

## DECISION AND ORDER

**Decision Issue Date** Tuesday, March 09, 2021

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): Elizabeth Geleff

Applicant(s): Fogler Rubinoff LLP

Property Address/Description: 4804-4812 Yonge St

Committee of Adjustment File

Number(s): 19 259484 NNY 18 MV (A0769/19NY)

**TLAB Case File Number(s): 20 124798 S45 18 TLAB**

**DECISION DELIVERED BY TED YAO**

**Hearing Dates:** Oct 30, Dec 11, 15, 2020, Jan 13, 2021 plus later written submissions

### APPEARANCES

4804/12 HRDOV Yonge Realty Ltd. (Stephen Ruse, Shmuel Zimmerman)	Owner of 4804 - 4812 Yonge St	Joel Farber, Max Reedijk, (Fogler Rubinoff LLP)
--	-------------------------------	---

Tony Volpentesta	Expert witness
------------------	----------------

2070649 Ontario Inc. (Elizabeth Geleff)	Appellant; owner of 4822-24-26-28 Yonge St, 1 and 3 Harlandale Ave	Christel Higgs, Jessica Karban (M & H LLP)
---	--	--

Mark Hall	Expert Witness
-----------	----------------

Michael Tedesco	Expert Witness
-----------------	----------------

HRDOV seeks a single variance: to use a portion of its building for a bank. It is subject to a circa 1992 zoning bylaw that states:

Provided that the use of the **first floor along Yonge Street** shall be restricted to restaurants, retail stores, personal service shops [e.g., barbershops, hairdressers etc. . . . a list of 9 uses in all]

This list does not include banks. The Committee of Adjustment granted the variance on February 20, 2020. Numbered company 2070649 Ontario Inc., owner of the building to the north, appealed and so this matter came to the TLAB. In this decision, I will refer to the owner of the subject property as “HRDOV” and the Appellant as “2070649”. Figure 1, below, shows the subject building.



## Background

The site is located at the northwest corner of Yonge and Sheppard adjacent to the Sheppard subway station. It is occupied by a 914 m<sup>2</sup>, mostly one-storey building of high-quality architecture. 2070649 alleges illegal parking complaints with respect to the lane, marked by the words “private” (solid line) and “public” (dotted line) in Figure 2 (next page), behind both properties.

The actual site owner is the City of Toronto, which has taken no part in this application. HRDOV may be considered the “owner”, but technically it is a 20 year lessee from the City with only surface rights. I have sketched a rough schematic in Figure 2, with “Taco” (Taco Bell) and “McD” (McDonald’s), the two current users. The centre unit is proposed to be leased to HSBC Bank. While it does have a “second floor” space, this is only suitable for mechanical equipment and signage. The Appellant’s [2070649’s] building to the north is marked “4822 Yonge Street”.

Figure 2 is self-explanatory, except for the southwest corner. It is marked “vacant”, is currently a parking lot, on which is planned 49 storeys with retail and office uses and 497 dwelling units.

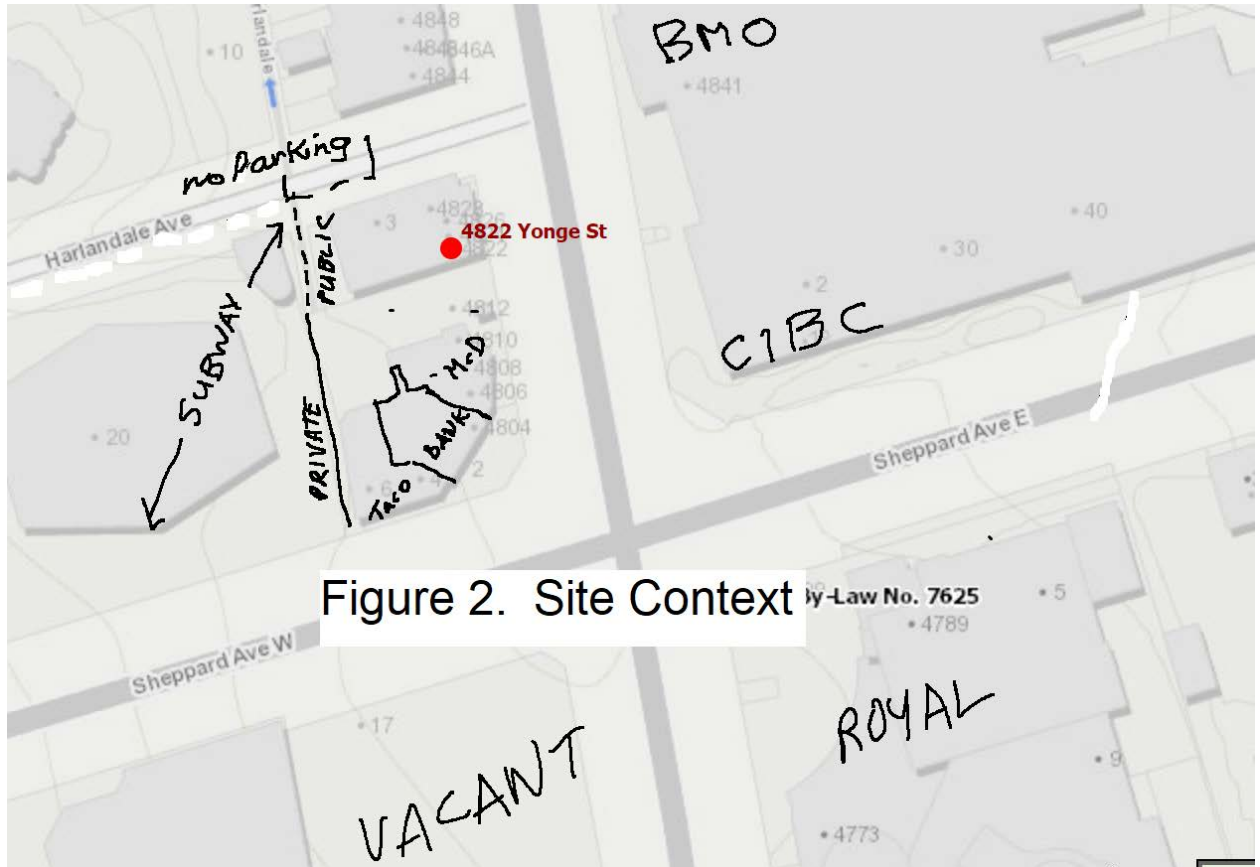


Figure 2. Site Context

## MATTERS IN ISSUE

Variances must be consistent with and conform to higher level Provincial Policies. The witnesses did not discuss these policies, but I have an independent duty to do so, nonetheless. I find the variances conform with the following provision of the Provincial Policy Statement.

1.6.7.4 A land use pattern, density and mix of uses should be promoted that minimize the length and number of vehicle trips and support current and future use of transit and active transportation.

“Active transportation” includes walking, cycling and wheelchair transportation. Accordingly, I find consistency and conformity with higher level policies.

