

ISSUE DATE:

**September 12,
2012**



PL110766

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Calloway Real Estate Investment Trust Inc.
Subject: Proposed Regional Official Plan Amendment No. 43
Municipality: City of Hamilton
OMB Case No.: PL110766
OMB File No.: PL110766

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Calloway Real Estate Investment Trust Inc.
Subject: By-law No. BL 11-191
Municipality: City of Hamilton
OMB Case No.: PL110766
OMB File No.: PL110767

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Calloway Real Estate Investment Trust Inc.
Subject: Proposed Official Plan Amendment No. 137
Municipality: City of Hamilton
OMB Case No.: PL110766
OMB File No.: PL110779

IN THE MATTER OF subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Calloway Real Estate Investment Trust Inc.
Subject: Proposed Plan of Subdivision
Property: 1125-1143 Wilson Street West
Address/Description:
Municipality: City of Hamilton
Municipal File No.: 25T-201005
OMB Case No.: PL110766

OMB File No.: PL110808

APPEARANCES:

Parties

Counsel

City of Hamilton and Trinity Development Group Inc.

Joel Farber
Sara Hickey

Calloway Real Estate Investment Trust Inc.

Mary Bull
Sharmini Mahadevan

DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD

1. Background

(i) Site

Trinity Development Group Inc., (“Trinity”) is the owner of 83.27 acres of land (33.7 hectares) on the north side of Wilson Street West, in the Duff’s Corner area of the former Town of Ancaster (“Ancaster”). These lands are municipality known as 1125-1143 Wilson Street West. Approximately 27 acres (11 hectares) of this parcel, being lands which front on Wilson Street West are proposed for commercial development (“Trinity Site”). The remaining 56.57 acres (22.7 hectares) to the north would remain as open space.

The Trinity Site surrounds three sides of property comprising approximately 5.4 acres and municipality known as 1185 Wilson Street West. These lands are occupied by a motel and restaurant which now appear to be closed and which, based on the evidence in this hearing, are now also owned by Trinity.

To the west of the Trinity Site is a Toyota car dealership, at the northeast corner of Wilson Street West and Mason Drive.

To the east of the Trinity Site are predominantly vacant lands with some businesses located in older, converted single detached dwellings.

On the south side of Wilson Street West, across from the Trinity Site, are the Duff's Corner Plaza and the Ancaster Crossing Plaza, consisting of a mix of retail and service commercial space, a Wendy's and Tim Horton's restaurant and a Pioneer service station.

Further east of the Duff's Corner Plaza and the Ancaster Crossing Plaza, on the south side of Wilson Street West, is a large retail, commercial shopping centre anchored by a Wal-Mart department store and a Canadian Tire store ("CT store"). Calloway Real Estate Investment Trust Inc., ("Calloway") owns this shopping centre except for the CT store.

(ii) Planning Instruments

In July 2010, Trinity submitted applications ("Trinity Applications") to the City of Hamilton ("City") to amend the Regional Municipality of Hamilton-Wentworth ("Region") Official Plan ("Regional OP"), the Ancaster Official Plan ("Ancaster OP") and Ancaster Zoning By-law No. 87-57 ("ZBL 87-57") to permit a commercial development comprised of 338,482 square feet proposed to be anchored by a large scale home improvement store. Trinity also submitted an application for the approval of a Plan of Subdivision.

In 2001, the Region and its constituent municipalities, including Ancaster, amalgamated ("2001 Amalgamation") to form the new city of Hamilton ("City"). As a result of the 2001 Amalgamation, the City embarked on a process to establish a Regional Hamilton Official Plan ("RHOP") and an Urban Hamilton Official Plan ("UHOP"). These official plans were intended to replace, inter alia, the Regional OP and the Ancaster OP.

