

ISSUE DATE:

Jul. 29, 2008



PL070085

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Calloway REIT (Woodstock) Inc.
Appellant: Loblaw Properties Ltd.
Subject: Proposed Official Plan Amendment No. 115
Municipality: County of Oxford
OMB Case No.: PL070085
OMB File No.: O070012

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

Appellant: Calloway REIT (Woodstock) Inc.
Appellant: Loblaw Properties Ltd.
Subject: By-law No. 8303-06
Municipality: City of Woodstock
OMB Case No.: PL070077
OMB File No.: R070017

IN THE MATTER OF subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Calloway REIT (Woodstock) Inc.
Subject: Proposed Amendment to Zoning By-law 5899-81
Municipality: City of Woodstock
OMB Case No.: PL070512
OMB File No.: Z070065

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Loblaw Properties Ltd.
Appellant: *Hermina Developments Inc.*
Appellant: Starbank Development Corporation
Subject: Proposed Official Plan Amendment No. 120
Municipality: County of Oxford
OMB Case No.: PL070512
OMB File No.: O070162

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: Calloway REIT (Woodstock) Inc.
Subject: Proposed Official Plan Amendment No. 118
Municipality: County of Oxford
OMB Case No.: PL070552
OMB File No.: O070085

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

Appellant: Calloway REIT (Woodstock) Inc.
Subject: By-law No. 8376-07
Municipality: City of Woodstock
OMB Case No.: PL070552
OMB File No.: R070219

APPEARANCES:

Parties

Counsel

Corporation of the City of Woodstock
Corporation of the County of Oxford

J. Alati

Hermina Developments Inc.

S. Rogers

Calloway REIT (Woodstock) Inc.
Calloway Real Estate In Trust Inc.

M. Bull

Loblaw Properties Ltd.

A. Patton

Starbank Development Corporation

B. Card

Participant

Joseph Zeffer

DECISION DELIVERED BY J.V. ZUIDEMA AND ORDER OF THE BOARD

The matters before the Board are as follows:

1. Appeals launched by Loblaw Properties Ltd. (“Loblaws”), Hermina Developments Inc. (“Hermina”), and Starbank Development Corporation (“Starbank”) of Official Plan Amendment 120 (“OPA 120”) adopted by the

County of Oxford (“the County”) with respect to the Calloway proposal (the “Calloway OPA”);

2. An appeal launched by Calloway REIT (Woodstock) Inc. (“Calloway”) of the City’s refusal or neglect to enact a zoning by-law amendment with respect to the Calloway proposal (the “Calloway ZBL”);
3. Appeals by Calloway and Loblaws of the County’s OPA 115 with respect to the Starbank proposal (the “Starbank OPA”);
4. Appeals by Calloway and Loblaws of the City’s Zoning By-Law 8303-06 for the Starbank proposal (“Starbank’s ZBL”); and
5. Calloway’s appeal of the County’s OPA 118 (“Hermina’s OPA”) and the City’s Zoning By-Law 8376-07 (“Hermina’s ZBL”), both for the Hermina proposal.

The Board has previously rendered a decision on a settlement reached between Loblaws, Calloway, Hermina, the City and the County with respect to Calloway’s appeal of Hermina’s OPA 118 and ZBL as well as Hermina’s appeals of Calloway’s OPA and ZBL. This decision addresses the remaining issues concerning the Starbank OPA and ZBL, and the Calloway OPA and proposed zoning by-law.

The facts of this case are as follows: Calloway requests this Board approve its official plan amendment (OPA 120) and a zoning by-law amendment (filed as Exhibit 2(a)) to permit it to expand the existing grocery department within the Wal-Mart store located on Juliana Drive in Woodstock Ontario. The City and the County support Calloway.

Starbank also requests this Board approve its official plan amendment (OPA 115) and zoning by-law amendment (By-law 8303-06) to permit a commercial development which includes a potential 45,000 square foot (4,181 sq. m.) supermarket. The Starbank site is approximately 12.7 acres in size and the proposed development will have access along Norwich Avenue and Parkinson Street. The City and the County support Starbank save and except for a proposed bank, which matter has been appealed to this Board and is still to be adjudicated and determined.