S. 45 of the *Planning Act* requires that any variance must meet all four tests:

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

The property in question is *Mixed Use* and *Centres* in the City of Toronto Official Plan. There are only four *Centres*, about which the plan says:

#### 2.2.2 CENTRES: VITAL MIXED USE COMMUNITIES

Four key locations on the rapid transit system, shown as *Centres* on Map 2, play an important role in how we manage growth. The *Scarborough*, **North York**, *Etobicoke* and *Yonge-Eglinton Centres* are places with excellent transit accessibility where **jobs, housing and services** will be concentrated in **dynamic mixed use settings** with different levels of activity and intensity. These *Centres* are focal points for surface transit routes drawing people from across the City and from outlying suburbs to either jobs within the *Centres* or to a rapid transit connection. (my bold)

Policy 2.2.2(2) states that growth will be directed to *Centres* in order to:

- use municipal land, infrastructure and services efficiently;
- concentrate jobs and people in areas well served by surface transit and rapid transit stations;
- create assessment growth and contribute to the City's fiscal health; and
- promote mixed use development to increase opportunities for living close to work; and
- encourage walking and cycling for local trips.

Policy 4.5.(2) states that development in *Mixed Use Areas* is intended to:

- create a balance of high quality commercial, residential, institutional and open space uses that reduces automobile dependency and meets the needs of the local community;
- provide an attractive, comfortable and safe pedestrian environment;
- have access to schools, parks, community centres, libraries and childcare;
- take advantage of nearby transit services; and
- locate and screen service areas, ramps and garbage storage to minimize the impact on adjacent streets and residences.

## EVIDENCE

Mr. Volpentesta [for HRDOV] and Mr. Hall [for 2070649] gave planning evidence for their respective clients. Both were qualified by me as able to give opinion evidence in land use planning. I qualified Mr. Tedesco [for 2070649] as able to give opinion evidence in transportation planning. I did not hear from non-experts.

## ANALYSIS, FINDINGS, REASONS

### Overview

I consider both Mr. Volpentesta's (for HRDOV) and Mr. Tedesco's (for 2070649) evidence was largely unrebutted. However, the two talked about different things. Mr. Volpentesta focused on "street animation"; Mr. Tedesco on problems occasioned by delivery persons making quick parking stops in the Harlandale area.

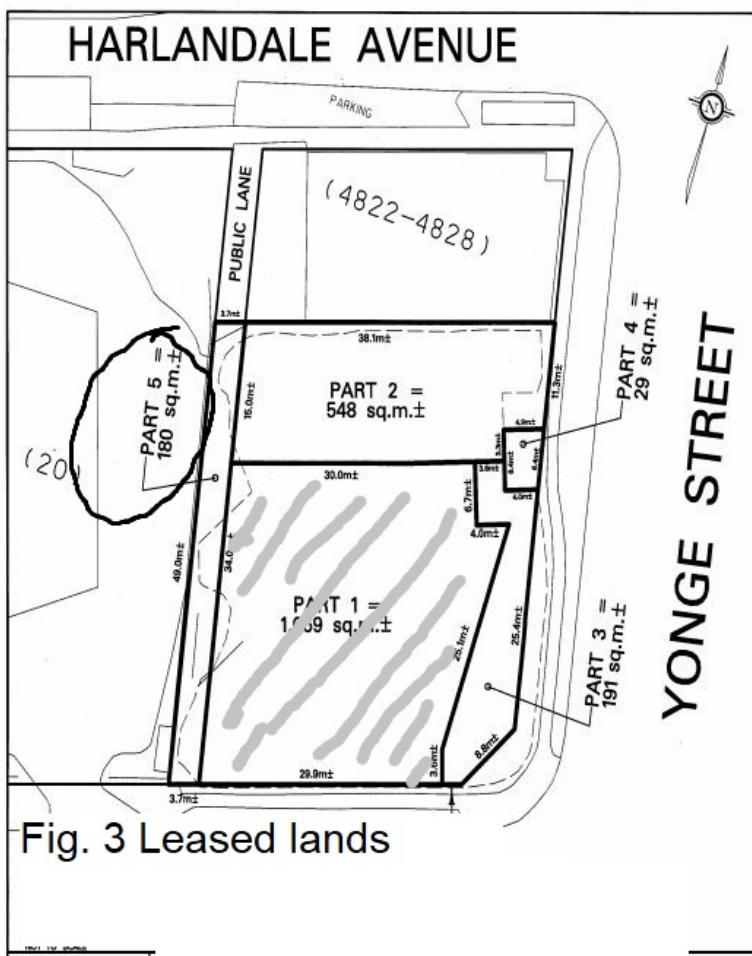
The theory of HDROV's case was that the applicable zoning by-law provisions are "obsolete". 2070649's case was more complex: it argued that the present parking impacts were so significant that any change could only be considered to have an unacceptable adverse impact and that they were caused partly by unilateral changes made to plans after an earlier OMB case between the same parties.

### Chronology

- Nov 4, 1988 I start here because the creation of this lane and subsequent management is a thread that runs through the dynamics of this case. In 1988 the City closes the southern part of a then public lane (about 49 m or 160 feet long), conveying it to the abutting landowner, Canderel (the owner at that time). The remaining northern portion (about 19 m or 63 feet) which abuts 2070649's parking lot remains public. This lane is one-car width throughout. In Figure 2 (page 3), the dotted line marked "**public**" is where most of the current problem parking takes place, based on Mr. Tedesco's evidence, which I accept.
- Circa 1990 The OMB approves Official Plan Amendment 330 and Zoning By-law 31277. The zoning contains the prohibition against a bank being on the ground floor; this is the issue that is at stake in this hearing. Canderel had obtained from the former City of North York permission for a 29 storey mixed use building with a total gross floor area of 35,000 m<sup>2</sup>. Because of unfavorable market conditions, it was never built. I note that both this and the 2007 OMB hearing described later were not contested hearings.

- Oct 9, 1997 The City acquires Canderel's interest for consideration. It needs the whole site because of technical engineering issues having to do with the subway system.
- June 2000 The TTC advises the City of Toronto that the Yonge-Sheppard lands are no longer required for the Sheppard Subway project and are surplus to its operational needs.
- 2002 Sheppard Subway Line opens.
- July 2006 The City, now the freehold owner, leases the subject land to HRDOV.
- March 2007 HRDOV chooses to erect a building virtually filling the entire site with no legal parking or loading spaces. Because of the lack of parking and loading spaces, it obtains variances at the Committee of Adjustment. However, 2070649, the same appellant as in this case, appeals and at the OMB, there is a settlement to which 2070649 agrees.
- July 2007 OMB Member Stefanko issues a decision to reduce all parking requirements to zero, subject to three conditions. After the decision there is delay before the present building is completed.
- June 2009 The City's Real Estate Services Department reports to Council that there is a delay in construction caused partly by required changes from City Planning staff.
- 2009 HDROV obtains a building permit for a different layout from the plans that were before the OMB.
- Sept 2019 The centre unit becomes vacant. HRDOV seeks to rent to HSBC and applies to the Committee of Adjustment to permit a bank notwithstanding it is "on the ground floor along Yonge St.",
- Feb 2020 The Committee of Adjustment grants the variance.
- Mar 11, 20220 Elizabeth Geleff appeals. I will refer to the appellant as "2070649",
- 2020 TLAB sets June 24, 2020 as a hearing date; this is subsequently adjourned because of the pandemic. This hearing resumes in October 2020 with 2070649 retaining Mr. Tedesco and Ms. Higgs only at the eve of the hearing commencing. In fact, Mr. Tedesco's drone and dash cam

evidence is mostly gathered after the formal start of the hearing. The hearing concludes in January 2021.