The RHOP became effective March 17, 2012 and the UHOP was adopted by City Council on July 9, 2009 and approved by the Ministry of Municipal Affairs and Housing (“MMAH”), with modifications, on March 16, 2011. Certain appeals (“UHOP Appeals”) in relation to the UHOP have been filed however and they are before the Ontario Municipal Board (“Board”) in another proceeding. Technically, therefore, the UHOP has not been finalized but the expert planning evidence provided in this case indicated that it should nevertheless be given significant weight because it represents the current iteration of planning policy, commercial and otherwise, for the City.

On July 7, 2011, City Council adopted Regional Official Plan Amendment 43 (“ROPA 43”) to the Regional OP, adopted Official Plan Amendment 37 (“OPA 37”) to the Ancaster OP and passed Zoning By-law 11-191 (ZBL 11-191”) amending ZBL 87-57. In addition, on July 29, 2011, the Director of Growth Planning for the City approved the draft plan of subdivision and conditions (“Draft Plan”) for the Trinity Site. ROPA 43, OPA 37, ZBL 11-191 (“Trinity Planning Instruments”) and the Draft Plan were set out in Tabs 62,63,64 and 65 respectively of Exhibit 5 filed in this proceeding.

Following the adoption and approvals above described, Calloway appealed the Trinity Planning Instruments and the Draft Plan to the Board.

2. Evidence

Stephen Robichaud, Manager, Development Planning for the City and Peter Walker of Walker, Nott and Dragicevic, provided expert land use planning testimony in support of the proposal.

Mr. Robichaud has been involved with the contemplated development for the past few years and prepared a report in June of 2011 which recommended approval of the Trinity Planning Instruments. That recommendation was ultimately adopted by City Council. Mr. Robichaud testified as to the studies which the City has engaged in over the years in relation to the UHOP and pointed out the extent of the consultative process employed

in that regard. He also confirmed that City staff, in report PED 08066 (a), June 4, 2008, advised that the subject lands could not be supported for conversion to a non-employment use. However, in light of events which occurred subsequent to June 2008, including the actions and decisions of City Council, Mr. Robichaud opined that the approval of the Trinity Planning Instruments was not a conversion for purposes of the Growth Plan for the Greater Golden Horseshoe ("Growth Plan") because a conversion occurred in June, 2008 when City Council made a decision to remove these lands from an employment land designation for purposes of the UHOP. He stated that the Trinity Planning Instruments are vehicles to implement the site's Arterial Commercial designation in the UHOP.

Mr. Walker was just retained in May of this year to provide planning input for the subject appeals. In his opinion, the Trinity Planning Instruments conformed with the Growth Plan, were consistent with the 2005 Provincial Policy Statement ("PPS") and met the general intent of the UHOP and the in force Ancaster OP and Regional OP.

Douglas Annand, of urbanMetrics Inc., was called in support of the proposed development and provided expert testimony as a retail market analyst. He was the author of a Retail Market Demand and Impact Analysis (the "urbanMetrics Study" or "US") dated December 20, 2011. The US was prepared after the Trinity Planning Instruments were approved by City Council and examined, according to Mr. Annand "the potential impact of the proposed development on the existing and planned retail commercial structure in the City". In Mr. Annand's opinion, the proposed retail development "is warranted and would not adversely affect the economic health of existing nearby shopping districts, including the traditional core of Ancaster"

Robin Dee, a Real Estate Consultant and Retail Market Analyst was also called to provide evidence in support of the proposal. Mr. Dee was retained in March of this year essentially to complete a peer review of the urbanMetrics Study. He was not retained to undertake any independent empirical research. Although he made a few minor

suggestions with respect to the US, he opined, among other things, that it “appropriately analyzes the market opportunities and impacts arising from Trinity’s proposed commercial development.”

Calloway called two individuals to provide expert evidence in opposition to the development proposed: Eric Saulesleja and Jeryl Jaque.

Mr. Saulesleja, a planner with GSP Group Inc. provided expert land use planning evidence and stated, among other things, that the proposal does not conform with the Growth Plan and should not be approved in its current form since ROPA 43, OPA 137 and ZBL 11-191 are inconsistent with the UHOP.

