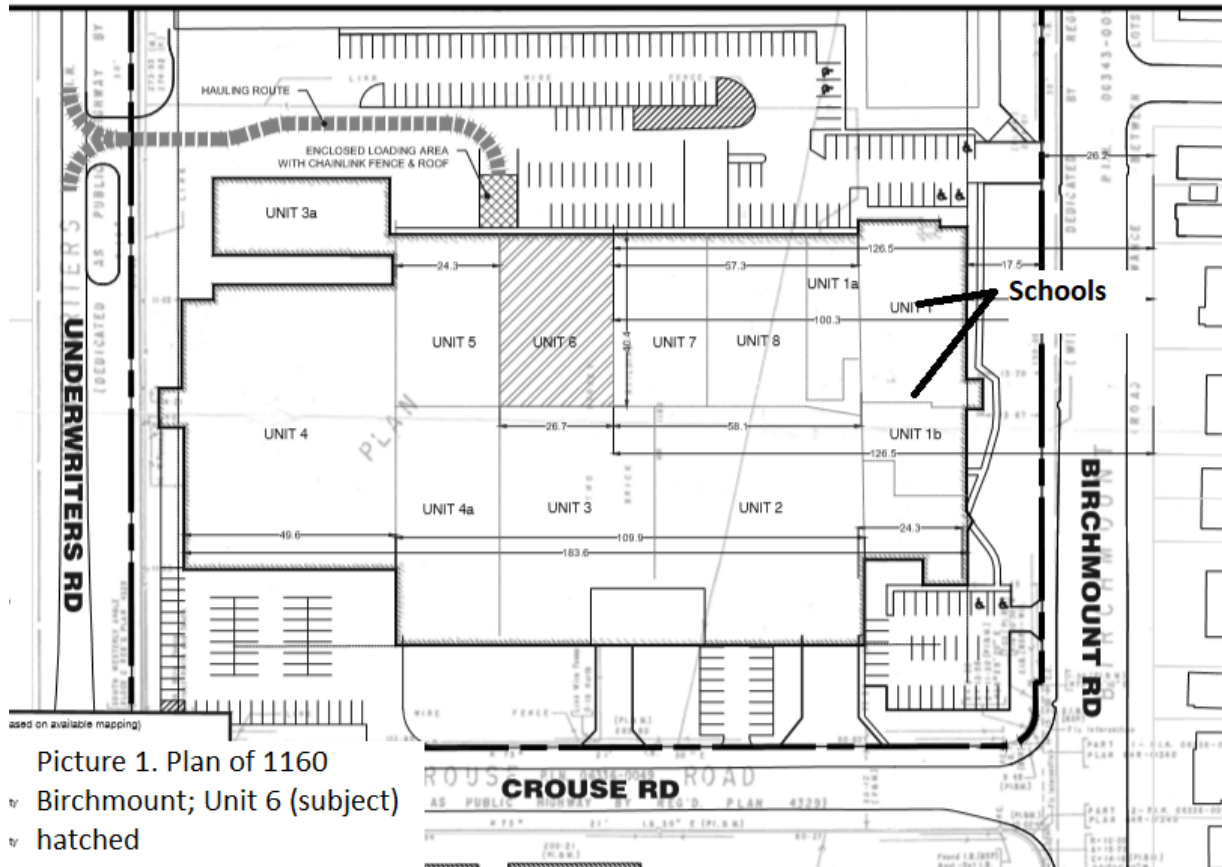
Mr. Hines' witness statement indicates that the lot is split zoned; the front (Birchmount) half being Employment Industrial (E) and the rear (Underwriters Road) Employment Heavy Industrial (EH). There is similar split zoning under the Scarborough By-law No. 24982. Both permit the intended use of a marijuana production facility, subject to the separation distances.

Unit 6 is 126.5 m from the nearest residential lot, more than the 70 m required by the zoning. The need for the variance results from the interpretation that distance is to measured **lot line to lot line**, not unit boundary to lot line. Since the site lot (1160 and 1170 Birchmount) is 5.8 hectares (14.3 acres), it would be unreasonable to insist on the lot line to lot line measurement.

