Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, October 20, 2020

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): ABC RESIDENTS ASSOCIATION

Applicant: SULA KOGAN

Property Address/Description: 211 AVENUE RD

Committee of Adjustment Case File: 19 193381 STE 11 MV (A0786/19TEY)

TLAB Case File Number: 19 258730 S45 11 TLAB

Hearing date: Thursday, October 08, 2020

DECISION DELIVERED BY Ian James LORD

APPEARANCES

NAME	ROLE	REPRESENTATIVE
SULA KOGAN	Applicant	
ABC RESIDENTS ASSOCIATION	Appellant	ANDREW BIGGART
211 COFFEE HOUSE	Party	DAVID NELLIGAN
C/O SULA KOGAN		
TJ CIECIURA	Expert Witness	
FRANCO ROMANO	Expert Witness	
BEATRICE FANTONI	PARTICIPANT	
MARCI LIPMAN	PARTICIPANT	
MUNAZA CHAUDHRY	PARTICIPANT	

INTRODUCTION

This is an appeal from a decision of the Toronto and East York District of the City of Toronto's (City) Committee of Adjustment (COA). The appeal is in respect of the COA's approval of a single use variance to permit a restaurant, described as a 'coffee shop', in a portion of the semi-detached premises at 211 Avenue Road (subject property).

The Toronto Local Appeal Body (TLAB) convened an oral Hearing in respect of the appeal by ABC Residents Association (Appellant) on October 8, 2020. The Hearing lasted a full day and both the Applicant and Appellant were represented by counsel. Mr. Nelligan appeared on the Owner's behalf, substituting for Ms. E. Costello, who was not present.

Three witnesses were called: Mr. F. Romano, a Registered Professional Planner on behalf of the Applicant; Ms. Munaza Chaudhry, an area resident and Participant on her own behalf; and, Mr. T.J. Cieciura, a Registered Professional Planner, on behalf of the Appellant. No officer, director or other representative of the owner or residents association gave evidence and no other Participant was present.

At the outset, I expressed my appreciation to all attendees for respecting the rules and measures of the City Medical Officer of Health and the Public Health Unit designed to exercise precautions due to the COVID-19 pandemic. I also indicated that I had visited the site and read the materials thoroughly to help enable the Hearing to be completed in the day allocated, which it was.

Despite there being no preliminary matters, Mr. Biggart, rose to provide brief opening remarks to the effect that it would be the Appellant's position that the Tribunal has no jurisdiction to entertain the relief requested by the Applicant and initially granted by the COA. In his view, the single variance requested cannot be granted in law as the proposal is to permit a restaurant use whereas the zoning by-law prohibits 'restaurants'. He spoke in furtherance of informing the Chair of the direction of his position and his intention in argument.

Mr. Biggart was frank to acknowledge that he had not brought a Motion respecting jurisdiction and was consenting to the hearing of the evidence. This was on the premise that his client would advance both a jurisdictional argument and its foundation with the assistance of, at least, factual evidence, as well as opinion evidence rejecting the merits of the proposed use.

I am grateful to counsel that the matter was able to proceed on consent and on the basis that a determination need not be made on the appropriateness of a Motion or its substance, at the outset. The agreement facilitated a full presentation of the evidence and argument, inclusive of the support basis for the jurisdictional position. It is a compliment to both Parties that the decision on the proposed change of use should be

fully considered in a timely fashion without the need for a possible second hearing with associated costs and delay

BACKGROUND

The COA mailed its decision on November 26, 2019. The hearing of this appeal matter was originally scheduled to be heard on or about June 1, 2020. Due to the above noted COVID- 19 pandemic, constituting a crisis across Ontario, the TLAB suspended in person Hearings between March 16, 2020 and the end of its Suspension Period, on August 14, 2020. The scheduling of this matter and many others ensued.

As stated, the COA approved the variance to permit a restaurant (coffee shop) despite the fact that the applicable zoning by-law provides that no person may use the subject property for a “restaurant, take-out restaurant…” and other uses. The approval given was made subject to seven conditions articulated by the COA based, in part, upon a City Planning Staff Report dated November 14, 2019, arguably supporting conditional approval. The COA’s seven conditions, in the main, appear to constitute refinements to those suggested in the Planning Staff Report. While I am to have regard to the COA decision and materials before it, they are not determinative in the TLAB’s originating jurisdiction.

The Appellate appealed the COA decision in its entirety. Mr. Biggart noted having reiterated before the COA the early advice as to its position on jurisdiction as it affected the COA and now the TLAB.

MATTERS IN ISSUE

There are two matters for disposition:

1. whether there is a jurisdictional prohibition on the ability of the TLAB to consider the relief requested on the application under appeal; and

2. if jurisdiction exists, is the change in use sought by the Application justified on the merits, with or without conditions?

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area ('Growth Plan').

Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of 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.

EVIDENCE

The planners agreed on the site, its surroundings, the particulars of the description of the Application and that there were no substantive issues with it in respect of either the application of provincial policy or of the City Official Plan and secondary plan. Their respective Witness Statements, Ex.1 and 3, address these matters and extensive repetition on these aspects is not warranted.

Ms. Chaudhry did not specifically address any of these planning instruments. Her Participant's Statement was entered as Exhibit 5.