Calloway's position is that the market can accommodate both the Wal-Mart expansion and the Starbank supermarket at this time. This is the same position held by the municipalities. Starbank submits that the market currently can accommodate either the Starbank supermarket or the Wal-Mart grocery component expansion but not both. Starbank submits that its supermarket should be preferred for various planning reasons and because its applications were made earlier than those of Calloway. Starbank submits that the Calloway Expansion can occur following the Starbank development in 2013.

Issues associated with the grocery department component or food related aspects of the proposed expansion at Wal-Mart and the new supermarket proposal for the Starbank site were the only matters before the Board and as such, the evidence led by the parties focussed only on the food related aspects to the developments.

As is often the case with such hearings, the Board heard from competing experts, all duly qualified in their respective areas of expertise to provide opinion evidence either in land-use planning or market analysis. Starbank called Mr Frank Clayton (Market Analyst and Land Economist) and Mr Chris Pidgeon (Land Use Planner); the City and County called Mr Rowan Faludi (Market Analyst) and Mr Gordon Hough (Land Use Planner); Calloway called Ms Mimi Ward (Market Analyst) and Mr Brent Clarkson (Land Use Planner). Each witness was professional and their testimony was compelling but in the end, the Board prefers the evidence of the municipalities and Calloway. The Board will focus on what became the central issues in the hearing and the reasons for its decision follow.

The Board also heard from Mr Joseph Zeffer, a participant in the proceedings. Mr Zeffer lives directly across from the Calloway shopping centre at the intersection of Juliana Drive at Norwich Avenue. His position in summary was that the proposed developments would result in increased traffic along Norwich, which in turn, will create significant negative traffic-related impacts for his property. He testified that he had appealed earlier applications, which established Wal-Mart in 2001 for similar reasons. Under cross-examination, Mr Zeffer admitted that he had negotiated and accepted a monetary settlement in regard to his prior appeals, which were to address his landscaping, and traffic concerns at that time. These funds were earmarked for Mr Zeffer to install a hammerhead on his driveway and to provide for landscaping along the

front of his property. A sensor or activation loop was also installed for him at the end of his driveway, which changes the traffic light located at that intersection to accommodate ease of movement. While Mr Zeffer did have some landscaping completed, he did not have a hammerhead constructed on his driveway. Mr Zeffer had the benefit of legal representation throughout those earlier proceedings.

Concerning his evidence at this hearing, the Board is not persuaded to alter its decision based on Mr Zeffer's testimony or documentary evidence. The Board prefers the evidence from the Municipal Planner, Mr Hough who indicated that there were modifications which Mr Zeffer could have made and could still undertake to his driveway and property, to address his issue of safe exit and entry. Further Mr Zeffer did not satisfy the Board that issues relating to access to his property are directly attributable to the existing shopping centre or the proposed developments.

The central issue at this hearing was whether or not the Wal-Mart food department expansion and the Starbank Supermarket could be accommodated in the current market without jeopardizing the planned function of the Central Area and other commercially designated areas in the trade area as set out in the policies of the County of Oxford Official Plan.¹ In addressing the threshold issue of whether the Central Area would be "jeopardized" the Board heard from Mr Clayton who testified that in his view, to be "jeopardized" meant, "exposed to risk" or "peril" but "did not mean close."

Mr Clayton testified that the Foodland Supermarket located in the Central Area would be exposed to considerable risk if both the Wal-Mart food expansion and the Starbank supermarket developments, each at 45,000 square feet, were approved at this time. After further analysis, Mr Clayton provided revised calculations² which indicated a warranted food space within the trade area of 81,805 square feet by the year 2011. As reflected in Exhibit 2(a), the Wal-Mart expansion was reduced from 45,000 square feet to 39,000 with an opening date of no earlier than January 1, 2010, thereby resulting in its first full year of operation being 2011. Mr Clayton's figures suggested a potential for an over-capacity of 2,195 square feet taking into account the reduced Wal-Mart expansion coupled with a Starbank food store of a maximum of 45,000 square feet.