Mr. Jaque was also qualified to give expert testimony as a retail market analyst. He was retained by Calloway in February, 2012, to complete a peer review of the US. Although his task was essentially the same as Mr. Dee’s, his conclusions were far different. In his opinion, inter alia, the urbanMetrics Study had problems of a purely market nature which had a significant effect on the study’s analysis and outcome and its reliability as justification for the Trinity proposal. In his opinion, the US did not establish a need for commercial facilities as required by section F.3.2.7 of the UHOP.

3. Issues

This case gives rise to the following issues:

- (a) Do the Trinity Planning Instruments represent a conversion under the Growth Plan and, if so, have the provisions of section 2.2.6.5 of the Growth Plan been met?
- (b) Are the Trinity Planning Instruments consistent with the provisions of the PPS?

(c) Do the Trinity Planning Instruments, and in particular, ROPA 43 and OPA 137, otherwise conform with the policies (“Official Plan Policies”) of (i) the UHOP,(ii) the Ancaster OP and (iii) the Regional OP?

4. Analysis

(a) Growth Plan

Calloway argues that since section 2.2.6.5 of the Growth Plan clearly stipulates that major retail uses, such as those contemplated in the Trinity proposal, are non employment uses, the redesignation of the Trinity site in the Regional OP and the Ancaster OP, is a conversion of land for purposes of the Growth Plan and therefore, all the requirements of subsections 2.2.6.5 (a) through 2.2.6.5 (f) must be met. In this case, Calloway urges that those subsections have not been met and that the municipal comprehensive review analysis undertaken by the City from 2006 to 2008 does not constitute a municipal comprehensive review that permits the conversion of the Trinity site as detailed in ROPA 43, OPA 37 and ZBL 11-191. If I accede to Calloway’s argument with respect to the Growth Plan I would be ignoring the site’s current Arterial Commercial designation in the UHOP and I am not prepared to do so.

Following the 2001 Amalgamation, the City embarked on a planning process which had, as one of its principal objectives, the completion of a new Official Plan to replace the Regional OP and all the existing local Official Plans of the amalgamated municipalities, including the Ancster OP. The introduction of the Growth Plan in 2006 forced the City to engage in a review and analysis of, among other things, its existing employment lands between 2006 and 2008. Although neither Hamilton staff nor Hemson Consulting Ltd supported the removal of the Trinity Site from employment to non-employment uses, in the UHOP, City Council in June of 2008, after a public consultative process ,removed the property in question from its employment land character in the Regional OP and the Ancaster Op to non-employment in the UHOP.

The decision by City Council in 2008 led to the site in question acquiring an Arterial Commercial designation in the UHOP, which was the new Official Plan the City was seeking. As already mentioned, the UHOP was adopted by City Council in July 2009 and approved by the MMAH in March of 2011.

I am prepared to accept City Council's decision to remove the Trinity Site from the City's employment land in 2008 and its designation of those lands as Arterial Commercial in July 2009 for two fundamental reasons.

First, although the UHOP still must be finalized, neither, Calloway nor any other party appealed the Arterial Commercial designation for the Trinity Site. Furthermore, in argument, the City and Trinity suggested that based on the planning evidence in this case, the non-employment use of the site has not been put in issue by any outstanding appeal, including the one general appeal filed. In my opinion therefore, the site's Arterial Commercial designation is simply not before me to possibly change and I would be acting beyond my jurisdiction if I did so.

Second, it is significant, in my view, that the MMAH questioned, by letter dated June 3, 2009, and before its approval of the UHOP, the contemplated conversion of the Trinity Site to a non-employment use. The change sought by City Council was therefore specifically addressed by the MMAH, the approval authority for the UHOP. The City, by letter to the MMAH dated July 10, 2009 responded to the conversion issue raised by the Ministry. This response obviously satisfied the Ministry because, the MMAH on March 16, 2011 approved the UHOP including the Arterial Commercial designation for the Trinity Site.

