

DECISION AND ORDER

Decision Issue Date Wednesday, April 20, 2022

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/Applicant: 1567854 ONTARIO LTD

Property Address/Description: 6758 KINGSTON RD

Committee of Adjustment File number: A0123/21SC

TLAB Case File Number: 21 183363 S45 25 TLAB

Hearing date: April 12, 2022

DECISION DELIVERED BY TED YAO

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
1567854 Ontario Ltd	Owner	-
Adam Grossi	Expert witness (planning)	

INTRODUCTION

1567854 Ontario Inc wishes to use 170 m² of space at its plaza at 6758 Kingston Rd for cannabis retail. The only issue is amount of permissible gross floor area (GFA), as the **use** is legal under the zoning by-law. The GFA is constrained by a site-specific zoning by-law (that is a special zoning bylaw written just for 6758 Kingston Rd). It states:

$$\frac{\text{office GFA}}{\text{retail GFA}} \geq 1.5$$

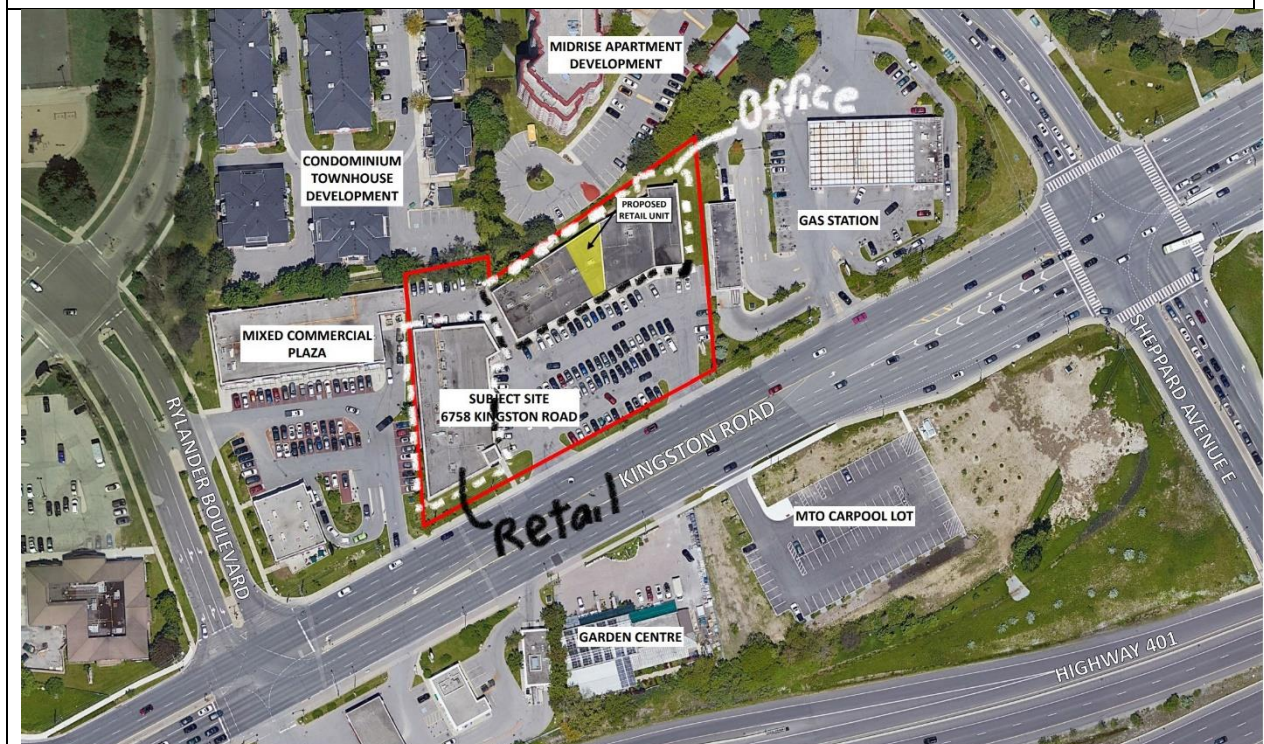
The cannabis retail store will push the ratio down to 1:1.

$$\frac{\text{office GFA}}{\text{retail GFA}} = 1.0$$

Table1. Variances sought for 6758 Kingston Rd			
Variances from Zoning By-law 569-2013			
		Permitted/Required	Proposed
1	$\frac{\text{office GFA}}{\text{retail GFA}}$	$\frac{1.5}{1.0}$	$\frac{1.0}{1.0}$
2	Accessory pinball machines	Not permitted	Four pinball machines

BACKGROUND

Figure 2. Aerial photo



6758 Kingston Rd is a strip plaza, one property away from the 401/Port Union interchange. On the east is a service station and car wash; to the south, Kingston Rd and a garden centre; to the west, multibuilding commercial, and to the north, townhouses and midrise residential. The plaza consists of two separate buildings, a bakery/coffee shop beside the parking lot (marked "retail" in Figure 2) and real estate

and medical offices to the rear (marked “office”). A portion of the real estate office will become converted to the new cannabis retail store.

