

DECISION AND ORDER

Decision Issue Date Monday, October 21, 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): 1884901 ALBERTA LIMITED

Applicant: SAJECKI PLANNING INC

Property Address/Description: 295 Belfield Road

Committee of Adjustment Case File: 18 136184 WET 01 MV (A0195/19EYK)

TLAB Case File Number: 19 161164 S45 01 TLAB

Hearing date: Wednesday, September 11, 2019, Tuesday, October 08, 2019

DECISION DELIVERED BY T. YAO

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Skyway Park (1282831 Ontario Inc)	Applicant	Adrian Frank
Davis Sajecki	Expert Witness	
Park 'n Fly (1884901 Alberta Limited)	Appellant	Patrick Duffy Jonathan Cheng
Martin Rendl	Expert Witness	
Gail Christie	Observer	
Samantha Dunlop	Observer	
Tuccio Zita	Observer	
Ali Hussain	Observer	

Sunthara Suresa

Observer

Harry Edgar

Observer

INTRODUCTION

Skyway Park seeks a variance to use its 1.2-hectare (2.97 acres) site in the Rexdale Employment Area for an airport parking business. The other party in this dispute is not the City of Toronto, but Park “N Fly, a competitor.

BACKGROUND

Skyway Park originally carried its business from 60 Skyway Avenue and 295 Belfield Rd. The “public” part (i.e., pickup and drop off) was at Skyway; overflow went to Belfield. Commercial parking lots are licenced by the City, and Skyway Park holds a licence (good until March 21, 2023) for both properties. 60 Skyway Ave’s zoning permits a public commercial parking lot, **but 295 Belfield’s does not.**



In June 2018, the lease at 60 Skyway expired, and was assumed by another airport parking business. Left with only the 295 Belfield site, Skyway Park switched its operation to operate solely from 295 Belfield. In so doing, the Belfield site changed its use from an overflow, non-public parking lot, defined as a “vehicle

depot” to a public one, defined in the zoning by-law as “**public parking**”.

295 Belfield now contains a full-service airport drop off parking site, with shuttle service to Terminals 1 and 3 running 24 hours a day. In Figure 1 (above, photo taken September 11, 2019), neat rows of vehicles may be seen parked. Access is by way of Belfield; the shuttle bus needs only to make a right hand turn to enter the on ramp to the 409 and make a straight run for Pearson Airport. For the return trip, there is a similarly convenient exit ramp from Highway 409 onto Marmac Drive

The north south dark shapes at the west end of the property in Figure 1 are trailer buildings to conduct the business transactions. The company employs 64 shift

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workers. I gather they will lose their jobs if Skyway Park is forced to cease operations. The usual approach is to disregard the present illegal operation and treat the application as a theoretical planning exercise, neither permitting the variance out of sympathy for the workers, nor leaning against a variance to punish Skyway Park.

On August 16 or 22, 2018 Skyway Park received a notice of violation that its operation at 295 Belfield was in contravention of the zoning. It immediately hired MHBC, a planning firm, to deal with the issue. In December 2018, dissatisfied with the progress of the file, it replaced MHBC with Mr. Sajecki.

On March 20, 2019, Skyway Park applied to the Committee of Adjustment, which relied upon a City planning report that advised that, "Should the Committee of Adjustment choose to approve the application" it recommended that a limit of 5 years be placed on the approval. Reports like this are as close as the Community Planning Department will go on record as approving the application, are commonly called a "no objections" report.

Skyway Park has never applied for a temporary use variance; the five-year limit being added only at the suggestion of the City Community Planning Department. On May 9, 2019, the Committee of Adjustment approved all variances on a time limited basis, to terminate in May 2024. Park 'N Fly appealed and so this matter comes before the TLAB.

At this hearing Mr. Sajecki stated that should variance 1 be granted, his client would have no problem to eliminating the need for 2 and 3. He justified #4, unopposed by Park 'N Fly, by a planning rationale -- the existence of an already large City road allowance at the west side of the flanking street, Attwell Dr. Thus, the only issue is variance #1 in Table 1, the temporary use as a public parking lot.

Table 1. Variances sought for 295 Belfield Rd			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Use	Commercial Parking Lot (Public Parking) is not a permitted use in the E zone.	Obtain variance for this use
2	Parking space setback from street	3 m	0.6 m on west side
3	Obstructed parking spaces	Parking space cannot be behind another parking space	5 parking spaces are obstructed

4	Soft landscaping	Min. 3 m wide along lot lines	The proposed soft landscaping will be 2.6 m wide on the south side and no soft landscaping will be provided on the west side.
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EVIDENCE

I heard from David Sajecki, Skyway Park's planner, and Martin Rendl, Park 'N Fly's planner, both of whom I qualified as able to give opinion evidence in the area of land use planning.