¹ Reference is made to s. 5.4.3 Criteria of New/Expanded Regional Commercial Nodes and for Site-Specific Official Plan Amendments

² Reference is made to Exhibit 20b Figure 4

In such a scenario, Mr Clayton could not conclude that the Foodland store would close but opined that there would be a “risk of closure.” Despite that risk, Mr Clayton did not indicate that the potential risk to the Foodland equated to jeopardy of the Central Area which includes the Central Business District; jeopardy to the Central Area is the specific test to be met pursuant to the Official Plan.

Unlike Ms Ward, Mr Clayton had not done a detailed analysis to review the potential impact to individual stores currently located within the Central Business District. Given these circumstances, the Board prefers the evidence of Ms Ward and is satisfied that the Central Area and Central Business District will not be jeopardized, as contemplated by the policies of the Official Plan, by both of the two proposed developments proceeding at this time.

Concerning allegations of closure, the Board’s Procedural Order required financial disclosure if such allegations were made. No such disclosures were produced. As stated, Mr Clayton’s opinion was that there was a “risk of closure” to Foodland; perhaps this may be distinguished from “an allegation of closure” as contemplated by the Board’s Procedural Order. However, the Board’s Procedural Order also required financial disclosure where an allegation of declining sales is made.³ That section of the Order required that if a party alleged that the Wal-Mart Expansion or Starbank Proposal, either individually or in combination, would result in the decline in sales performance levels of a store such that the decline, although not resulting in closure, would jeopardize or prejudice the planned retail or service function of the existing commercially designated areas, particularly the Woodstock Central Area, the party was required to:

- Identify the store;
- Identify the commercially designated area(s);
- Identify the extent to which the planned function of such commercially designated area(s) will be jeopardized or prejudiced, and why;
- Provide financial and other information as required where allegations of closure are made (sections 4, 7 and 8 of Attachment #3 to the Board’s Order); and

³ Reference is made to sections 9, 10, 11 and 12 of Attachment 3 to the Board’s Procedural Order

- Produce a witness who is a senior principal or operator of the store to provide *viva voce* evidence to support and explain the allegation.

In this case, neither financial disclosure nor a senior principal/operator of the store was produced by Starbank to support the allegation that the planned retail or service function of the existing commercially designated areas would be jeopardized by both proposed developments proceeding at this time. Sobey's, the owner of the Foodland Supermarket did not appear at this hearing. At no time did Sobey's indicate any concern with respect to the Wal-Mart Expansion or indicate that the Foodland was at risk. Section 14 of the same Attachment to the Board's Procedural Order speaks to the consequences of a party failing to provide such evidence. As such, the Board will not give considerable weight to Starbank's evidence on this issue.

Evidence led by Calloway and the municipalities concluded that should the proposed developments proceed contemporaneously, the Central Area would not be jeopardized. Ms Ward had provided an opinion that the impact of the Wal-Mart Expansion proceeding in 2009, in conjunction with the Starbank Food Store, would not put the other existing commercially designated areas, Central Business Districts ("CBDs") and Village Cores into jeopardy as contemplated by the official plan.

Mr Clarkson's evidence was that the Wal-Mart Expansion was consistent with the Provincial Policy Statement ("PPS") and in particular, referenced policy 1.7.1 (b) to opine that the proposed expansion did not pose a threat to the vitality or viability of the CBD. Mr Clarkson concluded that the planned retail and service function of the Woodstock Central Area and other existing commercially designated areas in the trade area would not be "jeopardized" referring to the language used in the County's Official Plan.⁴

The Board heard extensive evidence with respect to potential sales transfers on the four existing supermarkets in Woodstock. Ms Ward and Mr Faludi undertook directional impact analyses and Ms Ward also reviewed both the east and west Secondary Trade Areas. She opined that the introduction of the Wal-Mart expansion and the Starbank supermarket each at 45,000 square feet with a first full year of operation of 2009, would not jeopardize the existing supermarkets and that those

⁴ Reference is made to s. 7.3.3.4.3 of the County of Oxford Official Plan

existing supermarkets would remain viable and would not close.⁵ Further she concluded that while Foodland's sales would decline during this year, its recovery would occur approximately 4 years following. The Board prefers and accepts Ms Ward's evidence as a basis for its decision.

