ISSUE DATE:

February 15, 2012

PL100982
PL101296

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:	Southside Construction Management Limited
Subject:	Proposed Official Plan Amendment No. OPA 152
Municipality:	Town of Ingersoll
OMB Case No.:	PL100982
OMB File No.:	PL100982

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

Appellant:	Southside Construction Management Limited
Subject:	By-law No. 10-4587
Municipality:	Town of Ingersoll
OMB Case No.:	PL101296
OMB File No.:	PL101296

APPEARANCES:

Parties	**Counsel**
Town of Ingersoll and County of Oxford	J. Alati
Sifton Properties Limited	S. Mahadevan, M. Bull and D. Wood
Southside Construction Management Limited	A. Burton and R. Beaman

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

Sifton Properties Limited ("Sifton") is proposing to develop a 140,000 sq. ft. shopping centre and a medium density residential block on its lands in the Town of Ingersoll ("the Town"). The property is located near the intersection of Clarke Road and Harris Street in the Town ("the subject property"). Both the Town and the County of Oxford ("the County") supported the applications for an Official Plan Amendment ("OPA

152") and the rezoning resulting in By-Law No. 10-4587 ("ZBA"). The property to be developed is approximately 20 acres and is part of a larger parcel which already has permissions to proceed with residential development.

Through an iterative process at the municipal level, the applications were amended. The amended proposal sought the following:

1) an official plan amendment to redesignate the subject property from Low Density Residential, Medium Density Residential and Open Space – Neighbourhood Park to Medium Density Residential and Service Commercial with special policies, and

2) a rezoning from Development (D) to Special Residential Type 3 (R3 – Special) and Special Highway Commercial 10 (HC – Special).

It should be noted that the remainder of Sifton's property which is approximately 47 acres, is intended to continue for residential use. Planning, market, traffic, servicing, urban design and environmental studies were completed and submitted in support of the proposal. The Town and County engaged professional consultants to peer review some of these reports. By the time the hearing commenced, the areas of disagreement had been narrowed to include planning, market and traffic. And of those, planning and market evidence were the central focus areas of dispute.

Unlike other retail cases before this Board, here the market analysts were in agreement that the market demand of 190,000 sq. ft. was warranted for the Ingersoll trade area. As the hearing progressed, traffic also was not a significantly contentious issue and the traffic experts agreed that the Sifton site could work from a transportation network perspective as long as appropriate road improvements were made. This was especially true given that Sifton had recently acquired a new access point along Harris Road. Similarly, the traffic experts agreed that with the right road improvements, the parcel of land owned by Southside Construction Management Limited ("Southside") located across the street from Sifton, could also work. In the end, traffic did not materialize as a significant issue. The Board's decision to dismiss the appeals is grounded in the planning and market evidence and those details are outlined in my analysis and reasoning which follow.

Southside was the only appellant. It argued that allowing Sifton to proceed with the proposed development would negatively undermine the planned function of its site. Southside's site is located directly across Clarke Road to the south of the Sifton site. Southside has had permissions for service commercial development for a number of years. Those permissions were established through another Ontario Municipal Board hearing. That process culminated in OPA 79. Southside asserted that outside of the Central Area of Ingersoll, Southside should be the focus of a commercial retail centre because that was its planned function arising from the previous Board hearing and enunciated through the policies of the County Official Plan. Sifton suggested that Southside had inaccurately described its planned function and 50,000 sq. ft. of service commercial at the Southside site, would meet its planned function.

So this is really the first hurdle to overcome. Before determining if Southside's planned function would be deleteriously affected by Sifton's proposal, one must determine Southside's planned function. All the Planners agreed that one must look to the Official Plan. In assessing the planning evidence, the Board prefers the analysis provided by Messrs. Versteegen and McKay to determine that Sifton's proposal does not negatively impact or undermine the planned function of the Southside site.

Messrs. Versteegen, McKay and Zelinka were each qualified and accepted as experts in the area of Land Use Planning. Mr. Versteegen is the in-house municipal Planner and testified on behalf of the Town and County which supported the applications. He along with Mr. McKay, the Planner for Sifton, provided testimony that the planned function of Southside was for the development of a variety of service commercial uses in accordance with the Service Commercial policies of the Official Plan. They referred to Policy 9.3.3 which states that the "[s]ervice commercial area provide locations for a broad range of commercial uses that, for the most part, are not suited to locations within the Central Area because of their requirements for large lot area, access or exposure requirements or due to compatibility conflicts with residential development." Those uses included activities which could not be located in the Central Area and would cater to the needs of the travelling public, vehicular traffic and single purpose shopping. The policy states that a limited number of retail commercial uses which do not directly compete with those existing in the Central Area were also

permitted. All the Planners agreed that the thrust of the policies was the protection of the Central Area.