Mr. Romano addressed a comprehensive planning evaluation that asserted support for a confirmation of the proposed use, a specific revision to the COA conditions of approval and otherwise recommended a dismissal of the appeal. I recite noteworthy elements of his evidence and cross examination responses, below.

Ms. Chaudhry spoke next and included several elements of opposition to the proposed use, its implications and in support of the appeal.

Mr. Cieciura responsibly curtailed the content of his Witness Statement, Exhibit 3 and Document record Exhibit 4 a) and b), to address the evaluation of three tests each of which, he opined, warranted the appeal to be allowed, the variance refused and the matter of the Application remitted to a rezoning. I recite noteworthy elements of his evidence and cross examination responses in summary form, also below.

Mr. Romano provided as follows:

1. The subject site is the north one-half of a 21/2 storey semi-detached residential built form building located on the east side of Avenue Road mid-way between Davenport Road and Roxborough Drive West, in the Ramsden

Park area of the City. Its prior uses were said to have the vacant ground floor previously occupied for non-residential purposes including retail, art gallery and bakery. A single residential tenancy occupies space above the ground floor level.

2. There are no abutting residential zones despite a facing strip on Avenue Road of house form buildings; they and the subject property are designated 'Mixed Use'; a 50 foot wide naturalized entrance pathway abuts the subject property to the north while descending 7.7 meters as it enters Ramsden Park, a major public park extending easterly to Yonge Street; the Park contains passive and active recreational and 'dog park' facilities, is also abutting, to the east. The Avenue Road frontage is characterized by service commercial type uses at grade fronting onto Avenue Road, a Major Road in Official Plan terminology. Many house form buildings contain residential units above.
3. The proposed use is a small scale ground floor 'coffee shop' consisting of two components: 65 square meters of internal space with seating for 8-14 people and a seasonal outdoor deck of some 25 square meters of usable space capable of seating 10-12 people, within a 1.4 m fence and railing. Contrary to the definition in the zoning by-law of a 'restaurant, take-out facility', which he described as 'not a permitted use', the proposal has no kitchen or cooking facility for meal preparation and consists of a service counter and limited seating.
4. He cited several instances of restaurants existing and some approved by variance applications, including a 'coffee shop' in the vicinity, all as further detailed in his Witness Statement, Exhibit 1 at paras. 2.6 and 2.7.
5. From a Staff and City circulation perspective, he opined that the proposal fully conforms to Official Plan Downtown and Mixed Use policies addressing matters of growth direction, intensification of uses, built form and the development criteria for Mixed Use Areas. He noted that the Official Plan Site and Specific Area policy 211 (Bloor/Yorkville North Midtown Area) provided that development, in this instance adjacent Ramsden Park, required design considerations to address and to "adequately limit negative impacts on nearby residences with respect to, among other matters, noise, traffic, odours, intrusive illumination and the location and visibility of access and service areas." In the instant case, his opinion was that the small scale activity of the proposed use would not generate a need to study any of the listed concerns and no on-site parking is required or proposed.
6. The subject property is improved with a new permit approved and elevated deck which itself lies some 31 m from residential rears yards on Roxborough Street West, to the north, and some 70+ m from residences fronting on the south-side of Pears Avenue, to the south.
7. He noted applicable subject property zoning to be: Toronto Zoning By-laws 569-2013 and 438-86, such that the subject property has a mixed CR - Commercial Residential - a zoning that is subject to prevailing section 12(2)137 of Toronto Zoning By-law 438-86 –continuing a provision against

the use for ‘restaurant ‘ purposes. In his opinion, with no new construction, the proposal maintains the overall general intent and purpose of the zoning which, in his view, is to achieve an orderly, compatible form of residential, commercial or mixed residential-commercial uses up to a mid-rise height, mass, scale and intensity.

8. His evidence and Witness Statement, Exhibit 2, par. 5.6 expresses his opinion this way: ”The proposal maintains and utilizes the existing building and site features in a conventional physical form that is appropriately small scale and designed to fit in an orderly and compatible manner without unacceptable adverse impacts.” In oral evidence, he opined that the variance requested is to permit a ‘coffee shop’ whereas a ‘restaurant’ is not a permitted use. The general intent and purpose of the by-law, including the restriction, is to ensure that land uses proposed are appropriate for the property in a manner that protects nearby neighbourhood residences from inappropriate adverse impact.
9. While he acknowledged the historical and current intent of applicable zoning is to protect a defined area from uses that included incompatible ‘restaurant and take-out uses’, and that the proposed use, under the general ‘restaurant’ definition, enjoyed no ‘as-of-right’ permission, he expressed that a ‘coffee shop’ was not a ‘prohibited use’, a term he said was reserved for more decidedly obnoxious uses. His opinion advice was: “With respect to the individual variance being sought, the proposal satisfies the general intent and purpose to restrict the as-of-right introduction of the listed land uses in order to protect neighbourhood residences from inappropriate incompatible negative impacts. The introduction of the proposed small scale coffee shop in this instance represents an appropriate and compatible development along this major street. It minimizes negative impacts to an appropriate, compatible level thereby protecting neighbourhood residences reasonably.” Exhibit 2, para.5.7.
10. He noted that while a ‘coffee shop’ is not a defined term, it is a form of ‘eating establishment’, a term most closely associated with a ‘restaurant’ use.
11. In his view, the purpose of the variance power process is to deal with ‘nuances’ in zoning. He interpreted the by-law as providing a process for the determination whether the proposed use is appropriate and not as a prohibition.
12. On the tests of minor and desirable, he was emphatic that no unacceptable adverse impact measures could be attributed to the small scale use and an allowance would not create a precedent either in respect of the use of the variance power or the use itself, given his demonstrated summary table record of past approvals. He opined the use was desirable and fully in keeping with providing a community based service offering consistent with a complete community policy direction and other permitted use permissions in the City’s planning instruments and existing adjacent uses.