THEREFORE THE BOARD ORDERS that the appeals by Calloway and Loblaws of OPA 115 are hereby dismissed and that OPA 115 to the Official Plan for the County of Oxford is approved.

THE BOARD ORDERS that the appeals of Calloway and Loblaws against By-Law 8303-06 of the City of Woodstock are hereby dismissed.

THE BOARD ORDERS that the appeals of Loblaws, Hermina and Starbank are hereby dismissed and that OPA 120 to the Official Plan for the County of Oxford is approved.

THE BOARD ORDERS that the appeal of Calloway against By-Law 5899-81 of the City of Woodstock is allowed in part and By-Law 5899-81 is amended as set out in Exhibit 2(a) and which is appended as Attachment 1 to this Order. In all other respect, the Board orders that the appeal is dismissed.

This is the Board's Order.

"J.V. Zuidema"

J.V. ZUIDEMA
VICE-CHAIR

⁵ Reference is made to Exhibit 19 a, Appendix B, Table 3

ATTACHMENT "1"

THE CORPORATION OF THE
CITY OF WOODSTOCK
BY-LAW NUMBER _____

A By-law to amend Zoning By-law Number 5899-81, as amended.

WHEREAS the Municipal Council of the Corporation of the City of Woodstock deems it advisable to amend By-law Number 5899-81, as amended.

THEREFORE, the Municipal Council of the Corporation of the City of Woodstock, enacts as follows:

1. That Schedule "A" to By-law Number 5899-81, as amended, is hereby amended by changing to C6-1 the zone symbol of the lands so designated C6-1 on Schedule "A" attached hereto.
2. That Section 18A.4.1 to By-Law Number 5899-81, as amended, is hereby amended by removing subsection 18A.4.1.2.3 REQUIRED PARKING SPACES, and replacing it with the following subsection 18A.4.1.2.3:

"18A.4.1.2.3 **REQUIRED PARKING SPACES:**

1 space per 22 square metres of gross floor area"

3. That Section 18A.4.1 of By-law Number 5899-81, as amended, is hereby amended by removing subsection 18A.4.1.2.10, GROSS FLOOR AREA RESTRICTIONS, and replacing it with the following subsection 18A.4.1.2.10:

"18A.4.1.2.10 **GROSS FLOOR AREA RESTRICTIONS:**

	Maximum Gross Floor Area
Department Store	
department store	17,650 square metres
the area within the department store used for the display, storage and preparation of food, of which not more than 557 square metres shall open prior to January 1, 2010	4,181 square metres
Non-Department Store DSTM uses as defined in Section 18A.1	8,363 square metres
Specialty Food Stores	
As defined in Section 18A.1, provided that there is a maximum of three (3) Specialty Food Stores within the C6-1 Zone and provided that the Maximum Gross Floor Area of any one Specialty Food Store shall not exceed 465 square metres	
Total Gross Floor Area in the C6-1 Zone	35,302 square metres"

4. That Section 18A.4.1 of By-law Number 5899-81, as amended, is hereby amended by adding the following Section 18.A.4.1.2.12:

“18.A.4.1.2.12

Notwithstanding any provisions of By-law Number 5899-81 to the contrary, the following uses shall be permitted on the lands legally described as Parts 12 and 17 on Registered Plan No. 41R-6986:

- a retail food store with less than 929 square metres (10,000 square feet)
- a Specialty Food Store”