Before I address the appeal, I will now go back over the lease in a little more detail.

### The 2006 lease

The City Real Estate Services' objective was to improve "this high profile corner" with an "attractive multi-tenant development". HRDOV was chosen for its experience and ability to meet these objectives. The original concept considered leaving the lane out of the leasehold, and possibly reserving a right of access for 2070649<sup>1</sup>. In hindsight this might have alleviated parking issues, but this did not happen. Although Real Estate Services was not part of City Planning, it was cognizant throughout of "site plan, traffic impacts, and the objectives of the Secondary Plan" <sup>2</sup>.

<sup>1</sup> The report stated: "HRDOV would have a right in common with others (**including the occupants of 4822-28 Yonge Street**) (my bold) for access over Part 5. Part 5 is also subject to a Bell easement. HRDOV's lease proposal seeks to limit use of Part 5 to service vehicles only, through some form of traffic control, and HRDOV proposes that Part 5 be included in the Leased Land. As there has **been no site plan review or traffic review** (my bold) of the development proposed by HRDOV, it is recommended that Part 5 not be included in the Leased Land at this time. However, if HRDOV's development review process results in confirmation from City Planning and Transportation Services that including Part 5 in the Leased Land is acceptable, the Leased Land may be revised to include Part 5. (July report of Real Estate Services to City Council)"

<sup>2</sup> The Offer to Lease provides for a maximum of twenty (20) years and eleven (11) months term, subject to the City's right to early termination at the end of fifteen (15) years of the Tenant's operation on the Leased Land,. . . However, the City is likely to exercise its right to terminate the lease only if there is opportunity for a major redevelopment of the property in conjunction

The Report considered the term of less than 21 years “relatively short” for a ground lease and there was discussion about whether to include or exclude Part 5 (the private lane) (circled in Figure 3). The final decision **included** it in the lease:

Through the planning review process, it has been determined that Part 5 on the Sketch, the driveway, could form part of the leased premises rather than be licensed for use by the Tenant, as the proposed retail development **will exercise strict control of access over this driveway area and restrict its use to service vehicles**. . . . (Report March 2007) (my bold)

What the City did not envisage was that in the future, “gig” workers would create a whole new type of parking demand, for very short term “park and dash” pickup.

### OP and Zoning

The Official Plan and zoning policies are contained in the North York Centre Secondary Plan and North York Zoning By-law 32177. Both are early 1990s documents, in which there has been little updating. (The City has recently initiated the “Re-Imagine” study in which this stretch of Yonge will be narrowed and the area rejuvenated.)

#### Box 1 Secondary Plan (Yonge frontage)

5.3.2 g) . . . priority will be given to uses which add animation and activity to the sidewalk. Accordingly: h) less active uses such as **banks, offices and health care uses** may be prohibited along the Yonge Street sidewalk

#### Box 2 Secondary Plan (Sheppard frontage)

5.3.3 d). . . priority will be given to uses which add animation and activity to the sidewalk. The City may: . . . i) prohibit less active uses such as **banks, offices and health care uses** along the Sheppard Avenue . . . sidewalk;

---

with the Sheppard Subway Station for office purposes in keeping with the Secondary Plan objectives for this intersection.



**Box 3 Zoning (Yonge frontage)**

4. . . financial institutions are a permitted use **PROVIDED THAT** the use of the first floor along Yonge Street shall be restricted to service and pedestrian circulation areas, restaurants, retail stores, personal service shops, service shops, office lobbies, art galleries, museums, Toronto Transit Commission transportation facilities and service and circulation areas; **AND PROVIDED THAT** a day nursery having a minimum floor area of 393 square metres shall be provided . . .

**Box 4 Zoning (Sheppard frontage)**

4.. . .financial institutions are a permitted use . . .**AND PROVIDED THAT** a day nursery.. . . shall be provided . . .

The Secondary Plan covers Yonge Street between Drewry/Cummer (about four blocks north of Finch) and the 401 to the south. The sidewalks along Yonge Street are planned to be pedestrian friendly and animated by retail at ground level. But of course, this policy exists in an overall framework of the Centres, Avenues and mixed use policies referred to earlier.

For easy reference I placed the relevant animation policies in four boxes above; the two upper boxes being Secondary Plan (i.e., “official plan”) policies and the two lower boxes being zoning. Boxes 1 and 2 are identical, and permit the prohibiting of “banks, offices and health care uses” along the sidewalk of either Yonge or Sheppard. Thus, the same Secondary Plan policies apply to both frontages. Box 3 expresses the zoning restriction that is at the subject of this hearing. In Box 4, there is no prohibition at all; all commercial uses are permitted.

Trying to determine the intent of Zoning By-law 32177 is difficult. A barber shop or tattoo parlour is permitted on Yonge, but not a doctor’s office. A Yonge Street door can lead to a museum but not to a theatre. Although restaurants can be on Yonge, taverns must go around the corner to Sheppard. The intent is not clear and conflicting, which leads me to resort to the rules of statutory interpretation. I am engaging in this exercise because the tests require me to determine if the general intent and purpose of the official plan and zoning by-law are maintained; this requires a reading of the whole document to ascertain what the writer intended.

### **Three rules of interpretation**

The Courts apply three kinds of interpretive techniques

### 1. The plain words of the statute

The restriction applies to “the first floor along Yonge St”. “Along Yonge St” applies to the McDonald’s, but not to Taco Bell, which is clearly along Sheppard. The plain words are unclear whether a space whose front wall is at a 45% angle to both streets is “along Yonge St”.

### 2. Trying to avoid absurdity, i.e., an illogical or contradictory conclusion.

Taking a closer look at Zoning By-law 32177 (Box 3), the main clause is titled “Uses Permitted”, which permits 29 specified commercial uses. This clause has two “provided that” clauses:

PROVIDED THAT only 9 specified uses can be at “the first floor along Yonge Street” (these 9 do not include a bank); and

PROVIDED THAT a 393 m<sup>2</sup> daycare centre is provided.

The drafter should have made the two “provided that” clauses stand-alone instead of linking the general permission to the two conditions, as they are not logically or economically linked. Because of the way the by-law is written you have an absurdity in that the by-law is trying to create a 393 m<sup>2</sup> daycare in a 914 m<sup>2</sup> building. Also, with a 29 storey building, the drafter probably envisaged the banks occupying the second floor on Yonge atop restaurants and retail; a configuration impossible with the present building. In the next section I will note that even this configuration did not happen with the three other banks.