By taking into account the public consultative process initiated by City Council in March, 2008 with respect to the change in the Trinity Site, the MMAH raising the issue of conversion with the City and subsequently approving it, the fact that the Arterial Commercial designation has not been appealed on a site specific basis and the reality

that an appeal of the UHOP is not before me, I believe I have scrutinized and carefully considered the decisions of City Council and the MMAH as suggested in *Ottawa (City) v. Minto Communities Inc. (2009) O.J. No. 4913*.

It is arguable that the amendments before me are premature in that the appeals of the UHOP (“UHOP Appeals”) have not yet been finalized and therefore, one cannot say, without a scintilla of doubt, that the Arterial Commercial designation for the subject lands will be maintained. The prematurity argument, however, was not advanced in any substantive way during the course of this proceeding, and accordingly, I cannot place any meaningful emphasis on it. Moreover, my determination as to the subsisting nature of the Arterial Commercial designation in the UHOP should not be interpreted or construed as being a means to circumvent the need for a full and complete adjudication on the merits of the UHOP Appeals but rather, as a decision based on the limited and confined circumstances of this case. To treat the Arterial Commercial designation for the Trinity Site as currently subsisting, will not, in my view, impair another decision maker’s ability to address the issues raised in the UHOP Appeals.

In response therefore to the questions posed by the Growth Plan issue, I am satisfied that the Trinity Planning Instruments do not represent a conversion of the Trinity Site under the Growth Plan because that conversion occurred quite some time ago during the UHOP adoption and approval process. As a result, it is unnecessary to assess compliance with section 2.2.6.5 of the Growth Plan.

(b) PPS

The PPS, in section 1.3.2 also deals with a conversion of lands within employment areas to non-employment uses but not in the same fashion as the Growth Plan. The Growth Plan, at the end of section 2.2.6.5 states explicitly that “For purposes of this policy, major retail uses are considered non-employment uses”. The PPS however, does not contain a similar pronouncement.

In *Home Depot Holdings Inc. v. Toronto (City)*, (2009) O.M.B.D. No. 103, Vice Chair Schiller dealt with the issue of conversion in relation to major retail uses which are the uses proposed in this case by Trinity. At paragraph 14 she stated:

Section 1.3.2 of the PPS addresses the conversion of employment lands to non-employment uses, and sets out criteria for so doing. In the context of the PPS, major retail uses are employment uses. For the PPS, locating a major retail use within an employment use (sic) is not a conversion of employment lands to non-employment uses.

Based on this statement, and as Calloway candidly acknowledged, locating a major retail use in an employment area does not constitute a conversion in the context of Policy 1.3.2 of the PPS.

Notwithstanding its position on the question of conversion, Calloway nevertheless maintains that the Trinity Planning Instruments are not consistent with Policies 1.1.1 and 4.5 of the PPS.

Mr. Saulesleja felt that putting a shopping centre of the type proposed in the Trinity Planning Instruments ignores the urban structure and hierarchy of commercial designations established in the UHOP and would be inconsistent with Policy 1.1.1 (b). It is significant, in my estimation, that no contrary evidence was provided by Mr. Robichaud and although Mr. Walker referred to the language of 1.1.1 (b) in his witness statement, he did not provide any specific analysis of this Policy.

Policy 4.5 was also raised by Mr. Saulesleja. He was of the view again that the Trinity Planning Instruments were not consistent with this Policy because they did not meet the long term planning objectives put in place through the UHOP. No contrary evidence was provided by Mr. Robichaud or by Mr. Walker with respect to Policy 4.5.

The absence of compelling and detailed evidence from Calloway in relation to Policies 1.1.1 (b) and 4.5 of the PPS , at the very least, casts a shadow of doubt on the consistency of the Trinity Planning Instruments with the PPS in this case. Based on the evidence given, my own reading of Policies 1.1.1. (b) and 4.5 and the parameters of the Arterial Commercial designation in the UHOP, I have reservations as to whether consistency exists.