13. His concluding advice urged dismissal of the appeal in the main, but the inclusion of the COA identified Conditions of approval, varied to recognize and maintain a seasonal 'outdoor patio' as a permanent feature. It was his view that the small scale of the fenced patio feature mitigated against any noise or obtrusive contribution to the adjacent park uses and was an important, albeit seasonal, adjunct to the restricted use of the subject property- all adequately ensured by the Conditions otherwise expressed. He felt that to deny a 'coffee shop' an outdoor seating area, a customary feature of such uses, would be 'punitive'.
14. The revised conditions of variance approval recommended and accepted by the planner are attached as **APPENDIX A**, hereto.
15. In cross examination, Mr. Romano acknowledged the lengthy gestation and continuation of the restriction on 'restaurant uses' and that the same specifically did not apply to the building to the south. He described that the by-laws' intention, in part, is that the subject property could be used as-of-right as a 'restaurant'He confirmed there was no definition available for a 'coffee shop'; that the Zoning Examiner fitted the application into the 'basket of defined terms as a 'restaurant'; further, that it is this 'weakness' in the zoning by-law (to distinguish variations) that gave rise to the variance application. He also agreed the proposed use had no restrictive limitation on illumination and acknowledged that his client had not appealed the COA's allowance of a single season's use for the outdoor patio.
16. In re-examination, apart from the single season addressed by the COA, he felt the seasonal duration and hours of operation to be appropriate.

Ms. Chaudhry provided as follows:

1. Having lived on Pears Avenue for some 12 years, she expressed concern for types of land uses, especially restaurants and taverns with balconies or patios, that she has experienced from Davenport Road. She felt that it was justified that the City has supported a prohibition on restaurants, commencing with the Fishleigh by-law that has been carried forward to date. In her experience, a City noise control by-law and policing is ineffectual to maintain a quiet, residential neighbourhood. She was apprehensive of the "cumulative effect of a 'coffee shop' being added to what is there now."

2. She noted that Ramsden Park, after a recent four-million-dollar study and upgrade, maintained a quiet, area resident, pedestrian friendly facility that did not provide park benches for surreptitious surveillance of residences by non-local users. She felt a 'restaurant use' introduced on the park would be an anomaly and facilitate undesirable interference with the tranquility and safety of park users and adjacent residences.

3. She expressed generalized concerns with 'eating establishments' and accessory 'outdoor patios' in this neighbourhood, as including the negative impacts of noise (amplified by topography), pest infestation, waste management, food odours and parking nuisances.

4. She advised of the neighbourhood support in opposition for this application; in particular, she expressed a differentiation between the views of those who reside in the neighbourhood versus those who work in the neighbourhood and differences in impacts that would be experienced by both.

5. She expressed concern that an approval would apply to the whole of the subject property and mean that the quality of the park would be eroded and a precedent set for full-scale restaurants to be permitted. She lamented: "who has the time and energy to fight every single one of these things?"

6. In her opinion, the application does not meet the intent nor the purpose of the zoning by-law and that it is not a minor variance and should not be approved.

Mr. Cieciura provided as follows:

1. The current proposal is to permit a 'restaurant' on the property. A restaurant is listed within the applicable Zoning By-law as a use that is expressly not permitted. He felt the very clear intent of the by-law is not to permit a restaurant use on the subject property.
2. There is no real issue with the proposal meeting the general intent and purpose of the Official Plan and SASP.
3. The proposal is for a 'restaurant' as considered by Staff, as expressed in the COA decision and is the most accurately defined use in the Zoning bylaw, there being no definition of a 'coffee shop'.
4. The by-law states that a 'restaurant' specifically is not a permitted use on this property. In his opinion the general intent and purpose of the Zoning by-law is not maintained in this proposal. Namely, that a request to permit a use that is expressly "prohibited" cannot maintain the general intent and purpose of the by-law; that "polar opposites cannot occur through a variance." He restated that the expressed intent and purpose of the by-law is to not permit a restaurant use on this site. If the use is expressly listed as not permitted, then permitting that use cannot be interpreted to meet the general purpose and intent of the zoning. Therefore, it is his opinion that the variance for the use proposed does not meet the general purpose and intent of the Zoning by-law and the application fails this test under section 45(1) of the Planning Act. In his view, the Application should proceed, if at all, through a rezoning application, a more 'robust' process permitting a .fulsome review that can include studies'. (Evidence and Witness Statement, Exhibit 4, para.15.1-4).
5. On the test of minor, the planner restates the point expressed above: a minor variance to permit a 'restaurant' that is listed as a use that is not permitted cannot be considered minor. The potential negative effect that a' restaurant' will have on the abutting community park and nearby residences, in terms of noise, garbage, pollution, etc. makes this application NOT minor in nature. He repeated: "granting permission to permit a use that is expressly prohibited

cannot be a “minor variance”.” A change in the Zoning By-law to permit a use that is expressly ‘prohibited’ is a significant (major) change to the land use permissions upon the site and should occur only by way of a rezoning application under section 34 of the Planning Act.(Evidence and Witness Statement, Exhibit 4, para. 16).