MATTERS IN ISSUE

The variances must meet all four tests under s. 45(1) of the *Planning Act*: that is, whether they individually and cumulatively:

- 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.

In addition, the variances must be consistent with the Provincial Policy Statement and conform to the Growth Plan for the Greater Golden Horseshoe.

ANALYSIS, FINDINGS, REASONS

Overview and legislative purpose

The lands are in the heart of the *Core Employment Area*¹ of the Official Plan, whose employment policies permit manufacturing and warehousing, but not a public

¹ Core Employment Areas 4.6.1. Core Employment Areas are places for business and economic activities. Uses permitted in Core Employment Areas are all types of **manufacturing, processing, warehousing**, wholesaling, distribution, storage, transportation facilities, vehicle repair and services, offices, research and development facilities, utilities, waste management systems, industrial trade schools, media, information and technology facilities, and vertical agriculture.

4.6.2. The following additional uses are permitted provided they are **ancillary to and intended to serve the Core Employment Area** in which they are located: parks, small-scale restaurants,

parking lot. The lands are zoned Employment E which also does not permit public parking. Right away, this application would appear not to maintain the intent of either the Official Plan or the zoning by-law. While conceding his client cannot meet the literal words of 4.6.1 (*Core Employment Area* policies), Mr. Sajecki's "theory of the case" is that Skyway Park is part of a cluster of airport-serving uses; and from an overall viewpoint help drive Toronto's economy².

I find this theory is inconsistent with Council's vision of Employment land use planning. It recognizes that under market forces lands that are converted to non-*Employment*-type designations rarely return; **once lost, they are usually are gone forever**. While Skyway Park proposes a temporary permission and its construction consists only of trailers, it removes land from the stock of Employment land for the immediate future and attracts traffic to the heart of the Core Employment Area. It uses extremely good access to the Airport, an access paid for by the public, and keeps this access from a person that planning policy considers to be a more desirable user.

Analysis of Council's vision is an analysis of its **intent and purpose** of its Official Plan; as directed in the *Planning Act*. What this means is that I must ask what reasons underlie those policies and recognizing that there are probably more than one single intent, I must discern which are primary and which are secondary goals.

Section 4.6 of the Official Plan contains policies that apply to all Employment areas³ The policy looks to support Pearson but also to ensure the long term "integrity"

catering facilities, and small-scale service uses such as courier services, banks and copy shops. Small scale retail uses that are ancillary to and on the same lot as the principal use are also permitted. The Zoning By-law will establish development standards for all these uses. (my bold)

² In his opening statement, Skyway Park's lawyer, Frank Andres, stated: This case is about a major employer in the City, that being the Toronto Pearson International Airport, how that airport functions, to generate a **cluster of businesses**, how the airport relies on that cluster of businesses, and how we undertake land use planning in that context. . . We will come down to very specific policies and we will be asking you to evaluate, when it comes to the Official Plan, the intent and purpose of those policies, along with the intent and purpose of a number of zoning provisions which primarily relate to use. I'd say this is about being asked to consider both **existing function and planned function and the duality of those circumstances**, and ultimately whether a variance for use, restricted to a temporary basis, meets the four tests.