Unit 6 is 57.3 m from the nearest private school. Mr. Hines (the City's planning witness) wrote in his planning report "The schools were apparently established in the fall of 2011 and 2013 respectively, and it remains unclear whether the schools were established and have been operating in compliance with the zoning by-law" Kronic has submitted letters from both schools to the Committee of Adjustment expressing support for the subject application. Their lack of objection cannot be the sole substitute for a

³ The RingLord, a metal mail (i.e. chain mail used by knights) manufacturer. Its clients include the Tower of London and movies such as *The Hobbit*. Source: the RingLord.com

TLAB finding of “maintaining the general purpose and intent of the zoning by-law”, although it is relevant. I find that the zoning intent pertains only to a **legally established** private school, for which there was insufficient evidence and I concur with the opinion of both planners that this branch of the test is met.



Picture 1. Plan of 1160
Birchmount; Unit 6 (subject)
hatched

Guideline D-1

This guideline and other policies⁴ were issued in July 1995 under the authority of *Environmental Protection Act*, and *Environmental Assessment Act* as well as section 2

⁴I was provided with Guidelines D-1"Land Use Compatibility", and Procedures D-1-1" Implementation, D-1-3, "Land Use Compatibility: Definitions" and D-6 "Compatibility Between Industrial Facilities and Sensitive Land Uses". D-1-3 defines **Class I Industrial Facility** A place of business for a small scale, self-contained plant or building which produces/stores a product which is contained in a package and has low probability of fugitive emissions. Outputs are infrequent and could be point source or fugitive emissions for any of the following: noise, odour, dust and/or vibration. There are daytime operations only, with infrequent movement of products and/or heavy trucks and no outside storage.

of the *Planning Act*. They are still in effect but are not Provincial policy statements with which this decision must be consistent, since the preamble to D-1 and D-6 do not reference section 3(1) of the *Planning Act*. Accordingly, the primary legislative basis for the Guideline is section 14(1) of the *Environmental Protection Act*.

I accept Mr. Testaguzza's evidence that the 70 m separation distances have origins in the D-1 policies, which suggest a 20 m separation distance between sensitive uses and Class I industrial facilities but 70 m separation distance for Class II. Classes I and II correspond to light and medium industries. The site will have one outbound truck movement per day (a Canada Post truck carrying product in packages) and one inbound truck movement a month (e.g. fertilizers, packaging, supplies). There will be no consumers coming to the facility; indeed, there will be no external indication of the business. Mr. Testaguzza stated that the D-1 policies are to be flexibly interpreted and I find that a facility with no emissions and infrequent truck movements resembles more Class I facility than Class II. Accordingly, I find that the separation distances of 126 and 57 m exceeds 20 m and the variance proposed is consistent with the D-1 Guideline.

Official Plan intent

Mr. Testguzza's planning opinion was that the Official Plan and higher-level policies test were met, specifically:

- Section 1.2.6 of the Provincial Policy Statement; (minimizing odor, noise and other contaminants) and similar policies in OPA 231;
- Section 1.2 of the Provincial Policy Statement (coordination of land uses);
- Section 1.3 of the Provincial Policy Statement (promotion of economic development and competitiveness);

Toronto's Official Plan, as modified by OPA 231 (not fully in force) supports business and economic activities in Employment Districts. Growing the business tax base, employment opportunities near bus routes, export opportunities and the attractiveness of sites are all mentioned. Clearly, Kronic's facility is fully consistent with these goals.

Class II Industrial Facility A place of business for medium scale processing and manufacturing with outdoor storage of wastes or materials (i.e. it has an open process) and/or there are periodic outputs of minor annoyance. There are occasional outputs of either point source or fugitive emissions for any of the following: noise, odour, dust and/or vibration, and low probability of fugitive emissions. Shift operations are permitted and there is frequent movement of products and/or heavy trucks during daytime hours. See Guideline D-6, "Compatibility Between Industrial Facilities and Sensitive Land Uses" for classification criteria and examples to categorize a specific industry.

As previously stated, I had concerns about the condition preventing any future expansion of the site. No one wishes the private schools would be the subject of legal action, even if their location appears to be inconsistent with the exclusive use of Employment Areas for business and economic activities. I had insufficient evidence on their status and do not need to make a finding in this regard.

I conclude the general intent of the Official Plan is maintained, and the other tests set out in Section 45(1) of the *Planning Act* are satisfied.