6. On the test of ‘desirable’, the planner uses the same support rationale and foundation: “It has already been determined that the use is not desirable for the appropriate development of the site as evidenced by the in-force Zoning by-law, and the planning advice and opinion is that only through a completed Rezoning application can it be determined if a change in land use -to permit a prohibited use – is desirable and appropriate.” Given this, he states that because the use is expressly prohibited, he cannot say that the proposed use is “desirable for the appropriate development or use of the site.” (Evidence and Witness Statement, Exhibit 4, para. 17).
7. In cross examination, Mr. Cieciura acknowledged he had not done any study evidencing incompatibility arising from a ‘coffee shop’ use. He agreed that the restriction on ‘restaurant’ uses was a ‘means to an end’ to avoid the expectation of problems of nuisances: traffic; impacts; people. He did not think the proposed conditions permitted the application to ‘pass’ the test of minor, respecting impact, despite the absence of studies.

In argument, counsel referenced case law, cited below, to frame their polar opposite positions.

To Mr. Nelligan, a variance application is an empirical process to be determined in the light of the facts of the case. The zoning by-law is a ‘means to an end’, to protect from negative impacts. In this case, in his view, the Fishleigh By-law restraint on ‘restaurants’ continues to do its job by requiring an extra level of scrutiny into a proposed local service function, via the variance tests. .

To Mr. Biggart, there is no choice: the use variance sought is prohibited and the only vehicle available to change the by-law is an amendment under section 34 of the Planning Act, with its own tests. He submitted that the planning evidence is irrelevant: a use cannot be changed by minor variance as a prohibited use will fail every time on the test of meeting the intent and purpose of the zoning by-law.

For the Tribunal to try to do so is a ‘recipe for disaster’, “even with the use of conditions”; “it is wrong and dangerous; the tribunal cannot do it.”

Mr. Nelligan responded by urging the Tribunal to “look at the general intent and purpose of the zoning by-law, not the words of the by-law.”

I am grateful to counsel for their succinct framing of this issue.

ANALYSIS, FINDINGS, REASONS

1. Jurisdiction

In his opening and closing remarks, Mr. Biggart indicated that ABC's position on the issue of jurisdiction was independent and did not depend upon the opinion evidence provided by the planners. He stated that the question of the jurisdiction in the TLAB to entertain the use change raised by the application is a matter of law, not dependent upon planning opinions.

With this submission I agree. Though not specifically cited by the Appellant, there is ample authority for the proposition that the interpretation of planning instruments, both official plans and zoning by-laws, is a question of law. I am also confident that there is ample authority for jurisdiction in the TLAB to make preliminary determinations of law, where necessary, in the interests of permitting the administrative appeal process to advance.

Curiously, the Appellant, while raising the issue of jurisdiction before the COA, did not do so in its appeal letter to the TLAB of December 6, 2019. As well, throughout, the Appellant made little or no reference to the provisions of the statute other than reliance on the wording of certain of the 'four tests', above recited under 'Jurisdiction'

The jurisdictional challenge is an impediment to considering the matter and is fundamental. It is therefore necessary to address the first issue: jurisdiction.

In his closing argument with supporting case authority, Mr. Biggart put the jurisdictional position very clearly using the language just excerpted above and somewhat paraphrased.

On the other hand and with precedents supplied, Mr. Nelligan asserted jurisdiction for the Application; he simply requested the TLAB to ask itself, on the issue of whether there is jurisdiction to allow a 'prohibited' use, to examine the test as to whether the proposed use meets the "general intent and purpose," in this case, principally, of the zoning by-law. Where that test is accepted, it is then for the Tribunal to consider the evidence and reach a decision on all applicable considerations.

With respect to applicable jurisprudence, I am asked by both counsel to apply case authorities which support their respective positions on opposite sides of the jurisdictional argument.

I have read the authorities supplied by counsel and find them to be helpful but not determinative:

For the Appellant:

1. *City of Toronto v. Truprop Ltd.*32 O.M.B.R. 490 (J.R. Mills, Member) August 23, 1995 (*Truprop)*.

2. *Vincent et.al v. DeGasperis et. al.* Court File: Toronto 775/03&777/03 (Div Ct) per Matlow, J., 20050708 (*DeGasperis*).
3. *City of Toronto v. Romlek Enterprises et. al*. 62 O.M.B.R. 129 (Div.Ct.) per Swinton, J., 20090525 (*Romlek*).

And for the Applicant:

McNamara Corp. v. Colekin Investments Ltd. 15 O.R. (2d) 718 (Div. Ct.) per Robins, J., 19770419 (*McNamara).*

Toronto Standard Condominium Corp. No. 1517 v. Toronto (City) 54 O.M.B.R. 102 (S.W.Lee, V-Chair) June 21, 2006 (*TSCC 1517*).