The Committee of Adjustment refused the application on June 23, 2021. 1567854 appealed and so the appeal came to the TLAB.

The ratio of office to retail greater than 1.5 can be seen in the design of the plaza in which the rear building is all office and the building closer to Kingston road is all retail (the bakery/coffee shop). 1567854 had some “excess” retail gross floor area under the 1.5 ratio (about 10% of the proposed store). It used this permission to commence construction under a properly issued building permit for a separate entrance door and awning. If granted, the variance will allow the lessee to have a display area, a cash register, toilet and kitchen facilities, as well as a secure storage area (as required under Provincial legislation) for its cannabis products.

VARIANCE TEST

The variances from Zoning By-Law 569-2013 must cumulatively and individually:

- 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.

Right to develop

2547611 Ontario Inc must demonstrate to the decision-maker that the tests are met on the balance of probabilities; there is no right to a variance.

EVIDENCE

I heard from Mr. Grossi, a land use planner, and First Avenue Properties’ (a parent company of 2547611) Director, Planning and Development. I qualified Mr. Grossi as able to give opinion evidence in the area of land use planning even though he is a full time employee of the applicant. He signed the affidavit to give impartial evidence and is a full time member of the Canadian Institute of Planners.

ANALYSIS, FINDINGS, REASONS

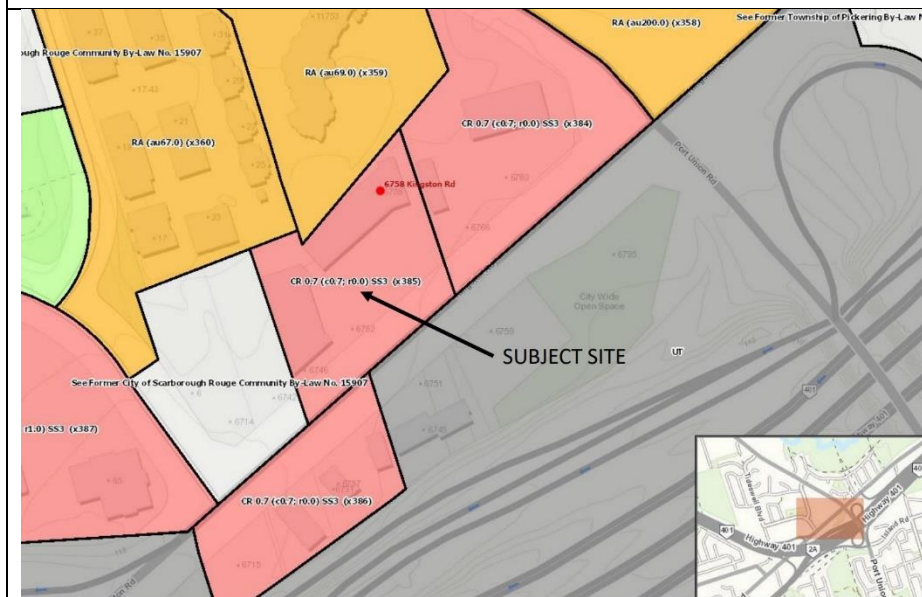
Even though this is unopposed, the decision maker has an independent duty to assess the evidence and ensure that the application meets all the tests under the *Planning Act*. Mr. Grossi wrote in his appeal letter:

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The requested variance is required to allow for 170 m² (1,830 ft²) of additional retail space on the subject site. Given a gross floor area of 2,517 m² (27,092.7 ft²), this increase represents 6.75% of the total GFA.

A second issue is that the lessee wishes to have four nonfunctioning vintage pinball machines inside the store for advertising. This is not permitted by the zoning.

Figure 3 Zoning map



Legality of cannabis retail

City Council accepted a planning report dated December 6, 2018 to opt into the Provincially funded and regulated program to control and license cannabis retail¹. It pointed out that regulated vendors would prevent access to children and be a responsible response to the Federal government's removal of cannabis from controlled substances legislation². Therefore, cannabis is a legally permitted retail product; all three levels of government have passed legislation to enable this to happen. The sole

¹ This report recommends that Toronto City Council not opt-out of Ontario's retail cannabis regime, thereby allowing provincially licensed cannabis retail stores to operate in Toronto. Provincial licensing is intended to ensure that operators conduct their business in a responsible and accountable manner and would support the goals of preventing youth from accessing cannabis and eliminating the illegal cannabis market.

² Cannabis Act, S.C. 2018, c. 16, Assented to 2018-06-21; An act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other acts

issue is whether the proposed lower ratio of office to retail satisfies the tests under the *Planning Act*.

Official Plan and zoning

Despite his best effort, Mr. Grossi, was unable to obtain the date of adoption of the original Scarborough zoning bylaw for the plaza. In 2013, the ratio limit was re-enacted into the present zoning bylaw. The original date of construction of the plaza was perhaps ten years earlier.