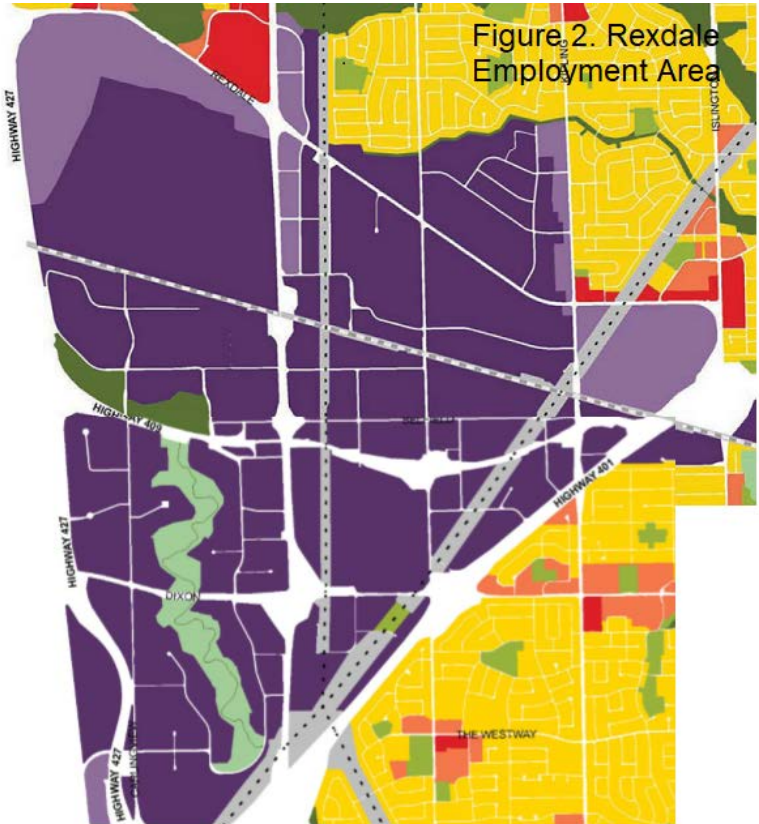
³ Policies for All Employment Areas 6. Development will contribute to the creation of competitive, attractive, highly functional Employment Areas by: a) supporting, preserving and protecting major facilities, employment uses and the integrity of Employment Areas; b) encouraging the establishment of key clusters of economic activity with significant value-added employment and assessment; c) providing a high quality public realm with a connected, easily understood, comfortable and safe network of streets, parks and accessible open spaces; d) integrating the

of the Rexdale Employment Area, which means that Employment uses, such as manufacturing and warehousing are to be prioritized. This case illustrates that these two goals may come into conflict.

Nomenclature

The broadest description of the range of permissible uses for land in Toronto is contained in a property's "designation", and each designation is a colour on the City's Official Plan maps. For example, yellow is the colour for *Neighbourhoods*, dark purple for ***Core Employment Area*** and light purple for ***General Employment Area***. In this decision, when the word "Employment" is italicized, it refers to the Official Plan policy. Please see the Official Plan map in Figure 2.

Those viewing Figure 2 in black and white will unfortunately not be able to distinguish dark purple from red (*Mixed Use Area*) or dark green (*Natural Area*).



There are several light purple areas, mostly associated with Rexdale Blvd, the top white street slanting down from left to right. Although the Plan states that *Core Employment* is generally in the interior, and light purple *General Employment* on the periphery, I prefer to think of *Core* as the default position. Where a major arterial road transects a *Core*, the Plan recognizes these high visibility areas (e.g. Highway 27 auto showrooms) by colouring them light purple and labelling them *General Employment*

development into the public street network and systems of roads, sidewalks, walkways, bikeways and transit facilities, and establishing new segments where appropriate; e) mitigating the potential negative impacts from traffic generated by development within Employment Areas and adjacent areas; f) providing adequate parking and loading on-site; g) sharing driveways and parking areas wherever possible; h) avoiding parking between the public sidewalk and retail uses; i) mitigating the potential adverse effects of noise, vibration, air quality and/or odour on major facilities and/or other businesses as determined by noise, vibration, air quality and/or odour studies;. . .(partial list only)

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Area. As well as all *Core* uses, the *General Employment Area* permits restaurants, fitness centres and a fuller range of retail⁴.

“Employment Area” unitalicized, is used in both the Provincial Policy Statement and Growth Plan to be a term very similar to the Official Plan, italicized version.

Unfortunately, the Zoning By-law 569-2013 also uses the word “employment”. There are four employment zoning categories, of which only the two bolded ones concern us:

Employment Light Industrial Zone (EL);
Employment Industrial Zone (E), which permits a variety of industrial and commercial uses, including a Vehicle Depot⁵;

Employment Heavy Industrial Zone (EH) and

Employment Industrial Office Zone (EO), which permits employment uses (with a small e and unitalicized). It is here that we find “public parking”, which is the use that Skyway Park seeks to be permitted to do.

⁴ *General Employment Areas* are places for business and economic activities generally located on the peripheries of *Employment Areas*. In addition to all uses permitted in Policies 4.6.1 and 4.6.2, permitted uses in a *General Employment Area* also include restaurants and [Decision by L.P.A.T. not yet determined: all types of retail and] service uses.