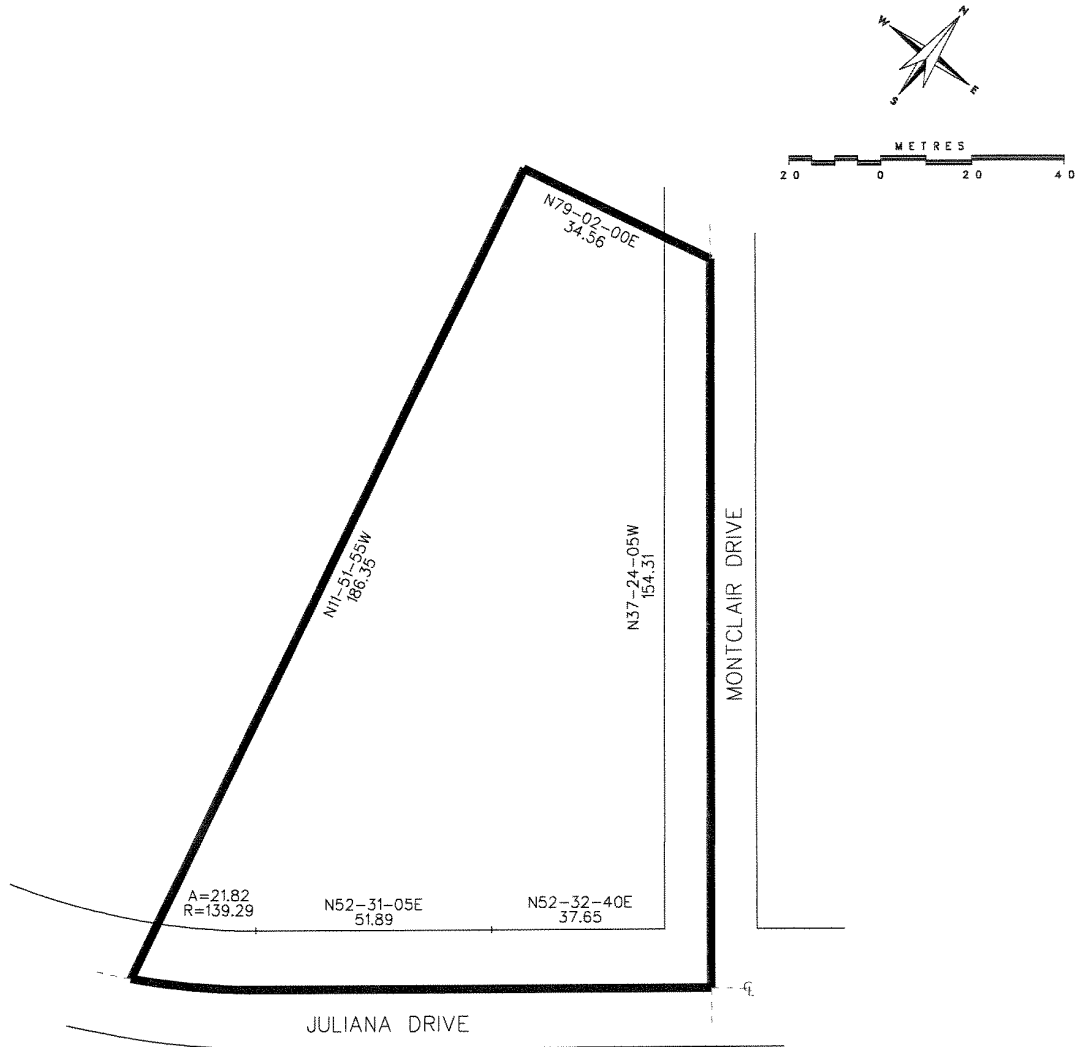
5. That Section 18A.4.1 of By-law Number 5899-81, as amended, is hereby amended by renumbering the existing subsection 18A.4.1.2.12 to 18A.4.1.2.13.


SCHEDULE "A"

TO BY-LAW No. _____

PART OF LOT 10, REGISTERED PLAN 41M-82, AND PART OF LOT 9, REGISTRAR'S COMPILED PLAN 1654
PARTS 12 AND 17, REFERENCE PLAN 41R-6986

CITY OF WOODSTOCK



 AREA OF ZONE CHANGE TO C6-1

NOTE: ALL DIMENSIONS IN METRES