### 3. Trying to accomplish what drafter intended (the “purposive approach”)

For this section I also rely on a second site visit where I reported what I saw and gave the parties an opportunity to comment. Mr. Volpentesta said the **purpose** of the Plan is to provide “animation” on Yonge and, he argued, modern banks are as inviting as restaurants. No longer are they “fortified vaults”; they are now like living rooms, with easy chairs, lots of glass, and ATMs just inside the door.

The Yonge Sheppard branches of the Bank of Montreal and CIBC both have an expanse of glass and steel separating the interior of the bank from the sidewalk. Frosted glass prevents any pedestrian from seeing much. Both banks have been raised about a half a storey above the sidewalk and it was somewhat surprising to me to see the sprinkler system in the “basement” below the CIBC.

To get to tellers, the sidewalk customer has to walk up a half flight of stairs. Undoubtedly most patrons begin their journey from an internal parking lot. For the CIBC, there is an ATM at sidewalk level at Sheppard; accessible to sidewalk wheelchair users. Nonetheless, both banks appear to be “internalized”, a concept that the plan discourages<sup>3</sup>. 2070649 argued that because those banks were connected to their own indoor parking, the variance should **not** be granted to a site which has no parking. I draw the opposite conclusion; the mixed use quadrants at this intersection have and will have hundreds of dwelling units. A sidewalk-only access bank within walking distance could appeal to those residents.

Moving south, the Hullmark building is located on the southeast corner, and houses a Rexall and Royal Bank; both on the ground floor but separated from the sidewalk by a large plaza. It may be that this plaza prevents the Royal Bank from being considered “along Yonge Street”. The HRDOV site also has its own “mini plaza” since there is an extra-wide sidewalk in front; Mr. Volpentesta argued that similar latitude should be given to his client and I agree.

We can’t forget that in Canada we don’t get many warm summer weekends; on a cold December Sunday afternoon, the most animated place was a warm and brightly decorated lobby leading to the subway. The animation the zoning by-law seeks was moved off the sidewalk to indoors.

The Rexall drug store does indeed ‘animate the street’, as the pedestrian can see into the drug store and the aisles have been arranged crosswise; merchandise on the ends being attractively arranged. The Royal Bank is less inviting; the one office visible from the plaza has opaque screens that can be raised or lowered. While animation is one intent of the policies, it is not the only intent. Landlords have to have reasonable freedom to design spaces that fit the needs of their tenants. A bank office worker needs to be able to meet customers in privacy and pull the shades when the sun is low. Or perhaps have privacy just to work. They also need handicapped access from the sidewalk.

---

<sup>3</sup> If a bank use were “retail”, which it is not, the Plan would discourage it as a non-street related and internalized use:

1.16 Street Retail

It is the intention of this Secondary Plan that along the sections of Yonge Street, Sheppard Avenue and Finch Avenue located in the Prime Frontage Area shown on Map 8-2, at grade street-related narrow frontage retail uses will be required. Below-grade and **internalized retail** uses will be discouraged.

We can't ignore the environment adjacent to the subject property along the Sheppard frontage; forbidding for pedestrians. They face "no trespassing signs" and must keep a lookout for buses which may be crossing into the transfer depot.

My conclusion is that "animation" is not something to "set and forget", but the result of a complex interplay of many factors.

I will now try to pull all these strands together. Besides animation, there are other, and in my view, more important intents, such as those mentioned in "Matters in Issue", such as "Centres" and "mixed use" areas which promote employment, transit and infrastructure. A purposeful approach suggests that this is a good candidate for a variance since other banks under the same policies have located nearby without the second floor over restaurant configuration envisaged in 31277. The strict application of the animation rules may have unintended consequences such as an "internalized" building and more difficult handicap access. This is a unique situation: a corner location which is also a Centre. There is an arbitrariness in applying one single provision of a by-law written for a much larger building.

**I find the variance maintains the intent and purpose of the Official Plan, the Secondary Plan and zoning and is desirable for the appropriate use of the land.** It is clearly minor since the middle unit which is to be leased to a bank has one exposure along Sheppard and one along Yonge; and the Sheppard exposure is already permitted.

The only remaining obstacle is whether a bank use will create an unacceptable adverse impact toward 2070649's lands within the meaning of s. 45(1) of the *Planning Act*. Now we must consider Mr. Tedesco's evidence.

### **The traffic evidence**

Mr. Tedesco was the only person to testify about traffic. Mr. Hall, 2070649's planner, relied on Mr. Tedesco, and concluded the present working of the site was "a disaster", a word Mr. Tedesco did not use. 2070649's written submissions are:

- The existing use of the subject site does not comply with the 2007 OMB approval;
- This has caused "significant and untenable traffic impacts"; and
- "While the 2007 approvals are not being appealed in these proceedings" (Ms. Higgs' words), she submits that "the results of that decision must be considered by this Tribunal in its assessment of the minor variance test."

I will deal with the OMB decision first.

### HRDOV's traffic study

The chronology sets out that the City leased a vacant site for a 20 year lease. Once lease arrangements were made, HRDOV proposed a 9-kitchen, "food court" (Figure 5, page 14, left). It was deficient by 10 parking spaces, and so HRDOV applied to the Committee of Adjustment for a variance from the parking requirements.

Sernas Transtech, its traffic consultant, submitted a proposed Truck Servicing plan (diagram on page **Error! Bookmark not defined.**) as well as a parking utilization study. I will discuss the Sernas plan more fully below. The City's Transportation Services Department asked that Committee of Adjustment hearing be deferred for Sernas to do a further field study. Mr. Tedesco's position is that Sernas's work was incomplete and he supports the City's Transportation Services position of thirteen years ago that the application should not go forward until more study was done. However, the Committee did not defer, but granted the variance. The neighbour 2070649 appealed but settled at the OMB.

### The OMB decision

#### MEMORANDUM OF ORAL DECISION DELIVERED BY S. J. STEFANKO ON JULY.Y 5. 2007 AND ORDER OF THE BOARD

1. <sup>4</sup>At the commencement of this hearing, I was advised by Ms. Kovar that a settlement had been reached between the parties. Although Mr. Paton, counsel for 2070699 (sic) Ontario Inc., was not present at the hearing, he had sent a letter to the Board outlining the conditions which were acceptable to him.
2. The proposed development is that **of a single-storey building which will accommodate nine tenants carrying on fast food or fast food related uses**. The gross floor area is projected to be 1040 square metres.<sup>5</sup>
3. The variances ("Variances") requested are as follows:
  - a) 0 [this is a zero] parking spaces whereas 10 parking spaces are required;
  - b) 0 loading spaces whereas 2 loading spaces are required<sup>6</sup>;

---

<sup>4</sup> I have added paragraph numbering to improve readability.

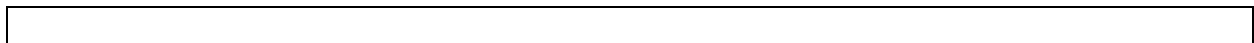
<sup>5</sup> The present building is 914 m<sup>2</sup>.

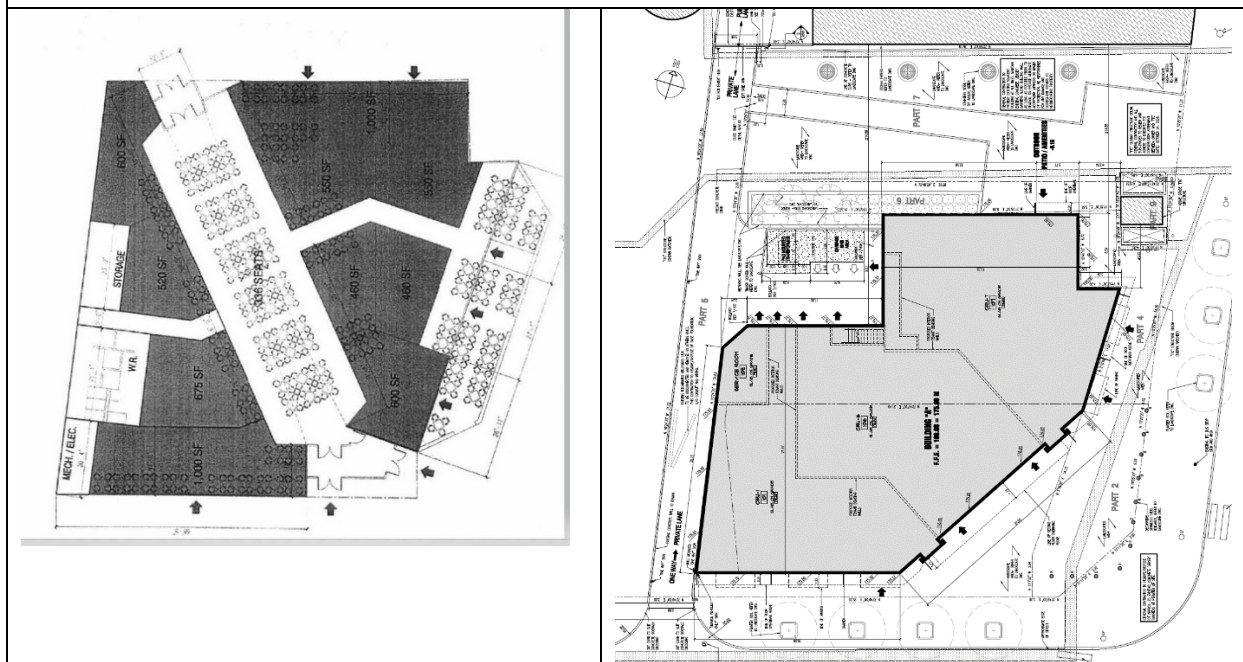
<sup>6</sup> By-law 31277 stated that the 35,000 m<sup>2</sup> building should have: "A minimum of two loading spaces 9 metres long, 3.6 metres wide and having a vertical clearance of at least 4.2 metres shall be provided, both of which shall have access to a lane or street which has a minimum width of six metres, and, in addition, two spaces for courier vans shall be provided;". It appears that the site actually can provide these loading spaces, albeit with substandard width and constrained by tandem access to Sheppard.

- c) 0 courier van spaces proposed whereas 2 courier van spaces are required; and
  - d) a proposed south side yard setback of 2.0 metres whereas 3.0 metres is required.
4. In relation to the settlement, Mr. Daly [planner for HRDOV] provided expert land use planning evidence. He testified that the proposed uses are permitted under the Official Plan, that since the site is only 20 metres from the Shepherd/Yonge subway, its location itself mitigates against parking requirements, the proposal will not create any adverse impacts and will be of considerable benefit to the area. In Mr. Daly's view, each of the Variances meet the four tests set out in s.45(1) of the *Planning Act*.
5. Based on the uncontradicted planning evidence of Mr. Daly and the settlement reached, the Variances are hereby authorized on condition that:
- a. Provided the existing public lane, which runs south from Harlandale Avenue to the driveway along the west side of the subject property, **remains open as a public lane permitting northbound operation, the driveway along the west side of the subject site shall be maintained and operated for one-way northbound traffic only;** (my bold)
  - b. The trees which are proposed along the north lot line of the subject property as reflected by the Site Plan marked as Exhibit 2 to this proceeding, shall be planted in raised planter boxes; and
  - c. The patio area on the north side of the proposed building shall be well lit, with a view to ensuring the safety and security of the site, such lighting to be secured through the site plan approval process.
6. The appeal by 2070699 (sic) Ontario Inc. has therefore been allowed in part. It is so Ordered.

I wish to comment on the grammatical organization of this decision as Mr. Tedesco argued that the nine tenant design was part of the Order. My interpretation is that paragraphs 1 to 4 are discussion and background only, and here is when Mr. Stefanko mentions the nine tenant design and 1040 m<sup>2</sup>, both of which never happened. The title reads "oral decision" **and** "order" so the Member contemplated two separate pieces. The order part starts at paragraph 5 and uses the words "hereby authorized"; the word "authorized" taken directly from s. 45(1) of the *Planning Act*, and for emphasis, concludes with the words, "It is so ordered." So, I don't interpret that there are any conditions except "a.", "b." and "c.".

After the OMB hearing, HRDOV chose instead to construct the present three tenant design (right in Figure 4 below). The old nine tenant concept is to the left.



**Figure 4 Floor plans – 2007 (left) and present (right). Not at the same scale**

I find that the OMB did **not** tie its order to any plans; neither the Sernas truck servicing plan nor the food court plan on the left. The parties and the OMB expected the conditions to be handled by the site plan process. Today, I am informed by Mr. Tedesco that the site plan cannot be found.

My analysis of the decision is not unquestioning; I don't understand condition "a" nor how it was to be enforced if the northern extension does not remain open as a public lane.

### **The improper parking and loading problems**

I now turn to the evidence on the "significant traffic impacts" established by Mr. Tedesco. These fall into three geographic areas:

**Harlandale-related:** "On average, the laneway is blocked or occupied for 10 minutes per hour, or 17 percent of the time." (Mr. Tedesco). They also block the "throat" rendering it impossible for the Harlandale building visitors to enter or leave the private 11 space parking lot. Mr. Tedesco says Ms. Geleff has told him she has lost a leasing opportunity through parking problems.

**Yonge Street related:** I will select two representative items. On February 19, 2020, the day before the Committee of Adjustment hearing, Elizabeth Geleff observed and photographed a Skip the Dishes driver park his car on the sidewalk, cross-ways



fashion, to make a pickup. She brought this to the attention of Mayor Tory. This is documented by pictures she took on her cell phone.

On Sunday November 29, 2020, at 5:13 am, 2070649's security cameras showed film of a delivery of buns to McDonald's.<sup>7</sup> The delivery vehicle is parked on Yonge St in the curb lane, southbound. There is a sedan behind it with hazard lights flashing, to protect the delivery persons and provide light. The McDonald's employees take a dolly with empty trays from the loading area at the laneway. They exchange these for fully loaded dollies from the bakery delivery truck (out of the picture to the left). All the dollies are stacked higher than a person's head and are unstable. A dolly rolls backwards onto the sidewalk and falls over (shown in Figure 6 below). The trays are put back on the dolly and get wheeled into the store (brightly lighted area to the right).

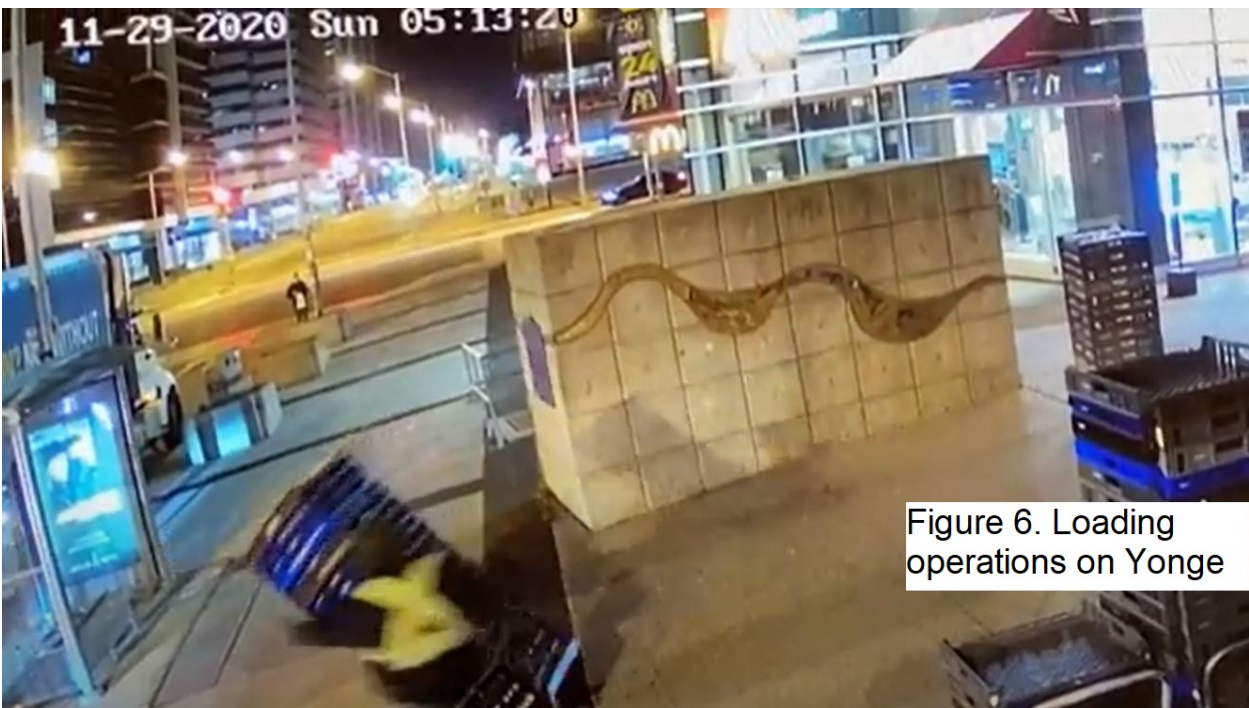


Figure 6. Loading operations on Yonge

My conclusion from the fact that the empty dollies were retrieved from the loading area to begin with, the emphasis in the lease about control of the lane, the size of the loading spaces in 31277, and the Sernas report is that loading activity should take place in its proper place, using the private laneway. This would be safer for pedestrians and would not obstruct the curb lane of Yonge St.

---

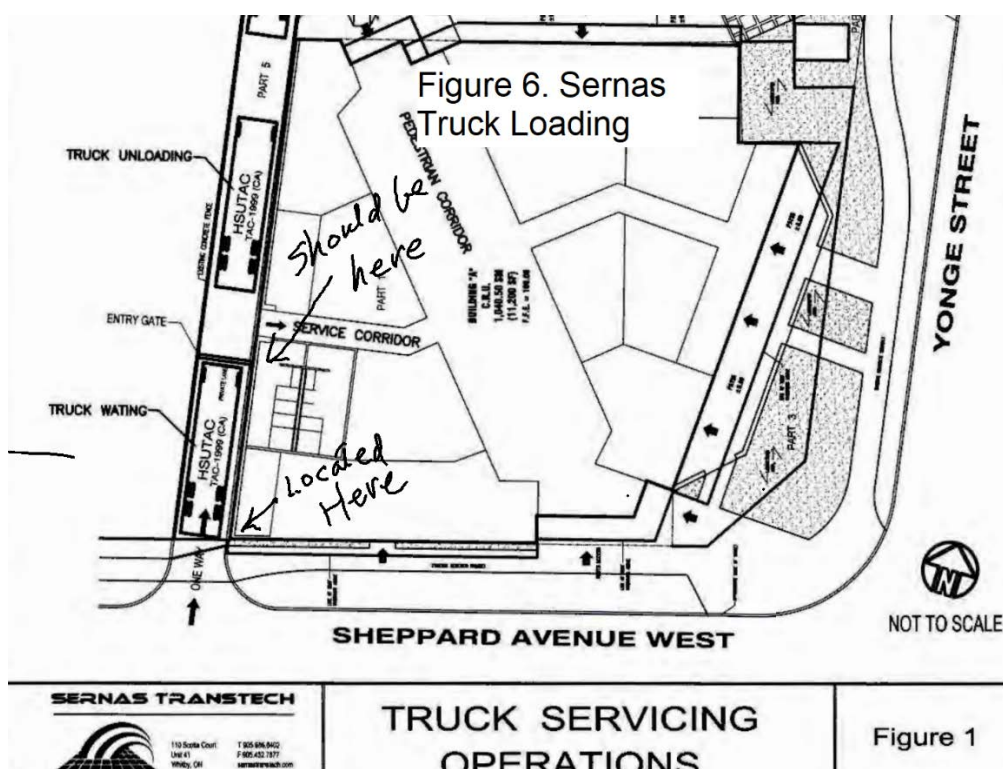
<sup>7</sup> [https://drive.google.com/drive/folders/1toelPlkyfO710j1nlqUZ\\_m8nVqPfmTnn?usp=sharing](https://drive.google.com/drive/folders/1toelPlkyfO710j1nlqUZ_m8nVqPfmTnn?usp=sharing)



**Sheppard related:**

On Sunday, November 29, 2020 at 4:36 pm, a Bristol truck delivering a salt box, the kind used to melt ice on the sidewalk, drove onto the Sheppard sidewalk. It stopped, a passenger in the truck got out to guide the driver, who backs the truck toward to a spot on the sidewalk and parks there.<sup>8</sup> As this is Sunday afternoon, there are pedestrians milling about on the sidewalk. This is an unsafe operation and Mr. Tedesco has reported this to the City. This incident is not directly related to the Harlandale incidents but aim to establish an overall pattern of indifference to loading activities on the sidewalk.

Has HRDOV failed to comply with the OMB decision?



2070649's first allegation is that HRDOV has failed erect the main barrier arm as specified in the Sernas truck servicing diagram (Figure 6, above). This arm controls all vehicles to wish to get access to the rear of the building. I have marked the current location of the arm as "located here" and the Sernas recommendation at "should be here". Note that the Sernas diagram was in conjunction with the nine-tenant "before" design, which was never built.

<sup>8</sup> <https://drive.google.com/drive/folders/1CDnjfFkEZ3VqANky4ej8vLilpjGXdcv0?usp=shAring>; Nov. 29, 2020, 17:37; i.e., early evening.

As indicated previously, since the OMB did not make either the Sernas recommendations or the nine-tenant plans a condition, HRDOV cannot be guilty of non-compliance with a condition that the OMB never made.

**Whether this is a “variance on a variance”**

This is really an allegation that the OMB decision was wrongly decided, because it is alleged that the number of parking spaces was wrongly calculated to begin with. As background information, Mr. Tedesco calculated the requirement under the then general North York Zoning By-law 7625 as:

30 spaces required for the McDonald's  
24 for Taco Bell; and  
9 for the proposed HSBC  
63 spaces.

Under the site specific By-law 31277<sup>9</sup>, only 10 spaces were needed, a conclusion Mr. Tedesco agrees with. His critique is based on the physical changes made after the OMB decision. He said the project went from a very low parking demand use to a higher one and this is partly responsible for the current parking impact.

I found this part of his analysis compelling. An indoor food court is the type of facility that exists at many malls. It has primarily a lunch or shopper clientele. Mr. Tedesco said many GTA food courts close at 4 pm. Since people may combine a shopping trip with a food court trip, it is difficult to say which purpose has caused the trip and this is harder to do than for standard uses and Mr. Tedesco was not able to locate an Institute of Transportation Engineers parking space demand for a mall food court.

But Mr. Tedesco went further and here is where I depart from his conclusions. He argues that HRDOV has received two benefits: a decrease in parking from 63 to 10 and then from 10 to zero, and the benefit of being located on top of a subway being counted twice<sup>10</sup>. On this theory, a new bank use would compel me to impose a new

---

<sup>9</sup> (ii) Parking spaces shall be provided on the following basis: Minimum - 0.9 spaces per 100 square metres of Gross Floor Area; Maximum - 1.1 spaces per 100 square metre This makes 9.5 to 11.5 spaces, and it appears that the 2007 plan examiner sawed off the difference.

<sup>10</sup> . . . Similarly, a 7-11 Variety store or a Fed Ex print / delivery store or a bank –whether or not on the ground floor -- are not the “*fast food related uses*” for which the parking variance was granted; (Those uses (including bank use on other than ground floor) are permitted, but only with the provision of on-site parking at a rate of 0.9 to 1.02 spaces per 100 m<sup>2</sup>, or **a separate variance.**) (my bold) As such, a variance for parking for the proposed bank use should also

and separate required parking space demand for HSBC, since no bank was envisaged by the OMB. 2070649's lawyer, Ms. Higgs, termed this "variance on a variance".

As far as I am able to tell, the change from the nine-tenant food court concept to the present configuration is likely a result of requests made by the City during the site planning and soil remediation phase — there was a time gap between the OMB decision and final building plans. It is likely that all parties, the OMB and the City's site plan approval post OMB were not cognizant of the subtle traffic implications such as Mr. Tedesco has presented. I find the change in plans was made innocently over a period of time.

Ms. Higgs is distrustful of the refusal of the 2007 Committee of Adjustment's refusal to defer its hearing and also of the OMB, which in her estimation did not provide her client more protection from illegal parking on the Harlandale portion of the lane. In submissions, she asks that I impose the condition that "Toronto's Transportation Services review and approve the application including parking and loading requirements and functionality . . . " I can't tell the City how to process a building permit or variance application. When and if HDROV applies for a building permit to renovate the space to HSBC's specifications, it is for a future plan examiner<sup>11</sup> to say what the needed variances are. Under the *Building Code Act*, a person aggrieved by that future plan examiner's decision may apply to a judge; it is not for me to impose this condition.

In conclusion, if there are deficiencies in the OMB decision, whether of omission or commission, they were consented to by 2070649 and its legal advisors. My task is to deal with the appeal, which does not include the revisiting of a decades-old decision of the OMB.

### **Will a bank worsen an already bad situation?**

The question is whether the **new use**, not the exiting use, will have an unacceptable adverse impact on its neighbour. Even if Mr. Tedesco and Ms. Higgs do not succeed in suggesting that HRDOV has failed to comply with the OMB decision,

---

have been sought and obtained, or alternatively, the amount of parking (at least) required for the proposed 270 m2 bank use should be provided on-site;- Put another way, if using the parking requirements from either the 1990 approval or 2007 approval, the Applicant would still need to obtain a "technical" minor variance for parking for a different (bank) use, for which they have not applied period. (Tedesco witness statement, p 20)

<sup>11</sup> HRDOV proceeded by "waiver", which is like a private zoning examination in which it takes the risk that the City's plan examiner does not agree with the waiver person's judgement. I have no knowledge of what if anything, the City's plan examiner has done or will do.

they argue that the variance should be refused because it would make a bad situation worse.

HRDOV's vacant unit has been occupied by a FedEx and a 7-Eleven store in the past. Standard ITE trip generation rates indicate the following:

<b>Table 5. Institute of Transportation Engineers (ITE) PM peak hour trip generation rates</b>	
	Trips (per 1000 square feet of GFA)
FedEx	7.42 trips per peak hour
7-Eleven	6.84 trips per peak hour
Fast food restaurant	28.34 trips per peak hour
Bank	12.13 trips per peak hour

Compared to the FedEx store or 7-Eleven; a bank will create about 60% more trips, but compared to a fast food place, 57% less. An OMB case offered by 2070649 confirms this; in that case, a restaurant on Bayview Ave, Toronto, was proposed to replace a bank use — and the bank required 6 spaces whereas the restaurant would require 13<sup>12</sup>.

The property cannot be sterilized, If I turn down the variance it is possible that the unit will become a third fast food restaurant, obviously a permitted use and one, on Mr. Tedesco's own evidence, would be deleterious for his client's parking issues.

So, I don't see the bank use making an admittedly bad situation worse and I reject Ms. Higgs' assertion that permitting a bank will cause an unacceptable adverse impact. In short, I find the variance meets the four tests under the *Planning Act*.

## Conditions

---

<sup>12</sup> . . .the property in question, in accordance with the Borough's By-Law No. 1916 has a total parking requirement of 25 spaces for all the uses on the property. The proposed restaurant use has a requirement for 13 parking spaces. The space to be occupied by the proposed restaurant was previously occupied by a bank which required 6 parking spaces. Therefore, with respect to the proposed use, there is a shortfall of 7 parking spaces. The cash-in-lieu of parking policy, according to its interpretation by Borough's staff, need only apply to the 7 spaces required by the new use. That is the requirement or provision of the 6 spaces is viewed by the Borough as a legal non-conforming condition. However, because the application for a minor variance must deal with the entire shortfall, relief is sought for 13 parking spaces even if part of it was a legal nonconforming situation. (C.A. Beach, in *Re Heider*, 1998 CarswellOnt 8478)

I now consider what condition should be imposed, particularly whether the barrier arm should be relocated.

I have to take a long term view. While not discounting the activities described by Mr. Tedesco, I note that there was a long hiatus between the first complaints to City officials and the present ones. Condition “a” of the OMB decision concerns the operation of the lane. This was imposed in 2007 and there is some indication that the building was not completed for many years. The latest record of complaint prior to 2020 is a June 26, 2012 email to Kia Najatian, executive assistant to Mayor Rob Ford:

The tenant at 4804 Yonge Street and their customers use this Lane to park, deliver goods and pick up goods and people. This is not the purpose of this Lane. This Lane has signage clearly marked as "No Parking" in the Lane. These signs were put up by The City. However, the tenant and people are abusive to this Lane. This is a direct result due to the fact the tenant fails to have a proper designated delivery area and also fails to have any parking for delivery or tenant use or customer use.

The next mention in the record is Feb 18, 2020, when 2070649 writes to Mayor Tory: (The Committee of Adjustment hearing in this case was February 20, 2020.)

In 2016 (sic), The City of Toronto allowed this building to (be) built with deviation from the bylaws omitting to have any parking and loading areas for its tenants. This building was allowed to be built with ZERO PARKING and ZERO LOADING ZONE. This was most unusual to allow a building at this very busy intersection to be (built) with no parking and no loading zones.

The parking has always been wrapped up with other issues including in the present appeal, which mentions that there is no need for another bank:

4. PARKING IN THESE AREAS IS BADLY OUT OF CONTROL WITH CONSTANT ABUSE.
5. THIS IS AN AREA WITH OVERWHELMING PUBLIC SAFETY ISSUES AND CONCERNS ASSOCIATED WITH TRAFFIC CONGESTION. SUCH USE OF PROPERTY IS A FURTHER FAILURE TO ACKNOWLEDGE THIS.
6. THERE ARE NUMEROUS SCHEDULE 1 BANKS IN THE IMMEDIATE VICINITY AT YONGE AND SHEPPARD AREA. THERE IS NO NEED FOR ANOTHER BANK.

Mr. Tedesco and Ms. Higgs have represented their client in exemplary fashion, but the fact remains that they were retained days before the start of the hearing without having been able to file witness statements in timely fashion. This did not allow HRDOV to deal with many issues raised by Mr. Tedesco, it did not know it ought to have examined its files for the approved site plan or investigate how its tenants deal with the delivery persons. Although it could have asked for an adjournment to do so, it is on record as wanting as early a hearing as possible. HRDOV's inability to deal with the site plan has hampered me in deciding whether conditions “b” and “c”, regarding lighting

and planting, should be imposed a second time. I also noted many pedestrians using the laneway, which is partly public and leads directly to a subway entrance. They have to be considered as having an interest, separate from the vehicular interests of the two parties in this dispute. This was a prime objective of the indoor pedestrian circulation envisaged in the Canderel building.

After the close of the hearing, at my request, HRDOV advised that it would erect “no parking” signs on the barrier facing 2070649. It included a photo which suggests that it has already done so.

In my view, my choices are to either grant the variance unconditionally or conditional on the 2007 Sernas recommendations — relocation of the barrier arm and radio controls recommended in Jan 2007. I have reviewed Sernas’s report.<sup>13</sup> Sernas was retained to justify the elimination of loading spaces; not to address a future bank use in the context of increased take-out delivery. The recommended location would permit a delivery vehicle to park in the lane way while the driver phones McDonald’s to ask that the barrier be lifted. The as-built location forces a vehicle to park on the sidewalk or queue in the street. According to Mr. Tedesco’s research, the City wanted additional study from Sernas and this report fell by the wayside, until resurrected by Mr. Tedesco for this hearing.

---

<sup>13</sup> The private lane is proposed to have both an entry and exit gate with sufficient distance between the entry gate and the sidewalk on Sheppard Avenue so that the vehicle waiting at the entry gate does not block pedestrians or through traffic on Sheppard Avenue. The total length of the private lane within the site is approximately 49 metres. The entry gate would be located approximately 13.5 metres north of the sidewalk along Sheppard Avenue and the exit gate would be located at the end of the private lane. The approximate distance between the entry and exit gate is 35.5 metres, which is more than sufficient to allow for storage of two heavy single unit trucks (design length of 11 .5 metres), the most likely delivery vehicle. The proposed locations of the gates are provided in Figure 1. . 3 The vehicles accessing the site would be controlled via a commercial gate system that generally consists of the following components:

- Gate hardware
- Phone entry system
- Security camera.

The width of the private lane is 3.5 metres and we recommend the implementation of a barrier gate with lowering arms at both ends. The exit gate would be activated via a loop detector located approximately two metres south of the gate. Phone entry system can be designed for full access control of the gate by one or more controllers who can grant or deny access. Each of the 9 convenience retail I restaurant sub-tenants and the chief of building maintenance could have control of the gate. Security camera(s) should be considered during the installation planning stage for commercial gate systems. Security cameras can assist with control of the gate and to monitor activity on the private lane to discourage pedestrian traffic.

Mr. Farber said that his client was reluctant to relocate it because it would encourage quick park and dash behavior (possibly HSBC's future clients). We don't know why the arm was placed in its present location, but it is not a great cost to move it. I am declining to do so because such an action needs to be in concert with operational changes, which the TLAB has no ability to supervise.

We also know that the City would be unlikely to enter into an agreement registered on title to enforce any "operational changes". If I did impose the Sernas measures temporarily and put in place a review mechanism, say after six months, with a view to deleting or fine tuning the condition I would be stepping out the limited role envisaged for the TLAB in s. 45(1) of the *Planning Act* of applying the four tests.

At least for the duration of the pandemic, better traffic control involves better communications between McDonald's and Taco Bell and their delivery persons about the access gate. Perhaps there is something like the transponder system used on the 407 or other technological mechanisms such as passwords embedded in the takeout order confirmations. I do not have the expertise nor the evidence to devise these procedures and it would not be desirable or advisable to try to impose such a condition.

Accordingly, I am making the variance decision unconditional except for compliance with the as-built plans. I ask that HRDOV continue good faith efforts to encourage better parking and loading operations and pedestrian convenience and safety.

## **DECISION AND ORDER**

I authorize a variance to permit the central unit of the subject building to be used as a financial institution. This variance is conditional on the building continuing to be substantially the same as shown in Figure 4.



---

Ted Yao  
Panel Chair, Toronto Local Appeal Body