⁵ In the E zone, the following uses are permitted: Ambulance Depot Animal Shelter Artist Studio Automated Banking Machine Bindery Building Supply Yards Carpenter's Shop Cold Storage Contractor's Establishment Custom Workshop Dry Cleaning or Laundry Plant Financial Institution Fire Hall Industrial Sales and Service Use Kennel Laboratory All Manufacturing Uses except: [16” heavy” uses], Office Park Performing Arts Studio Pet Services Police Station Printing Establishment Production Studio Public Works Yard Service Shop Software Development and Processing Warehouse Wholesaling Use

Conditional uses

Body Rub Service Cogeneration Energy Crematorium Drive Through Facility Eating Establishment Marihuana production facility Metal Factory involving Forging and Stamping Open Storage Public Utility Recovery Facility Recreation Use Renewable Energy Retail Service Retail Store Shipping Terminal Take-out Eating Establishment Transportation Use Vehicle Depot Vehicle Fuel Station Vehicle Repair Shop Vehicle Service Shop Vehicle Washing Establishment

Each zone comes with a list of permitted uses; these are further divided into those permitted unconditionally and those that are permitted subject to conditions, For example, “retail store” is permitted in Employment Industrial E” only if it is “associated with a permitted manufacturing use; separated from the permitted manufacturing use by a floor to ceiling wall and is capped at 20% of the interior floor area. The EO zone is further subdivided into two categories: “e” (generally, clean industry, such as a carpenter’s shop or bindery) and “o”, (office or office-like (such as software development, medical office).

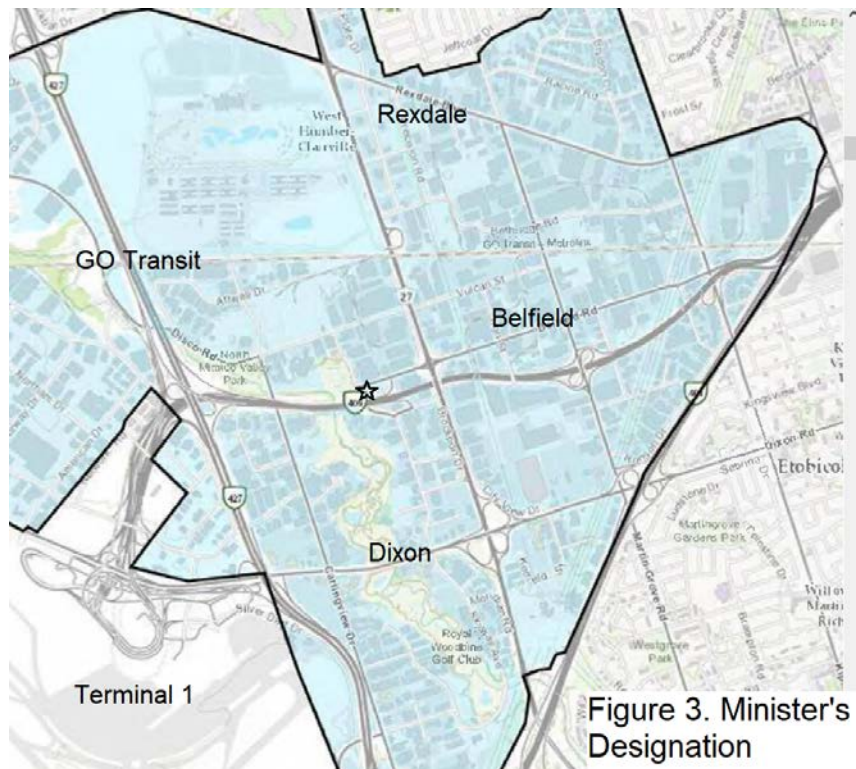
It is not the case that the *Core Employment Area* consists of exclusively Employment Industrial E zones, although Skyway Park’s parcel at 295 Belfield and Park ‘N Fly’s land on Dixon Rd have this designation and zoning. Park ‘N Fly’s public parking use was permitted under the former Etobicoke zoning and it has carried on this use continuously from the date of passage of current zoning in 2013. In the next section I will discuss Dixon Rd in more detail, but for this summary, I note both E and EO zones may be found in *Core Employment Areas*.

The use of “employment” in so many contexts can cause confusion: Mr. Rendl said, “Just because you have employees, doesn’t mean you are an Employment (Zone) use.”

We now return to the purposive analysis starting with how the Official Plan conforms to the Provincial Growth Plan.

2019 Growth Plan

S. 2.2.5.4 states surface parking is to be minimized.⁶ S. 2. 2.5.12 permits the Minister to designate provincially significant employment lands.⁷ Figure 3 shows the of



⁶ In planning for employment, surface parking will be minimized, and the development of *active transportation* networks and *transit-supportive* built form will be facilitated.

the provincially significant employment area — all the Rexdale Employment Area plus a corresponding area in Mississauga.