Holt v. Wilmot (Township) 40 O.M.B.R. 122 (D. Perlin, Member) January 13, 2000 (*Holt).*

With respect to the application of the three cases provided by Mr. Nelligan, I agree with Mr. Biggart that they relate to variances requested from performance standards or regulations under zoning. In the matter before me, the jurisdictional prohibition is rooted in the ability to authorize a change of 'use' in the provisions of the zoning by-law and, as well, the ability and jurisdiction to meet the statutory tests in a circumstance where the very use sought is argued to be a listed use that is specifically not permitted on the subject property. Mr. Nelligan's authorities are distinguishable as they do not relate to examples of a change of use as is before me in this circumstance. That is not to say, however, that the language, reasoning or interpretive sentiment expressed in those decisions may not have analogous application in the different context of a change of use; however, these cases do no address the aspect of use.

For his part, Mr. Biggert submitted the above listed Appellant's cases addressing use and the statutory power (*DeGasperis*).

The first, *Truprop* is a decision by Member Mills then of the Ontario Municipal Board on a Motion. He found that a requested permission for an identical use that was expressly prohibited in the zoning by-law (a "commercial parking lot") could not be entertained in those circumstances. The decision equates the application and the prohibition as the same defined use, a somewhat different circumstance than is proposed by the refinement and scale (Mr. Cieciura's 'lower spectrum of development') of the substantive use before me. Mr. Mills raised the question of how a request to allow a prohibited use can be "consistent with the intent and purpose of By-law 438-86 when the use is prohibited?" In finding in favour of the Motion, he also stated parenthetically that "new uses cannot be created."

The second, *DeGasperis*, through Justice Malloy, establishes that planning tribunals are to apply the rigours of the Planning Act and consider all four identified tests rather than reducing an application on appeal to some perception or measure of "impact". It confirms, as a matter of jurisdiction, that relief under section 45(1) of that Act "is permissive and confers…a residual discretion as to whether or not (to) grant

(variances) even when the four tests are satisfied" (p. 6). In *DeGasperis,* the question of the application of the test respecting zoning was not addressed in the tribunals decision and such omission was found wanting. There is no finding as to jurisdiction in respect of the application of that test to a 'prohibited' use in the circumstance before the court.

In *Romlek,* the court grappled with an appeal of the tribunal's decision to permit a retirement residence as a permitted use in a building wherein the zoning by-law permitted highway commercial and place of work uses. The court found that the tribunal failed to give proper consideration to the test of the general intent and purpose of the zoning by-law. Further, that it came to an unreasonable interpretation and decision, *inter alia,* in analogizing a retirement residential use to a 'hotel' or 'motel', permitted uses, when the by-law allowed no residential uses.

The court also found, at paragraph 41: "This is not a case where a type of use has arisen not previously contemplated and for which some categorization needs to be found." This latter comment may be a harbinger of Mr. Romano's comments on the relatively recent phenomenon, in Ontario, of limited scope 'coffee shop' establishments.

I cannot find in any of the cases cited by the Appellant a definitive binding principle of law that there is no jurisdiction in the COA, or on appeal, to permit a use under the variance power even in the circumstance where the use, or a general definition of the use is expressly not permitted.

Rather, I find the jurisprudence sensitive to the COA (and appellate tribunal) dealing with a use that is not permitted, with an insistence on the consideration of all applicable tests on relevant considerations and an application of the doctrine of reasonableness.

I am, of course, not bound to follow or apply the Appellant's submissions on *Truprop* of the decision of an equal and parallel tribunal. However, it is to be afforded deference and consideration. I am bound to follow judicial jurisprudence where it is applicable to the facts and legal circumstances.

I do not find in any of the case authorities presented a clear statement that a planning tribunal, whether the COA or the TLAB, is without jurisdiction <u>to consider</u> a request for a change in use or in the special circumstances where the use requested, in part of whole, is 'prohibited' by existing zoning.

Rather, I find the referenced jurisprudence directory as to relevant considerations; namely, the language of the enabling legislation in all its aspects as to its scope, and the judicial emphasis to address each of the four statutory tests, applicable policy and reasonableness in the decision. It should also be said that the TLAB should be mindful that it is not the elected Council and should be wary of requests to assume its functions. The prior decisions of previous Councils must be regarded in that context.

In my view, the issue of jurisdiction starts with the wording of the enabling legislation. In that regard, section 45(1) reads as follows:

> **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.* R.S.O. 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1); 2009, c. 33, Sched. 21, s. 10 (11) (Emphasis added)

In my view and interpretation the underlined words are revealing. First, they vest in the COA in first instance jurisdiction to deal with applications to grant a variance to the use of the land, building or structure. Second, the qualification on such jurisdiction is the requirement that in the mind of the COA, the decision must satisfy the four statutory tests so often recited. Third, it is the general intent and purpose of the Official Plan and zoning by-law which is the aspect that must be addressed, not the higher standard of "conformity' often seen in planning legislation.

There is nothing in this enabling legislation that subordinates this jurisdiction to language that may be present from time to time in a municipal document, such as an official plan or zoning by-law. I was not directed to any other provincial enabling legislation that circumscribes the jurisdiction of the COA, in first instance, in the exercise of its power.