(c) Official Plan Policies

(i) UHOP

Although it was suggested during the course of this hearing that failure of an official plan amendment to otherwise conform with other relevant official plan policies is not fatal to the approval of the amendment in question, I am of the view that such a planning proposition does not accord with conventional and established planning wisdom and should not be embraced. In my opinion, any time an official plan amendment is being put forward for approval, (and, as in this case, a concurrent zoning by-law amendment) other relevant official plan policies should be assessed in the context of the change proposed. In this way, inter alia, inappropriate departures from a plan's planning objectives can be avoided and prescribed land use and development patterns can be maintained. The finalization of an Official Plan is oftentimes a long and arduous exercise involving an extensive consultative process. To ignore or downplay relevant policy considerations whenever an amendment is proposed, does not do justice to the time and energy expended in the plan's adoption and approval and could potentially result in the amendment running counter to or not being entirely consistent with the planning objectives initially established.

In this case, Trinity did not file any application to amend the UHOP even though the Trinity Applications to amend the Regional OP, the Ancaster OP and ZBL 87-57 were made a full year after the UHOP was adopted by City Council. If such an application,

which some consider as common practice, had been made, notice thereof would have been required under the *Planning Act* and any relevant policy requirements of the UHOP would undoubtedly come into play. Furthermore, the City and Trinity acknowledge that ZBL 11-191 is not in conformity with the UHOP and that a UHOP amendment will be subsequently required if I were to approve the Trinity Planning Instruments. In my estimation, the failure by Trinity to make an application to amend the UHOP, should not circumvent the need to address its policies.

The UHOP was the culmination of years of studies, reports and public input. My reliance on its provisions when assessing the Trinity Planning Instruments is justified not only by the evidence of the planning witnesses who testified that it was a key policy document but also in the comments of Mr. Krushelnicki in *James Dick Construction Ltd. v. Caledon (Town)*, [2003] O.M.B.D. No. 1195. At paragraphs 44 and 45 of that decision he stated:

44...Inclusion of the Board is authorized to conclude when it is fair to apply the Clergy principle and should undoubtedly do so in the vast majority of cases. And equally, it has the authority to conclude when the circumstances of a case warrant the application of another principle. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest.

45. To conclude otherwise is to require the current practices and policies, no matter how reasonable, must be ignored or given so little weight as to be made virtually trivial, in all cases where the date of the application precedes them. This would amount in some to a wilful blindness that would prevent the decision-maker when determining the merits of an application – even where it is reasonable to do so – to apply criteria, standards and tests that are based on the most current research and information.

The Trinity Applications having been filed more than one year after the UHOP was adopted by City Council were therefore made with full knowledge of the City's direction with respect to commercial planning, in general, and the Trinity Site, in particular.

Through the process leading up to the adoption and approval of the UHOP, the City identified the appropriate location for general retail commercial and shopping centre development in Hamilton. In this regard the designation known as District Commercial was established and was described as containing “a range of retail shops and services that cater primarily to the weekly and daily shopping needs of residents in the surrounding neighbourhoods”.

A District Commercial designation was placed on nearby lands on the south side of Wilson Street which encompassed the Calloway shopping centre, with its Canadian Tire and Wal-Mart stores, and the Ancaster Crossing development. The UHOP Also identified the District Commercial designation for additional retail commercial development up to 753,474 square feet (70,000 square meters).

The Trinity Site, on the other hand, is designated Arterial Commercial in the UHOP, not District Commercial. The Arterial Commercial designation is ‘intended to provide for a range of uses catering to the travelling or drive-by consumer as well as retail stores which are land extensive and require outdoor storage or sales and *cannot be appropriately accommodated in other designations*’.(Board emphasis added)

It would appear therefore that with the Arterial Commercial designation, the UHOP has established a limited role for the Trinity Site insofar as accommodating retail commercial uses.