DECISION AND ORDER

I authorize the variances set out in Table 1 upon the following conditions

1. A Marihuana Production Facility at 1160 Birchmount Road is limited to location in Unit 6, or any future westerly or southerly expansion thereof, only;
2. All deliveries and shipping associated with the Marihuana Production Facility is limited to vehicles accessing the site from Underwriters Road only; and
3. The minor variance approval is limited to a period of three (3) years from the date of issuance of the federal license to operate the Marihuana Production Facility.

X



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

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TORONTO LOCAL APPEAL BODY
PROCEEDINGS COMMENCED UNDER subsections 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant(s):	Kronic Relief Inc.
Applicant(s):	The Biglieri Group Ltd.
Property Address/Description:	1160 Birchmount Road, Unit #6
Committee of Adjustment File Number(s):	A0395/17SC
TLAB Case File Number(s):	18 256530 S45 37 TLAB

MINUTES OF SETTLEMENT

B E T W E E N:

KRONIC RELIEF INC.

- and -

CITY OF TORONTO

WHEREAS Kronic Relief Inc. (the "**Appellant**") is the lessee of Unit #6 on the property municipally known as 1160 Birchmount Road (the "**Subject Property**"), in the City of Toronto;

AND WHEREAS the Biglieri Group Ltd., on behalf of the Appellant, filed an application with the Committee of Adjustment on October 11, 2017 for minor variances required to establish a medical marihuana production facility on the Subject Property (the "Application");

AND WHEREAS the Committee of Adjustment heard and refused the Application on November 8, 2018 and the Appellant appealed such decision to the Toronto Local Appeal Body ("TLAB") on November 14, 2018 (the "Appeal");

AND WHEREAS the City of Toronto (the "City") filed a Notice of Intention to be a Party Form 4 to obtain party status in the Appeal;

AND WHEREAS the Appellant and the City (each a "Party" and collectively, the "Parties") have reached a settlement of the Appeal on the terms set out herein;

DH 01253837

NOW THEREFORE in exchange for the payment of two dollars (\$2.00) of lawful money of Canada each paid to the other, the receipt and sufficiency being hereby acknowledged, and other good and valuable consideration **THE PARTIES HEREBY COVENANT AND AGREE AS FOLLOWS:**

1. Subject to the conditions to be requested pursuant to section 2 below, the Parties will support the Application and request that the TLAB approve the following minor variances for the Subject Property (the "Variances"):

To By-law No. 569-2013

- i. The proposed marihuana production facility would be located on a lot less than 70m from lots in a Residential Detached (RD) zone and lots in a Residential Apartment (RA) zone on the east side of Birchmount Road. Whereas a lot with a marihuana production facility must be at least 70 m from a lot in a Residential Zone category or a Residential Apartment Zone category.
- ii. To permit the proposed marihuana production facility in a building in which two private schools are located.
Whereas a lot with a marihuana production facility must be at least 70 m from a lot with a public school or private school.

To By-law No. 24982

- iii. The lot with the proposed marihuana production facility is less than 70 m from the lots in Apartment Residential (A) Zone, Single-Family Residential (S) Zone and Two Family Residential (T) Zone on the east side of Birchmount Road.
Whereas a lot with a marihuana production facility must be at least 70 m from a lot in any zone that is not an "E", "M", "MG", "MS" Zone or any of these zones in combination with a "VS" Zone.
 - iv. To permit the proposed marihuana production facility in a building in which two private schools are located.
Whereas a lot with a marihuana production facility must be at least 70 m from a lot with a school.
2. The Parties will request that the TLAB impose the following conditions as part of any approval by the TLAB of any of the Variances:
 - i. A Marihuana Production Facility at 1160 Birchmount Road is limited to location in Unit 6, or any future westerly or southerly expansion thereof, only;
 - ii. All deliveries and shipping associated with the Marihuana Production Facility is limited to vehicles accessing the site from Underwriters Road only; and

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- iii. The minor variance approval is limited to a period of three (3) years from the date of issuance of the federal license to operate the Marihuana Production Facility.
- 3. The Parties will request that the TLAB schedule a settlement hearing in respect of the Appeal for the earliest availability in the TLAB's schedule.
- 4. Each Party shall bear its own costs in respect of the Appeal.

IN WITNESS WHEREOF the Parties, through their duly authorized legal counsel, have executed these Minutes as of the 14th day of January, 2019:

Kronic Relief Inc.



Meaghan McDermid, counsel to Kronic Relief Inc.

City of Toronto



Benjamin B. Baena, counsel to the City of Toronto