In my view, the COA is entitled to deal with a use request applicable to land, a building or a structure. Of course, this is not a license to usurp the role of council as the legislative body responsible for zoning permissions as that can invoke the oversight of judicial 'reasonableness', as demonstrated in *Romlek.* Short of that, I find jurisdiction in the COA, and TLAB on appeal, to address applications with respect to the use of land within the context of the variance power.

Similarly, there is nothing in the enabling legislation that supports a limitation or jurisdictional prohibition on considering a use request even where that use in general or specific terms is 'prohibited' under the zoning extant. The effect of that 'prohibition', if any, heightens the awareness of the exercise of the power in the application of the relevant tests, but it does not, in my view, displace the power of application or its consideration. To suggest that the zoning by-law language can remove the jurisdiction of the COA to consider an application reverses the statutory scheme and places the 'cart before the horse', to borrow Mr. Biggart's analogy.

In my view, the circumstance here is analogous to the decisions in *McNamara, TSCC* and *Holt* in the case of the scope of variances to regulations.

Here, the COA and the TLAB, in my view, are entitled to deal with the use sought and that use request is required to survive an assessment of all relevant considerations

and be reasonable, including the consideration of the “general intent and purpose“ of the zoning bylaw.

There is nothing in the *Truprop* decision by Mr. Mills that addresses the scope of the statutory language. He was also not dealing with something that was described as being characteristically different than the restricted use. If his decision were to be read to conclude that the COA has no jurisdiction to deal with applications for the change in use of the land, building or structure, I must respectfully disagree. If in the circumstances before him, he had found a use to be inappropriate on a hearing into the merits, then I could have no comment. I acknowledge this was not the case. To the extent that his decision can be read to find no jurisdiction to address a request for a change in use or in the face of a ‘prohibition’ as a matter absolute, I respectfully disagree for the reasons expressed.

It is of course by virtue of section 45(18) that the TLAB stands in exactly the same shoes as the COA.

I find on the first issue that there is jurisdiction in the TLAB to consider the Application on appeal and that it is appropriate to proceed to consider all the evidence on the merits and demerits of the appeal.

2. Application Considerations.

Having found no jurisdictional impediment to entertaining the application on appeal to permit a use generally or expressly not permitted, there remains the obligation to consider and apply the public interest represented in the policy and statutory tests applicable.

I find that there is no issue with the application of public policy expressed in the applicable current Provincial Policy Statements and Growth Plan for the Greater Golden Horseshoe. The planners are in agreement on consistency and conformity, respectively. At the level of abstraction of these documents, I agree.

In this regard, I simply relate a description stated by Member Lanthier in a recent decision of the Local Planning Appeal Tribunal, *Pillon v. Sabolik* (PL190504) released September 09, 2020, at paragraph 76:

> “It is first important to recognize that a minor variance appeal, unlike other planning appeals, is often more limited in its scope and issues. Appeals relating to planning matters such as amendments to official plans, zoning by-laws, plans of subdivision will often bring into play more complex and multiple planning concerns relating to the PPS, applicable growth plans, multiple official plans and secondary plans, urban design and a myriad of contested issues requiring analysis and opinion in order to determine whether the approval of such instruments for development represent good planning in the public interest. In contrast, the issues relating to minor variance appeals, as identified above, are precisely focused upon the four tests, and higher order provincial policies often

do not come into play in the evidence. The requirement that the variance maintain the general intent and purpose of the official plan is recognized as a less rigorous benchmark than conformity with the official plan."

This quotation is not read by me to say that variance matters are any less challenging in their dispute resolution obligations. Rather, in that they deal more directly with immediate relationships within neighbourhoods and between neighbours in a direct sense, and in this Member's experience their resolution can be equally or even more engaged in evidentiary submissions than more abstract application instruments.

I accept from the agreement of the planners that there is no Official Plan policy that prevents this application on appeal from meeting the general intent and purpose of the City Official Plan. The subject property is designated Mixed Use and the category of uses include a 'restaurant', however defined. The planners are in agreement that the proposed use, a 'coffee shop' at the scale set by the Conditions, if adopted, will not generate unacceptable adverse impacts measured on issues of noise, odour, vermin, parking, access or deliveries. Although under its terms, no approvals are to be given that do not conform to the policies of the Official Plan, this is not a case where the proposed use, whether called a 'coffee shop' or a 'restaurant', is a use that is not permitted by the Official Plan. It is a permitted use under policy intent and there are no detracting policies to the contrary. I agree with the planners' consensus that the general intent and purpose of the Official Plan would be met by the proposed scale of the use in the Mixed Use designation.

Counsel for the Appellant sought to categorize the zoning bylaw as 'prohibiting' the use of a 'restaurant' on the subject property. Mr. Cieciura used the term of description as a 'prohibition'. Mr. Romano preferred to stick with the language of the zoning instruments as specifically naming a 'restaurant' as "not a permitted use." In his vernacular, the use of a 'restaurant (coffee shop)' "is not a use permitted as-of-right."