Notwithstanding this limited role, the Trinity Planning Instruments permit uses which are specifically prohibited in the Arterial Commercial designation (e.g. food stores, department stores, stores primarily selling apparel, housewares, electronics, sporting goods or general merchandise and theatres), uses that are not listed as permitted uses in the Arterial Commercial designation (e.g. Brewers Retail store, LCBO store, banks and financial institutions and offices) and uses which can be appropriately accommodated in other designations.

Furthermore, based on the cross examination of Mr. Robichaud, ZBL 11-191 does not achieve the objective of ensuring that the gross floor area developed is , for the most part, Arterial Commercial and that the restricted uses are secondary. In that regard, It is , significant, that 52.7% of the permitted gross floor area could be developed with non-arterial commercial uses if one assumes the entire H-C2-630 Block on ZBL 11-191 is developed for a home improvement store. Moreover, 64.5% of the permitted gross floor area could be developed in non-arterial commercial uses if the H-C2-630 Block is developed for a home improvement store of 120,000 square feet(11,148 square meters) and 40,059 square feet (3,721 square metres) of non arterial uses. Therefore, based on the size and type of uses deployed, it is entirely possible that the entire development could fall for short of being predominately Arterial Commercial.

Policy E.4.2.11 is also relevant to this matter and it reads as follows:

Official Plan amendment applications for retail or service commercial development exceeding 5,000 square metres of gross floor area shall be required to undertake a commercial needs and impact assessment in accordance with Policy F.3.2.7 – Commercial Needs and Impact Assessment.

It is argued by the City and Trinity that such an assessment is not required because a majority of the gross floor area is Arterial Commercial uses and that, in any event, the US addressed the essence of the requirements for a Commercial Needs and Impact Assessment.

These arguments however, have a hollow ring to them. In terms of uses and gross floor area, it is apparent from my comments in relation to Block H-C2-630 that the Trinity Planning Instruments do not ensure that the development will be primarily Arterial Commercial in nature. And, in relation to the US, I have doubts as to whether it justifies the requisite need for the development. Even if I assume however that it does, Mr. Annand acknowledged that, notwithstanding the mandatory language of F.3.2.7 he did

not address all the requisite considerations. Even though, as suggested in the evidence, the requirements of F.3.2.7 may be onerous, that is not justification for ignoring some of them.

And lastly, in relation to the UHOP, Policy E.4.2.8 should also be taken into account. It reads:

Application for retail and service commercial uses or areas greater than 25,000 square metres in gross floor area that are not of an arterial commercial nature shall require an amendment to the urban structure to create a new *Urban Node* or extension of an *Urban Corridor*.

Since the Trinity Planning Instruments include either uses prohibited or not permitted in the UHOP's Arterial Commercial designation, the development is not of an Arterial Commercial nature and is greater than 25,000 square metres (269,000 square feet). I would also note that, based on section E.2.2.4 of the UHOP, changes to the urban structure shall be considered *only during the five year review of the Plan.* (Board emphasis added)

In my view, the contemplated development is proposing a rather dramatic change to the urban structure in the UHOP, without an amendment to the urban structure and without the Urban Needs and Impact Assessment required by F.3.2.7. Moreover, the nature and extent of the uses being proposed, fly decidedly in the face of the permitted and prohibited uses set out in the UHOP's Arterial Commercial designation.

(ii) Ancaster OP

Under the Ancaster OP, the Trinity Site is designated Industrial. However, section 4.5.5 directs new shopping centre proposals, such as the Trinity proposal, to the Duff's Corners area subject to the policies in section 5.5 and 5.6. Calloway asserts that the provisions of subsection 5.5.5.(v) have not been met whereas Trinity and the City

maintain that the US satisfies the requirements of 5.5.5 (v). For ease of reference, the relevant portions thereof read as follow:

Any shopping centre proposed...shall only proceed after evidence has been provided to the satisfaction of Council justifying the need for such a facility... Such evidence preferably shall take the form of studies which also consider the impact of such commercial development on the Village Core of the Town.