To repeat, complex policies have many purposes, goals and aims. Thus, it is not impossible for Mr. Sajecki to find some support for his position. For example, there are the following two propositions, the first from the PPS and the second from the Growth Plan:

1.3.2.3 Planning authorities shall **protect** employment areas in proximity to major goods movement facilities [e.g. Pearson] and corridors for employment uses that require those locations.

And from the Growth Plan:

2.2.5.5. Municipalities should designate and **preserve** lands within settlement areas located adjacent to or near major goods movement facilities and corridors, including major highway interchanges, as areas for manufacturing, warehousing and logistics, and appropriate associated uses and ancillary facilities. (my bold)

Both of those statements speak to the “protection” of the stock of *Employment Area* lands. The reason these lands are prized is their scarcity, lower purchase price and freedom from proximity to sensitive land uses. Both the Minister and Council intend to discourage users such as Skyway Park and, indeed Park ‘N Fly itself, (were it not legally nonconforming) from locating in Employment Industrial E lands.

Because the variance is not in the long-term economic interest of Toronto, I find it does not conform to the Growth Plan.

I now go on the four tests

The zoning intent

Number 295 Belfield is in a sea of Employment Industrial E zonings, whereas the much of the competition is located along the “hotel strip” on Dixon Rd, to the south of Belfield. Most of Dixon is zoned Employment Industrial Office EO⁸ permitting offices, along with hotels, places of worship, and health clubs, and other uses formerly permitted in pre-amalgamation days. The rationale is to limit traffic from those uses from

⁷ The minister may designate provincially significant employment zones and may provide specific direction for planning in those areas to be implemented through appropriate official plan policies and designations and economic development strategies.

⁸ The following conditional uses are permitted under the {“EO o] zone: Drive Through Facility, Eating Establishment ,Hotel, Outdoor Patio, Personal Service Shop, Place of Assembly, Place of Worship, **Public Parking**, Recreation Use, Retail Service, Retail Store ,Take-out Eating Establishment, Vehicle Fuel Station. (References to condition number omitted)

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interfering with traffic to and from manufacturing etc. Since public parking is not listed in Employment E, it is difficult to argue that a variance to permit a non-permitted use maintains the intent of the zoning by-law. Therefore, a purported variance would, at first glance, appear **not** meet the intent of the zoning bylaw. This is compounded by the fact that zoning is tightly emmeshed with the OP designations.

This conclusion is strengthened when we consider the jurisdiction-granting provision --: s. 34(1) of the *Planning Act*, which gives municipalities the power to pass zoning by-laws.

34 (1) Zoning by-laws may be passed by [Council]. . . For prohibiting the use of land, for or except for such purposes as may be set out in the by-law . . .

Accordingly, all zoning by-laws, including 569-2013, create a list of permitted uses such as in Footnote 4 on page 11. Any use not listed is prohibited; notably “public parking.”

In ascertaining intent, I must ask: “What is the zoning by-law trying to achieve?” Mr. Rendl gave me presentations from Malone Givens Parson report (the initial municipal comprehensive review for *Employment Areas*) which states that after Downtown, the Rexdale Employment Area is the largest in Toronto, both in terms of area and jobs. Thus, there is nothing advanced by Skyway Park, on whom the onus rests, that shows me that the intent of the zoning is to permit public parking in an Employment Industrial E zone.

Mr. Sajecki’s table of comparable properties.

Mr. Sajecki created a table showing 13 other properties, besides Skyway Park’s, that carry on the business of public parking to illustrate the existence of a “cluster” of airport parking lots in the *Core Employment Area*.

Table 2. Mr. Sajecki’s comparable <i>Core Employment Area</i> properties with my notes					
			Is public parking legal?	Explanation	My notes
1	295 Belfield Road	Skyway Park	No	E	Subject site
2	60 Skyway Avenue	Payless Toronto Airport Parking	✓	EO	
3	901 Dixon Road	Impark Parking	✓	EO	Marriott Hotel
4	933 Dixon Road	Park’N Fly	✓	E, but legal nonconforming	
5	626 Dixon Road	Park’N Fly	✓	EO	
6	950 Dixon Road	950 Dixon Road	✓	EO	