I do not think much turns on the distinction. The *Planning Act* permits the councils of local municipalities to pass zoning bylaws prescribing the use of land "for or except for" such purposes as are set out in the zoning instrument. At least once court has expressed the interpretation that the scope of the power does not extend to absolute 'prohibition'; namely, that there must always be some use to which privately owned property may be put (*R. v. Schatz,* circa 1959*)*. Instances where the legislature has sanctioned absolute prohibition under zoning can be readily found in those parts of the zoning power, section 34, dealing with the protection of environmentally sensitive or hazard lands.

For the purposes of this appeal, it is only necessary to accept, as all the planners did, that a 'restaurant, take out restaurant…" is not a permitted use on the subject property, as well as on those nearly over a discreet and localized geographic area.

I am urged to find that a 'coffee shop' is a restaurant, there being no other applicable defined term used under applicable zoning. Even if that were true, the request is tantamount to asking me to turn a blind eye to considering any differentiating

characteristics proposed that make a ‘coffee shop’ something different than a ‘restaurant’.

The applicable lineage follows as recited by Mr. Cieciura:

> “The property was zoned under former City of Toronto Zoning By-law 438-86 until 2013 when the City passed zoning by-law 569-2013. However, exception 1507 under 569-2013 states that section 12(2).137 is still applicable to this site. Section 12(2).137 states that no person shall, within an area shown delineated by a heavy line on the maps below, use land or erect or use a building or structure for the purpose of a restaurant, or a take-out restaurant or a caterer’s shop, a billiard or pool room, a club, a delicatessen or a place of amusement.” (Witness Statement, Exhibit 4, para. 11.4)

‘Restaurant’ includes a kitchen for the cooking and preparation of meals.

I agree with the evidence of Mr. Romano that what is sought by the variance requested and refined by Conditions is different than a ‘restaurant’ defined under City zoning. I do agree, that for the purposes of categorization, a ‘coffee shop’ fits under the rubric ‘restaurant’ as defined if there were nothing further; however, a ‘coffee shop’, limited by the Conditions does not fit the essential characteristic naturally and normally associated with ‘restaurant’ in common parlance or as described under City zoning. This is a distinction constituting a meaningful difference in terms of use.

I have some doubt with Mr. Romano’s suggestion that a ‘coffee shop’ is an entity that is new to the world in Ontario; however, I do accept that the passage of time has seen the distinct evolution of uses involving increasingly more definitive terms for service offerings once more generally described and commonly perceived. For example, ‘automotive service stations’ have evolved to be defined as ‘repair garages’, ‘gas stations’, ‘retail gasoline service stations’, ‘convenience gasoline service stations’ and ‘gas bars’, amongst others. Their use characteristics change.

I find that the opinions expressed that would confine the scope of the variance power to the definition used for a ‘restaurant’ in the applicable zoning bylaw is to ask the approving authority to turn a blind eye to relevant considerations. Namely, the actual use proposed, the real use, the use possessing an individuality of its own: is it a ‘restaurant’, or something different?

I am of the view that an establishment that does not have a kitchen, that does not prepare and cook meals and that does not serve in-house prepared food to tables is something different than a ‘restaurant’; it is perhaps not something more depending on scale but it certainly can be something appreciably less, as advanced here.

I accept the opinion evidence of both planners that from a policy perspective, there is no challenge to the fact that a ‘coffee shop’ does not have the attributed concerns for cooking odours, waste, garbage removal, servicing and vermin. These are relevant considerations in the lineage attributed to the use restriction applicable to the

subject property. No case has been made out of any issue with these factors applicable to the subject property. Both Ms. Chaudhry and Mr. Cieciura alluded to the "possibility" of these complaints, but offered nothing beyond the verbiage of apprehensions. Neither disagreed with Mr. Romano's opinion that the proposed use of the subject property would not create an undue adverse impact from any of these listed topics.

Similarly, while noise generation could be a legitimate issue, again, nothing beyond apprehension was raised. Here, a raised deck enclosed by solid board fencing limited in the season of use and hours of operation (patio) with seating for a very limited capacity cannot be expected to be a significant noise generator, especially given the proximity of Avenue Road and the well utilized dog park (with longer hours of availability), in the near vicinity.

I find on this evidence that a 'coffee shop', limited by the proposed Conditions as to scale and activities, does constitute a use distinction worthy of being weighed as to whether a change of use application should be considered.

I do not accept the circular planning opinion advanced by Mr. Cieciura that a general use, a defined use 'restaurant', that is specifically not permitted by zoning means that any use however analogous to a 'restaurant' use, can never survive the test of meeting the 'general intent and purpose of the zoning by-law, never be 'minor' and never be 'desirable'. To so find closes the planner's eyes, mind, and perception to the scope of the variance power and to considering and defining of the use. To fail to examine the application for distinctions, if any, can fail to consider and address change and evolution, to consider the meaning and application of the word 'general' in its association with the by-law as well as the use, and amount to a failure to entertain distinctions intended by the legislature as to the purpose and the application of the four separate 'tests'.

In my view, there is a duty to look and weigh substance over definition, fact over form and creativity over stasis.

I find that to support an interpretation that the language of a restriction in zoning can categorically limit and oust the scope of the COA and this appellate body to address applications and independently assess the statutory tests, is simply not supportable.

On the tests of 'minor' or 'desirable', the Appellant's planner abandoned the measures commonly applied and reverted to a wrote appreciation and determination that the larger definition of 'restaurant' applied and constituted a "prohibition" on all forms of delivering the food service industry. Respectfully, this is a self-imposed misdirection.