Although subsection 5.5.5 (v) does not require that a study be done, the US was done and it is being relied upon by Trinity and the City as justification for compliance with 5.5.5 (v). This subsection focuses on the “need” for and the “impact” of a proposed shopping centre. Because of the manner in which these words are used in the subsection, the subsection creates two separate requirements for any shopping centre proposed. This is evidenced by the phrase “justifying the need for such a facility” which is the first requirement and then, later in the subsection, the use of the phrase “the form of studies which *also* consider the impact of such commercial development” as the second requirement. (Board emphasis added)

Although the US clearly demonstrates the impact of the proposed development on other commercial developments in the area, it is indeed arguable that it does not provide the level and detail required to establish a “need” in Duff’s Corners for the Trinity proposal. As Mr. Jaque suggested, the US analysed the opportunity or feasibility of the Trinity proposal rather than the issue of need. In view of the very clear language of subsection 5.5.5(v) which states that both need and impact must be addressed, there is in my view, an obligation on Trinity to provide a level of clarity and detail so as to satisfy both requirements in a convincing fashion. In this case, I do not believe it has done so.

(iii) Regional OP

The Regional OP designates the Trinity Site as Urban Area – Business Park which does not permit retail and commercial uses. In assessing the amendment proposed, section 3.1.6 is directly on point. The relevant portion thereof reads as follows:

Now retail developments, particularly those on a large scale such as new malls, should only be permitted where demand can be demonstrated and existing retail areas will not be adversely affected.

This section is slightly different than subsection 5.5.5(v) of the Ancaster OP. For one thing, section 3.1.6 is not mandatory, but rather directive in its language. The word “shall” is not used. For another, although the concept of impact appears to be addressed with the words “will not be adversely affected”, the notion of “need” is replaced with the word “demand”.

As I have already indicated in these reasons when dealing with the Ancaster OP, I am satisfied that the US deals with the issue of impact in an appropriate fashion. However, I also believe that the concept of demand is more closely aligned with the concept of need than not and accordingly, I would reiterate my comments, as set forth under the Ancaster OP heading, that the US has not met, in a convincing fashion, the demand requirement of section 3.1.6.

In the final analysis, I believe the Trinity Planning Instruments fall short of conforming with applicable Official Plan Policies and, as a result, I am unable to agree with the decisions made by City Council in that regard.

5. Disposition

Based on all of the foregoing, the Trinity Planning Instruments shall be modified so as to be consistent with the Arterial Commercial designation in the UHOP. Specifically, the Trinity Planning Instruments shall only permit those uses permitted in section E.4.8.2 and shall prohibit those uses prohibited in section E.4.8.3. Subject to the foregoing, the Draft Plan is hereby approved with final approval being given in accordance with subsection 51(56.1) of the *Planning Act*. The appeals have therefore been allowed in part.

If the parties encounter any difficulty making the modifications above described I may be spoken to by teleconference.

It is so ordered.

“Steven. Stefanko”

STEVEN. STEFANKO
VICE CHAIR

ISSUE DATE:

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APPEARANCES:

Parties

City of Hamilton and Trinity Development
Group Inc.

Calloway Real Estate Investment Trust Inc.

Counsel

Joel Farber
Sara Hickey

Mary Bull
Sharmini Mahadevan

AMENDING DECISION BY STEVEN STEFANKO AND ORDER OF THE BOARD

The Board's Decision/Order issued September 12, 2012 ("Decision") is hereby amended in the following manner:

1. The first sentence on page 11 reads, "The absence of compelling and detailed evidence from Calloway in relation to...." The word "Calloway" is hereby replaced with the word "Trinity";
2. The first paragraph on page 14 ends with "...the entire development could fall for short of being predominantly Arterial Commercial". The word "for" is hereby replaced with the word "far"; and
3. Page 17 of the Decision refers to Section 3.1.6 of the Regional OP as follows: "Now retail developments, particularly those on a large scale such as new malls...." The word "Now" is hereby replaced with the word "New".

In all other respects, the Decision remains as issued.

It is so ordered.

"Steven Stefanko"

STEVEN STEFANKO
VICE-CHAIR