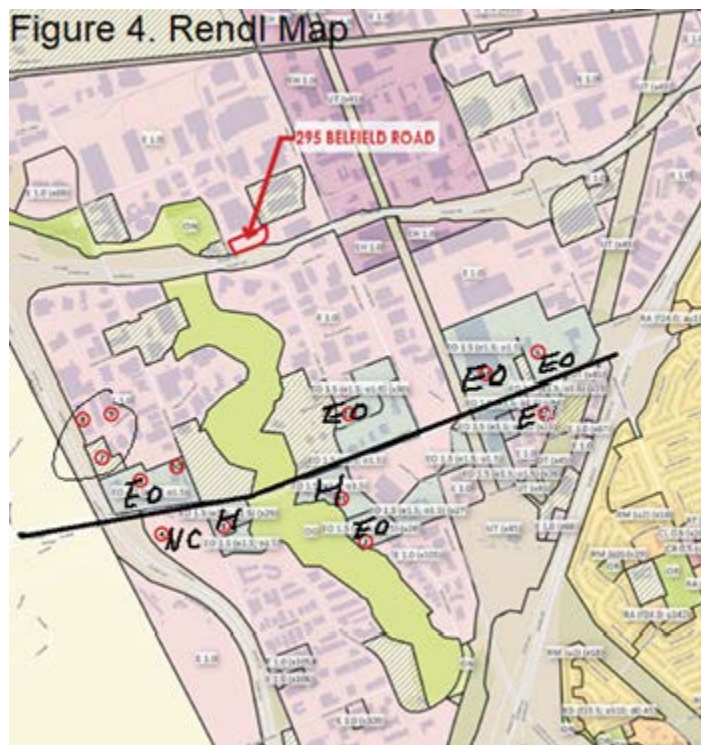
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		Parking			
7	31 Fasken Drive	Skypark		Not applicable	
8	50 Fasken Drive	Skypark	✓	E, but legal nonconforming	
9	30 Fasken Drive	Park for U	✓	E, but legal nonconforming	N/A
10	264 Carlingview Drive	Direct Flight Parking Carlingview	✓	Split zoned; partly EO	
11	801 Dixon Road	Impark Parking	✓	EO	Sheraton Hotel
12	10 Carlson Court	Impark Parking	✓	EO	Office with typical display of receipt parking
13	650 Dixon Road	650 Dixon Road Parking	✓	EO	Toronto Congress Centre parking lot
14	615 Dixon Road	Park2Sky	No	E	illegal

I reproduce Mr. Sajecki's list in Table 2 above, omitting Official Plan designations and Etobicoke zoning since they are all *Core Employment Area* and all had public parking permission under the former Etobicoke zoning. I bolded the two relevant E lots on Dixon. The Fasken properties (circled with a light line in Figure 4) are not material to this discussion because although they are Employment E zoned, they are typical factory buildings with public parking as an ancillary use.

Mr. Rendl displayed the list in Figure 4. The heavy bent line is Dixon Rd. I have manually marked his zoning labels to show them more clearly at this small scale. Recall that the zoning divides into:

- EO, which permits public parking; and
- E which does not.



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All but two of the properties are EO; the two E properties are at either end of Dixon: 933 Dixon Rd (Park 'N Fly) and 615 Dixon Rd (Park2Sky, which I will discuss at length in the next paragraphs) I labelled Park 'N Fly's land "NC" for "non-conforming", and Park2Sky's land as "E"

The rest of the properties are labelled EO except for the two hotels ("H"). For those that are familiar with this stretch of Dixon, the Marriott is on the west bank of Mimico Creek and the Sheraton on the east. South of the Sheraton is 60 Skyway, where Skyway Park originally operated; it too, is zoned EO.



Before and after photos of 615 Dixon are shown in Figure 5. This parcel is on the south side of Dixon, south of the Toronto Congress Centre and east of Kelfield Street (Kelfield industrial buildings can be seen to the left.)

This property is subject to a closing order that authorizes the police to bar entry.. I infer from the photos and evidence:

- In 2013, there was an apparently usable factory-style building being partially demolished;
- A manufacturing use was always permitted under the Employment Industrial E zone and likely preceded this demolition;
- In 2018, the lands appear to be used for public parking;
- On May 6, 2019 Justice of the Peace Carolyn Humeniuk pronounced a Closing Order noting convictions with May and November 2018 offence dates;
- The property was thus unavailable⁹ for a buyer seeking a site for a legal Employment Industrial E use from a period from before 2013 to 2019.

⁹ Mr. Rendl said that he has heard that parking lots in redeveloping areas in the downtown are sufficiently profitable that they inhibit reinvestment.

I find this shows that the market, left unregulated, will tend toward public parking in *Core*, which demonstrates the need to protect these lands.

It may also be seen that 615 Dixon is in the same stretch of Dixon as Park 'N Fly's. The passage of amendments in 2016 effectively downzoned Park 'N Fly's lands, and in order to protect its reduced level of planning permission, it requires, not unreasonably, that rules be adhered to. Before a variance is granted, it asks the decision maker to carefully consider the full range of applicable policies.

Ancillary and the issue of conversion

I now deal with two arguments raised by Mr. Sajecki and conclude with a counterargument by Mr. Rendl based on "conversion".

"Employment Area" is defined in the Provincial Policy Statement as "Areas designated in an official plan for clusters of business and economic activities including, but not limited to, manufacturing, warehousing, offices, and associated retail and **ancillary** facilities." The word "ancillary" provides the only exception to manufacturing and warehousing uses in *Core* and *General Employment Areas*.

Mr. Sajecki suggests that public parking is "ancillary" to Pearson, in the same general way that small scale shops are ancillary to the *Core Employment Area*.

I disagree and I believe very few people employed or doing business in the *Core* area would park at 295 Belfield; rather it serves those persons from a huge area in southern Ontario who come to the Airport. Attracting those people to this central *Core* location is inimical to the policies of the Official Plan. So, while this is "ancillary" to Pearson Airport, it is not ancillary to the *Core Employment Area*.

Mr. Sajecki continued that jobs are created, business taxes are paid, and a major facility is supported, which is true. The first two are true of any development in the City of Toronto. Moreover, and again being conscious of multiple perspectives in a complex planning document, the policies also speak of "**significant** value-added employment and assessment." As valuable as Skyway Park's workers are to their customers, this is not the focus of the *Employment Area*. Finally, while supporting Pearson, the development will not "preserve and protect employment uses and the **integrity** of *Employment Areas*". Balancing these competing interests, I find that the variance should not be considered ancillary and should not frustrate the Policies for all Employment Areas (4.6.6.) which is have both taxes, and significant value-added jobs and long-term preservation of Employment Areas.

I
I now move to the topic of "conversion", which is a legal change of permission *Employment* to non-*Employment*. Such a change might be at the zoning level:

from Employment Industrial to Residential, e.g. say, an eight storey condo; or

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from a condition to a zoning use; e.g. say a factory store that is larger than 20% of the premises.

Each case must be looked at on its merits and while the first is clearly a conversion, the second might not be. The *Employment Area* policies are fine-grained; but I am satisfied that this variance would amount to a conversion.

Conversion has severe consequences; it must be justified by a Municipal Comprehensive Review^{10, 11}: In Toronto, the last Review's terms of reference were adopted by Council in 2012, and the process is still ongoing, as we are still at the stage of site-specific appeals to the LPAT. In recognition of this burden on conversion seekers, the Province has put in place less onerous tests for most conversions, but not for lands within Provincially significant employment areas¹².

Thus, even if the change from "storage"¹³ to "public parking" is subtle, it represents a conversion, which underlines the seriousness of Provincial policy¹⁴, which seeks to preserve employment lands for the long term.

¹⁰ Provincial Policy Statement 1.3.2.2 Planning authorities may permit conversion of lands within employment areas to non-employment uses use through a comprehensive review only where it has been demonstrated that the land is not required for employment purposes over the long tern and there is an ed for the conversion.

¹¹ 15. In my opinion, the introduction of additional accessory or ancillary uses that are not otherwise permitted in a Core Employment Area should be considered a conversion of the Core Employment Area, even if the proposed land use designation is General Employment Areas. The distinction being that although the additional accessory or ancillary uses permitted in General Employment Areas provide a type of employment, they are not employment uses within the context of Core Employment Areas as defined by the Official Plan. Lands designated Core Employment Areas are intended to provide security of land use for employment area employment. A proposed conversion from Core Employment Areas to General Employment Areas could change the planned function and character of the Core Employment Area and have the potential to pose a risk to the planned function of any remaining Core Employment Areas lands in the vicinity. (Reply Witness Statement of Steven Dixon, MCIP, RPP, August 19, 2019, 10 QEW Inc. et. al., City of Toronto Official Plan Amendment No. 231, OMB Case No.: PL140860

¹²[The exemption in the first part of 2.2.5.10 does not apply when the land is] . . . part of an employment area identified as a provincially significant employment zone. (from 2.2.5 of the Growth Plan)

¹³The word ""storage is the fifth use in the list of permitted *Core Employment Areas* in the list that starts with manufacturing and ends with "vertical agriculture" in footnote 1 on page 5.