I prefer the evidence of Mr. Romano, that a 'coffee shop' is something different and less obtrusive than a 'restaurant' as defined in Section 2, Definitions (i) to (v), inclusive in Zoning Bylaw 438-86, as amended by Bylaw 1197-2019. I accept his opinion that a limited 'coffee shop' outlet at this location is an ascertainable and distinct use that can provide a community service offering consistent with this Mixed Use district

and CR zone that does not detract from the public interest in any measured or attributable way.

Ms. Chaudhry raised the often expressed concern for precedent; namely, that an approval here can lead to a proliferation of all manner of applications of similar or related uses. There is no evidence to support that concern, as legitimate and genuine as it may be held. There is a record of past applications and a limited presence of 'eating establishments' despite an area restriction on those as a permitted use. The subject property is on a major street, has a service commercial history, a restricted floor space and use offering, a unique location opposite a significant entrance to a major public park and it is well sheltered from residential uses. Its distinctions are many; I can attribute little weight to an apprehension of an adverse precedent in such circumstances.

I find the use proposed is a reasonable and responsible employment of available space in a manner and subject to restrictions that are in the public interest.

Turning to the element of the outdoor deck and seasonal 'outdoor patio' as proposed, I also find in favour of the application tempered by the Conditions, as proposed to be varied by Mr. Romano and the TLAB, **APPENDIX A.**

I find that the limited seasonality of the use of the existing patio space under restricted hours of operation is an appropriate accessory space incidental to the permitted use. I will direct and further modify the Conditions that the access stairway to the upper level exterior of the building be signed and cordoned off to protect against unauthorized access and that any patio lighting be directed onto the deck floor, so as not to extend beyond the footprint of the existing deck.

I am satisfied that, cumulatively, the limited space on the deck, its surrounding fence and railing, the noise Condition, seasonality and hours of operation together with the expected respect for community interests are all sufficient and practical constraints so as to curtail any offsite impact. I find that there is no prospect, from the location of this deck, for unwanted surveillance of properties on Pears Avenue.

I find that a 'coffee shop', so circumscribed, is an appropriate and compatible use of the subject property. Further, that the use constitutes a constrained limitation on a 'restaurant' use that is in general conformity with the intent and purpose of the Official Plan. I find that the restricted ambit of the use, demonstrably distinguished from a 'restaurant' defined to include the making and cooking of meals, is a suitable and lesser variance that falls within the ambit of service commercial uses contemplated in the general intent and purpose of the CR zone.

I accept the evidence of Mr. Romano that the variance to permit the use of a restrained and narrowly defined 'coffee shop' is minor both in terms of importance and neighbourhood impact. I find the proposed use to be a local community personal service use in the nature of the personal service offerings such as the Hair Salon, in the immediate south one-half of the same building. These latter elements are encouraged

by both the applicable Official Plan designation and the zone category permissions. I find the Application to be justified on its merits.

I accept that the concern expressed by Ms. Chaudhry that the use not be permitted to spread throughout the subject property and into the attached semi-detached premises is valid. This is adequately controlled by the size limiting Condition proposed.

If necessary, I would find that this 'coffee shop' selling hot/cold beverages and foodstuffs that are not made or cooked on site and so further defined by the restrictive Conditions, **APPENDIX A,** is not a 'restaurant' as defined in the City zoning by-laws.

I find this is not a case of usurping Council's jurisdiction; the Application is for a distinct and lesser use than that addressed in zoning. There is no requirement in law or from weighing the evidence that its consideration be addressed exclusively through a rezoning application.

DECISION AND ORDER

The appeal is allowed in part; a variance to permit a 'coffee shop', being a retail outlet for the sale, on and off-site, of hot/cold non-alcoholic beverages and including foodstuffs that are not made or cooked on site, is allowed as a permitted use at 211 Avenue Road, subject to the Conditions attached as **APPENDIX A** hereto.

APPENDIX A: Conditions

This decision is subject to the following condition(s):

(1) The coffee shop shall be limited to the ground floor of the building and shall not occupy more than 65 m^2 of floor area.

(2) An outdoor patio limited to a usable deck area of 25 square meters, may operate seasonably in conjunction with the coffee shop use, commencing on May 1, and ending October 31 in any year, and only during the hours of 8:00 a.m. to 8:00 p.m., weekdays and weekends. Access to the fire stairs landing on the outdoor patio shall be signed as 'Access Restricted - Private', or similar, and any exterior lighting serving the outdoor patio shall be directed onto the deck floor so as not to extend beyond the footprint of the existing outdoor patio deck.

(3) No music, artificial or amplified sound shall be played on, or be projected into the rear outdoor patio area.

(4) Garbage and waste material generated by the coffee shop shall be stored indoors, until the designated time for pick up by a waste collector.

(5) Other uses and attributes associated with a "restaurant" as defined and found in Section 2 Definitions (i) to (v) inclusive, in Zoning By-law 438-86, as amended by By-law 1197-2019, are not permitted to operate on/from the subject property.

(6) No cooking facilities shall be permitted in conjunction with the coffee shop on the subject property.

(7) The building permit plans shall clearly note the aforementioned conditions of approval (1) through (6)

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord