

DECISION AND ORDER

Decision Issue Date Wednesday, April 14, 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): ONOFRIO NOCERA

Applicant(s): WEIR FOULDS LLP

Property Address/Description: 2095 CODLIN CRES

Committee of Adjustment File: Number(s):

Number(s): 20 124954 WET 01 MV

TLAB Case File Number(s): 20 194400 S45 01 TLAB

Hearing date: March 30, 2021

DECISION DELIVERED BY ANA BASSIOS

APPEARANCES

Name	Role	Representative
Weir Foulds LLP	Applicant	
Streetsville Road Services Inc.	Owner	
Onofrio Nocera	Appellant	Chris Tzekas
Franco Romano	Expert Witness	

INTRODUCTION

This is an Appeal by Onofrio Nocera of the condition attached to the Etobicoke York Panel of the City of Toronto (City) Committee of Adjustment (COA) decision on August 27, 2020 to approve, on a time limited basis, the existing use of outdoor storage (truck and trailer parking) at the subject property. A previous COA application approved the

use of outdoor storage (truck and trailer parking) for a one year term which expired on May 31, 2020. A request for a one year extension, to May 31, 2021, had been before the COA. The COA approved the application but applied a condition that the approval be valid only until November 30, 2020.

The Applicant filed their Appeal to the Toronto Local Appeal Body (TLAB) on September 16, 2020. The material filed with the Appeal addressed the one year extension that had been requested of the COA. The Applicant's Disclosure filed on November 24, 2020 did not identify a specific change to the application that had been before the COA but stated that "an extension" to the expiry date would be required. The request that the proposed variance be authorized for a limited time period of two years from the date of any TLAB approval decision was first stated explicitly in the Expert Witness Statement of Franco Romano dated December 29, 2020.

The subject property is located in the extreme northwest corner of the City, where Toronto abuts the Region of York and the Region of Peel. It is designated *Core Employment Areas* in the Toronto Official Plan (OP) and is subject to Site and Area Specific Policy 1. It is zoned Class 1 Industrial (I.C1) under the Etobicoke Zoning Code.

In attendance at the 'virtual' Hearing were: Sylvain Rouleau (Weir Foulds LLP), legal counsel for the Applicant; Franco Romano, Expert Witness for the Applicant; and Paul Chronis, land use Planner with Weir Foulds LLP.

I advised that pursuant to Council's direction, I had attended the site and the surrounding area and had reviewed the pre-filed materials but that it is the evidence to be heard that is of importance.

BACKGROUND

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

Section 2, By-law 517-2000

Truck and trailer parking is not a permitted use in an I.C1 Zone.

Outside storage is not permitted in connection with any of the uses permitted.

The request before the COA was to permit an extension of the COA's previous authorization of the existing outside storage (truck and trailer parking) use for an additional year to May 31, 2021.

The request before the TLAB is to allow the existing use of outside storage to continue for a period of two years from the date of any TLAB approval decision.

MATTERS IN ISSUE

The Applicant's representatives are well aware that an Appeal against the decision of the COA is a Hearing "*de novo*", (i.e., that the entire application will be considered anew by the TLAB) and have provided land use planning evidence in support of the proposal.

The Application, however, is not for a permanent variance to the By-law to allow the requested use. The proposals before both the COA and the TLAB request a time limited authorization of the variance. The COA had authorized a six month extension to the previous approval and not the one year extension that had been requested. The request before the TLAB is for an extension of two years from the time of the TLAB Decision. Thus, in addition to the four tests mandated by s. 45(1) of the *Planning Act* (the *Act*), there is an additional matter at issue regarding the appropriate duration for an extension of a "temporary" variance, should the application be deemed to meet the four statutory tests.

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 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.

Temporary Use Provisions – s. 39(1)

39 (1) The council of a local municipality may, in a by-law passed under section 34, authorize the temporary use of land, buildings or structures for any purpose set out therein that is otherwise prohibited by the by-law.

Area and time in effect

(2) A by-law authorizing a temporary use under subsection (1) shall define the area to which it applies and specify the period of time for which the authorization shall be in effect, which shall not exceed three years from the day of the passing of the by-law.

EVIDENCE

Land Use Planning

The only witness in this matter was Mr. Franco Romano, who was qualified as an Expert Witness in land use planning. Mr. Romano's Expert Witness Statement was entered as Exhibit A.

Mr. Romano testified that the subject property is located within a *Core Employment Areas* designation under the OP and is in close proximity to major transportation corridors, Pearson International Airport and rail yards in Brampton, Vaughan and Mississauga. He noted that there are a multitude of employment uses that rely on transported goods for their businesses and a truck terminal facilitates those uses.

It is Mr. Romano's evidence that the section where the subject site is located shows that outdoor storage predominates, both as primary and accessory use. It is his evidence that true residential uses are limited to a few remaining occupancies. Most of the remaining residential buildings, he suggests, are not occupied as residential buildings but are used for other purposes such as for offices for the businesses located in the area.

Of note in this matter is that the area, many years ago, consisted of a residential area that was expropriated to facilitate the construction of Highway 427. It is Mr. Romano's testimony that the previous existence of residential uses in this area underlies the specific policy wording of Site and Specific Area Policy 1 (SASP 1) in the Official Plan.

1. South of Steeles Avenue, West of Alcide Street

- A limited range of industrial uses compatible with existing residential uses are permitted.
- Vehicle body shops, recycling facilities, truck terminals and driving schools, and other incompatible land uses will not be permitted until the majority of existing residential land uses cease to exist. However, truck driving school classrooms may be permitted, provided that the storage, parking and maintenance of trucks, trailers and/or training vehicles are located off-site.
- Outdoor storage uses will not be permitted except for outdoor storage uses established prior to December 16, 1999.
- A limited range of live/work uses may be permitted in conjunction with existing residential uses.
- No expansion of the existing houses is permitted.




Figure 1

The subject property is not governed by the City of Toronto Harmonized Zoning By-law (By-law 569- 2013), largely as a result of continuing appeals and refinements of the

City's OP *Employment Lands* policies. The subject property continues to be governed by the Etobicoke Zoning Code (By-law 517-2000), until such time as the OP policies are finalized and the "holes" in the Harmonized By-law can be filled. The I.C1 zoning permits a limited range of employment uses which does not include a truck and trailer/container parking facility, or outdoor storage associated with the permitted range of employment uses. The thirteen single detached dwellings which existed at the time the By-law was approved, and which are listed in a schedule attached to the By-law, were permitted provided that no expansion to any of them be allowed. In addition, there is a "notwithstanding" clause that permits a garden centre at 2117 Codlin Cres.

In reference to the SASP 1, Mr. Romano contended that 'truck terminals' are contemplated as a permitted use when "the majority of existing residential uses cease to exist", (see Figure 1). In this regard, he disagrees with the City Planning Staff report dated August 27, 2020 which states that "site specific Zoning By-law 517-2000 (which) prohibits the use of outdoor storage including the proposed truck and trailer/container parking". Mr. Romano contends that the residential uses have largely been eliminated and that therefore the prohibition on the listed "incompatible land uses" should no longer be considered to be in effect.

Mr. Romano noted that "truck terminal" is also known as truck and trailer/container parking and is defined by the Etobicoke Zoning Code as '*a building or place where commercial trucks are rented, leased, kept for hire or stored or parked for remuneration, or from which commercial trucks being stored or parked on the property are dispatched for hire as common carriers, or which is a bonded or sufferance warehouse*'.

Mr. Romano provided photographic evidence of the preponderance of outdoor storage that is evident in immediate proximity of the subject site, including other businesses that operate exactly as the business on the subject site, parking trucks and shipping containers on site. This kind of business is common in the surrounding area as the proximity of highway, air transportation and rail yard infrastructure, combined with the adjoining employment areas in the surrounding municipalities make this a highly accessible place for the location of trucks, trailers and shipping containers.

Mr. Romano advised that COVID 19 pandemic movement and travel restrictions have resulted in an increased need for storage of containers and equipment. He advised that shipping containers are having to be stored for longer periods of time because there is difficulty returning the containers to their originators. He stated that the intention is to limit onsite storage and that the business's primary intent is the transport business, with storage being secondary.

The truck and trailer/ container parking facility on the subject site employs fifty persons. No new building, demolition or construction is contemplated by this proposal; it is a request to continue the current existing use for an extended period of time.

In summary, it is Mr. Romano's opinion that the proposal represents a context-suitable employment land use which is similar to other uses in the area, compatible with all uses, generally contemplated by the land use planning instruments within this area and creates no significant adverse impacts. He asserted that the proposal "appropriately

implements the evolution that the Official Plan envisions for this area by way of variance relief to the zoning by-law, being reflective of the current physical context which includes “the cessation of most residential”. He noted that the temporary nature of the variance request will suspend for the short-term rather than amend the zoning-related planning instruments for a longer duration.

Duration

With regard to the extent of time that this temporary, or time-limited, approval is requested, Mr. Romano advised that the tenant has unsuccessfully made efforts to find an alternate location. While the COA had approved the request for an extension, it was only approved for a period of three months (beyond the date of the decision), which is insufficient for the relocation of the business in pandemic times.

In response to my questioning as to what initiated the temporary use request, legal counsel advised that the Owner had received a *Notice of Infraction*. I was informed that the property is currently on the market for sale, and that there have also been discussions with the City regarding redevelopment of the site.

In response to my enquiry regarding other applications in the area, Mr. Romano advised that a site plan for a hotel has just been approved on the adjacent (vacant) site at 2045 Codlin Cres.

I was advised that Canadian National Railway (CN) is a primary connection for the tenant business and CN has obtained approval to build a new logistics hub in Milton. I was advised that while the requested two-year extension of the COA approval is premised on enough time to find a new location, it is hoped that the timing would coincide with the tenant finding a location in or near Milton as the rail hub becomes operational.

I enquired of legal counsel why a further two year extension (to extend to March/ April 2023) is now being requested of the TLAB when the original period requested from the COA, (and not granted) would have ended May 31, 2021. I was advised that the evidence is that the four tests of s. 45(1) are met and on that basis even a permanent variance could be authorized - which then begged the question of why a permanent variance had NOT been requested and instead three different decisions regarding the temporary use have been engaged.

I was advised that the tenant would likely have to move anyway to service the CN client base and that the two year period would perhaps get the area to a City-initiated Zoning change. It seems that it is anticipated that the City will begin to address the Employment Lands “holes” in the Harmonized By-law within the next few years.

ANALYSIS, FINDINGS, REASONS

As outlined in the Matters in Issue section, I consider this matter in two dimensions. First, does the application satisfy the four tests under s. 45(1) of the *Act* and, second, what extension, if any, should be allowed for the duration of the “temporary” variance?

Official Plan

I find that the proposal is consistent with the PPS, the Growth Plan and the OP’s *Core Employment* policies in that it does not introduce sensitive uses into the employment area, and it does not constitute a conversion of employment uses.

The OP Specific Area Policy which applies to this area (SASP1) prohibits “incompatible” uses, such as vehicle body shops, recycling facilities, truck terminals and driving facilities until such time as the majority of existing residential uses cease to exist. It is Mr. Romano’s evidence that the condition is met – that for all intents and purposes, very few of the remaining dwellings are occupied for residential purposes. Mindful of the degree to which the use of the remaining houses can be ascertained by a private consultant, I accept that it is most likely that the majority of residential uses that existed in 2000 in this defined area are no longer in existence, and therefore that the intent and purpose of the OP is maintained in this regard.

However, the SASP also separately prohibits outdoor storage uses unless established prior to 1999. This prohibition is not subject to any condition regarding the continued existence of residential uses. Mr. Romano equates “truck terminal” with truck and trailer/container parking and refers to the Etobicoke Zoning Code for the definition of Truck Terminal as follows: “*A building or place where commercial trucks are rented, leased, kept for hire or stored or parked for remuneration, or from which commercial trucks being stored or parked on the property are dispatched for hire as common carriers, or which is a bonded or sufferance warehouse*”.

In my opinion, the definition addresses the storage of trucks only and does not include the storage of shipping containers, of which there are an abundance on the subject property. Thus, while I accept that the broader intent and purpose of the Official Plan with regard to the use of lands for employment and employment-supportive purposes can encompass the operation of a truck terminal on the subject property, I do not agree that the permitting of outside storage of a large number of shipping containers is consistent with the intent of the OP. I anticipate that the issue of outside storage will be a policy matter for the City to address in its further OP and Zoning By-law work and I am reluctant to anticipate that policy work or presume its outcome in this Decision.

Zoning By-law

The applicable By-law, By-law 517-2000, zones the lands Class 1 Industrial (I.C1) and stipulates the lands shall not be used for any other purposes than those listed. It specifically stipulates that outside storage shall not be permitted in connection with any of the uses permitted within the Section. The list of uses permitted includes hotels,

banks, manufacturing operations, warehouses, and recreational facilities. A truck terminal or truck and trailer/container parking are not included as permitted uses.

Mr. Romano has carefully documented existing uses within the boundary of SASP1 and has provided evidence to show that the use to which the subject property is currently put has long existed in the SASP1 area. I note that the current tenant on the subject property was previously located at the adjacent property, 2045 Codlin Cres., which is now vacant. On the other adjacent property, 2099 Codlin Cres, a similar business operation currently exists. The parking of large trucks from a truck driving school is occurring in the immediate proximity of 2154 Codlin Cres. Mr. Romano employs this contextual evidence to support the contention that the continued operation of the business on the subject property would not have unacceptable adverse effects.

I recognize the important role this type of business plays maintaining the supply chain for manufacturing and other employment activities, and I recognize the value of the 50 jobs associated with this operation, especially in these pandemic times. While the proposal seeks to authorize a fairly longstanding use in the area, and notwithstanding evidence that other similar operations exist in the immediate area, the second test under s. 45(1) to be met is whether this proposal meets the intent and purpose of the Zoning By-law. I do not find that permitting the proposed use would be consistent with the intent and purpose of the Zoning By-law.

I go further: Zoning By-law 517-2000 specifically stipulates that outside storage “shall not be permitted in connection with any of the uses permitted...”, and the request before the TLAB would seem to me to be an exception to this requirement of the By-law, not a variance to it. Reinforced by the prohibition of outdoor storage in the OP, via SASP1, I am of the opinion that it is not within the TLAB’s jurisdiction to authorize as a (minor) variance a request which totally eliminates a by-law requirement. Such an approval is, in my opinion, the jurisdiction of City Council via an application for rezoning.

Duration of “temporary” variance

I am mindful that the request before the TLAB is not for a variance from the By-law to allow the proposed use on a permanent basis but is presented for consideration to allow a “temporary” extension of the existing use for a period of time which would allow for the successful relocation of the business from the subject property. This aspect of the request requires further consideration.

The opinion evidence that has been provided to the TLAB regarding the satisfaction of the four tests mandated by the *Planning Act* does not hinge on this request being of a time-limited nature. There was no intimation during the Hearing that a less strict application of the four tests should be applied in consideration of the temporary nature of the variance being requested. In partial response to my question as to why the request has been framed as a temporary variance, I was advised that this approach would allow the use to continue without making permanent changes to the underlying By-law. This response seems to me to be somewhat contradictory; on the one hand I am provided with evidence that the request fully meets the four tests for a “permanent”

variance but on the other I am offered the impermanence of the request as a beneficial feature of the request.

Leaving aside the question of whether *any* variance changes an underlying by-law, I am led to conclude that a request for a “temporary” variance could temper the COA members’ (and perhaps the TLAB’s) evaluation of the potential adverse consequences of otherwise allowing the request on a more permanent basis, i.e., short-term vs long-term impacts. The consideration of potential adverse impacts is central to the fourth test, that the variance be “minor”.

The temporary variance granted by the COA was for a period of one year, ending on May 31, 2020. The Applicant’s request for a further one year extension to May 31, 2021 was not fully granted; the COA limited the extension to November 30, 2020. The timelines that are dictated by the procedural requirements of filing an Appeal to the TLAB and arriving at a Hearing have meant that the TLAB’s Decision of this matter is expected mid-April 2021, achieving as a result almost all of the year-long extension that had been requested of the COA and the limitation of which has been appealed to the TLAB. Somewhat ironically, had the COA approved the full year extension of its previous approval, the Applicant would not have been in a position to Appeal the COA decision and would not have been able to put the request for a *further* two year extension of the before the TLAB. Desire for a further extension would have required a third application to the COA.

The jurisdictional line between changing a use on a property, which requires a rezoning, and varying a use, is sometimes not a clear and bright one. While this matter is a variance request before the TLAB, I have previously expressed the opinion that this matter presents as an exception to the By-law, requiring a rezoning for approval rather than a variance. Rezonings under the *Planning Act*, (s. 39) are limited for a period of time which shall not exceed three years. The request before the TLAB is to extend the temporary variance for an additional period that would, if approved, allow the duration of the temporary use to span a period of close to four years, from May 31, 2019 to mid-April 2023.

In light of the Act’s limitation of the duration a temporary change of use, I do not find that a use variance, (potentially an exception) should be permitted for a greater period than is contemplated by the *Act* for a change of use rezoning.

For all of the above-stated reasons, I find that the requested variance does not maintain the general intent and purpose of the Official Plan, does not maintain the general intent and purpose of the Zoning By-law, is not minor and should therefore be denied.

DECISION AND ORDER

The Appeal is dismissed. The Committee of Adjustment decision noted above is final and binding, and the file of the Toronto Local Appeal Body is closed.

X



Ana Bassios
Panel Chair, Toronto Local Appeal Body