The site is designated “Mixed Use Area” in the Official Plan and zoned “CR x385”³, the “x385” referring to exception number 385. This exception has subclauses A to E:

- A permits eight types of land uses, including “retail” and “office”;
- B, prohibits “ancillary pinball machines”; and
- D provides that the ratio of office to retail cannot exceed 1.5 to 1.0.

s. 4.5.1 of the Official Plan encourages “high quality commercial uses that meets the needs of the local community”⁴ as well as “well-paid, stable, safe and fulfilling” jobs.

³

(385) Exception CR 385

The lands, or a portion thereof as noted below, are subject to the following Site Specific Provisions, Prevailing By-laws and Prevailing Sections:

Site Specific Provisions:

- (A) Despite the land use permissions for this zone, only the following uses are permitted: financial institution, day nursery, library, office, personal service shop, place of worship, retail store, and education use;
- (B) Despite land use permissions for this zone, ancillary amusement devices are not permitted;
- (C) The permitted maximum gross floor area cannot exceed 0.7 times the area of the lot;
- (D) The total combined gross floor area of all retail store, personal service shop, financial institutions, and day nursery uses must not exceed the ratio of 1.0 square metres for every 1.5 square metres of gross floor area for office and educational uses; and
- (E) The minimum building setback from a lot line abutting a street is 3.0 metres.

⁴ 4.5.1 In Mixed Use Areas development will: a) 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**; b) provide for new jobs and homes for Toronto’s growing population on underutilized lands in the Downtown and Central Waterfront, Centres, Avenues and other lands designated Mixed Use Areas, creating and sustaining well-paid, stable, safe and fulfilling employment opportunities for all Torontonians; c) locate and mass new

The other provisions in this section, transition to an adjacent residential area, shadow impacts etc. were used as a guide for the original construction of the plaza, before 2547611 acquired the property. Under s. 24(4) of the *Planning Act*, zoning provisions in x385 are “deemed” to conform with the Official Plan as there were passed by City Council without anyone appealing them. Since the as-built form of the plaza will not change, this conformity must carry through to this application and Mr. Gross notes that the conversion from office to retail will have no impact on the physical appearance of the property, nor on its proper functioning, including, fire access, garbage and loading. There is also no impact on the required parking. He notes as well that the plaza has good pedestrian access and is on a street with higher order transit.

S. 4.5⁵. of the Official Plan also attempts to achieve Mixed Use Areas in which Torontonians can live, work, and shop in the same area, another objective which this conversion meets.

I now turn to the CR x385 zoning. Mr. Grossi notes that none of the surrounding CR lands have this restriction, even though some contain commercial plazas similar to 2547611's. Avenue Properties, 2547611's parent company, is an experienced property owner and flexibility is an asset for effective long term management. Office space will not fall to zero because office lessees typically pay higher rents, enter into longer term leases and provide the lessor with greater cost and revenue certainty. Mr. Grossi said:

The ratio requirements are a hinderance when trying to lease space, particularly at a time when the need for office space, especially in this format, is on a decline. This has been exacerbated by the shift in how office-based businesses are operating as a result of the COVID pandemic

In my view the intent and purpose provisions of clause A of x385, permitting 8 uses including retail, is maintained by the granting of this variance.

buildings to provide a transition between areas of different development intensity and scale, as necessary to achieve the objectives of this Plan, through means such as providing appropriate setbacks and/or a stepping down of heights, particularly towards lower scale Neighbourhoods ; d) locate and mass new buildings so as to adequately limit shadow impacts on adjacent Neighbourhoods, particularly during the spring and fall equinoxes; e) locate and mass new buildings to frame the edges of streets and parks with good proportion and maintain sunlight and comfortable wind conditions for pedestrians on adjacent streets, parks and open spaces; f) provide an attractive, comfortable and safe pedestrian environment; g) have access to schools, parks, community centres, libraries and childcare; h) take advantage of nearby transit services;

⁵ 4.5 MIXED USE AREAS *Mixed Use Areas* achieve a multitude of planning objectives by combining a broad array of residential uses, offices, retail and services, institutions, entertainment, recreation and cultural activities, and parks and open spaces. Torontonians will be able to **live, work, and shop in the same area**, or even the same building, giving people an opportunity to depend less on their cars, and create districts along transit routes that are animated, attractive and safe at all hours of the day and night.

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The plan examiner has found that the vintage pinball machines are ancillary amusement devices and are therefore prohibited. Since this prohibition was passed, cell phones were invented and everyone now has access to similar devices in their pockets. The cannabis retailer is subject to strict Provincial legislation, such as not permitting minors on the premises. The pinball machines are currently for display purposes only, but even if they are restored, in my view, the purpose of clause B of x385 is maintained.

I also find the variances are minor and desirable. I quoted Mr. Grossi's evidence that the conversion is 7% of total GFA and is therefore minor numerically and does not affect the functionality of the site. The need for the landlord to have flexibility in leasing and not to incur the time and expense of the variance process for small changes in the office to retail ratio makes it desirable that these variances be granted.

DECISION AND ORDER

I authorize the variances in Table 1 on condition that the construction is substantially similar to the plans filed with the plan examiner.

X



Ted Yao
Panel Chair, Toronto Local Appeal Body