¹⁴ Given that Public Parking is not a permitted use within **Core Employment Areas**, it is my opinion that the introduction of Public Parking as a principal use on the Subject Lands constitutes a conversion under the terms of Minister-approved Policy 2.2.4.14. (Rendl Witness Statement, par 87)

Desirable for the appropriate development

What is the **appropriate** development of 395 Belfield? Surely one appropriate development is manufacturing, which is compliant with both the Official Plan and the zoning. Does a public parking use move the needle towards manufacturing? Clearly, it does not. I have explained that economic forces tend to remove employment lands from the market, and away from the appropriate use for manufacturing etc., and restricted ancillary uses, as defined by the Official Plan and zoning.

The basic purpose of the four tests themselves is to make minor and desirable adjustments for lands, that because of some anomaly do not fit the general situation. I find this to be **not** such an adjustment and the lands have a size, location and market context that make it desirable for users that **do** fit the Official Plan and zoning policies.

Fred Doucette

Each party submitted *Fred Doucette Holdings*¹⁵, whose facts greatly resemble those in this case. This case stands for the proposition that the Committee of Adjustment has the jurisdiction to allow a use that is not in the list of permitted uses.

Meats Galore was the successful party at the Committee of Adjustment. It obtained a variance to sell meat in a retail store in the industrial zone and sought to escape the following conditions:

1. Its store was not ancillary to a meat processing plant “on the same premises”; and
2. It occupied 100% of the leasehold. The bylaw contemplated that the store and the meat processing plant together would share one building with the store occupying no more than 50% of the premises. (Toronto’s analogous regime caps “factory stores” at 20%. (Please see page 8).

Its position was like Skyway Park’s here in this (Belfield) case. Fred Doucette was a franchisee of M & M Meat Shops and was the “appellant,” like Park ‘N Fly. Both Fred Doucette and Park ‘N Fly found themselves in the position of seeking to enforce City policy to ensure a level playing field.

Unlike this case, the “appellant” chose to seek Judicial Review instead of appealing to the OMB. The question for the Court was whether the Committee had the jurisdiction to allow a new use, to which the two-person majority answered “yes”. The Court then turned its mind to whether the Committee of Adjustment decision was

¹⁵1997 CanLII 16235 (ON SC), 1997 CarswellOnt 2765, [1997] O.J. No 6292, 32 O.R. (3d) 502, 40 M.P.L.R. (2d) 1, 71 A.C.W.S. (3d) 973

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correct, which usually includes ascertaining the standard of review. It concluded that there was little difference to a customer between shopping for meats sold from a “factory store” or from an ordinary retail outlet in a commercially zoned strip mall ¹⁶.

With the greatest respect to the majority panel, the analysis ought to have examined the Official Plan criteria. These underpin why retail in an industrial area is permitted only when “complementary” to the industrial use.

Justice Keenan, the dissenting member of the panel, stated:

M & M competes with Meats Galore. However, because of its location in an industrial strip mall Meats Galore pays lower taxes and a lower rental rate and thereby has a competitive and financial advantage over M & M.

Justice Keenan concluded that it was erroneous to infer an intent to change the general vocation of industrial areas if one considered the “complementary” policy:

There are no planning criteria, area characteristics, zoning amendments or economic considerations which would permit a finding that the general intent and purpose of [the Official Plan or zoning bylaw] are maintained. Rather, it is clear that the intended grafting of another non- permitted use onto the permitted ancillary use is a violation of the general intent and purpose of both the Official Plan and the by-law.

I find this decision remarkable for its prescience, since it predated the planning principles that are now in today’s Employment Area provisions of the *Planning Act*, Provincial Policy Statement and present -day Growth Plan (which includes the Region of Waterloo).

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Conclusion

The application does not conform to the Growth Plan nor to the policies of the Official Plan that seek to preserve employment lands by severely restricting what are “ancillary” to *Core Employment Areas*. A public parking use is not an appropriate use of 295 Belfield. Considering the conversion policies, the variance cannot be minor. The “grafting on of a non permitted use on the permitted ancillary use” (Justice Keenan’s words) is not within the intent of Zoning By-Law 569-2013. None of the four tests under the *Planning Act* is met.

ORDER

None of the requested variances in Table 1 is authorized.



T. Yao
Panel Chair, Toronto Local Appeal Body