The types of uses which were permitted at Southside were hotels, motels, auto service stations and gas bars, fast food outlets and restaurants, and business services. The limited range of larger scale retail uses which were contemplated were food stores, and furniture and appliance stores. A community shopping area is also permitted along those Service Commercial lands located near Highway 401, which includes Southside; however, such areas are limited to 50,000 sq. ft. Policy 9.3.3 requires the reader to look to Schedule I-1 which identifies the areas designated Service Commercial. Besides the Southside site, service commercial is designated along Harris Street and Culloden Road, in the vicinity of interchanges from Highway 401, as well as along Bell and King Streets.

In continuing with a review of this part of the official plan, policy 9.3.3.1 is critical. This policy was the focus of disagreement amongst the Planners. The policy addresses the scale of uses and the requirements for studies. It states that the scale will generally range from 3,500 sq. ft. to 50,000 sq. ft. Small office and professional uses are encouraged to locate in the Central Area. Anything less than 3,500 sq. ft. is discouraged. It also speaks to community shopping areas and indicates that they are permitted to locate in the Service Commercial designation immediately adjacent to the Highway 401 corridor. The policy specifies that such community shopping areas will have between 10,000 to 50,000 sq. ft. gross leasable commercial floor area.

On this specific point, Mr. Zelinka, for Southside, opined that Southside has a distinct status separate and apart from other Service Commercial lands. He testified that Southside was the only site outside of the Central Area that could accommodate a community shopping centre. This was due in part to the parcel size of the Southside lands which, it was submitted could not only accommodate a community shopping centre but even one of a regional scale. Mr. Zelinka however had to address the 50,000 sq. ft. limit which existed under policy 9.3.3.1. In this regard, he testified that in his reading of policy 9.3.3.1, the reference to community shopping areas [emphasis added] could be interpreted to address the scenario whereby the Southside lands were developed for more than 50,000 sq. ft. by having multiple shopping areas. He agreed

under cross-examination that the service commercial area along Culloden Road, also adjacent to the Highway 401 corridor could fall under this construal but from his interpretation, multiple shopping areas on the Southside lands could be a possibility. He went on to state that that could be achieved through subdivision of the Southside parcel.

Mr. Zelinka's understanding of this policy was in stark contrast to Planners Versteegen and McKay and to Paul Lowes who was also qualified and accepted as an expert in land use planning. Mr. Lowes had been retained by the County to do a commercial policy review ("CPR"). He prepared two reports: Module 1 June 2009 and Module 2 February 2010. Since then, he has been engaged to draft the necessary amendments to the County's Official Plan to implement the CPR. He was not one of the peer reviewers of the Sifton proposal. In a nutshell, he testified that the maximum of 50,000 sq. ft. referenced under policy 9.3.3.1 applies to the entirety of the Southside parcel and he was clear that for development beyond 50,000 sq. ft., an OPA and market impact study were required. He testified that the zoning currently in place for Southside would limit the gfa to 50,000 sq. ft. "no matter how many lots were created on the Southside parcel." He concluded to state that in his professional opinion, OPA 152 had had proper regard for the CPR.

It should be noted that while there was a procedural order in effect to govern the proceedings which included meetings of expert witnesses, the opinion presented by Mr. Zelinka had not been raised earlier. He had not suggested his reading and interpretation of policy 9.3.3.1 either at the experts' meetings or through his witness statement. In fact, Mr. Zelinka has prepared a planning justification report for recent applications made by his client for an Official Plan Amendment to increase the 50,000 sq. ft. limit on the Southside lands. In that report, as borne out during his cross-examination, no indication was made that Southside could get around the 50,000 sq. ft. cap by dividing its property. The first the responding parties heard of it was through the hearing process. In short, I take a negative inference from these circumstances. If the interpretation was the key to Southside's exemption from the 50,000 sq. ft. limit, surely it would have been mentioned at some point prior to these proceedings. The whole point of procedural orders and disclosure in advance of the hearing process is to avoid surprises and to allow parties to fully vet each other's opinions and positions. Even if

Mr. Zelinka arrived at his interpretation following the experts' meetings and the submission of his witness statement, he could have raised it formally through an amended witness statement or informally through discussions with the other Planners. Undoubtedly there would have been objections for the late information but that would have attracted lesser criticism than to raise it for the first time during his testimony.

On this point, I cannot agree with Mr. Zelinka's interpretation of policy 9.3.3.1. To suggest that "areas" included the possibility of Southside's ability to divide its parcel is not reasonable on a plain reading of the document. Firstly, it assumes that division of the Southside property would be granted and that is not a certainty either at the municipal level or before this Board, should the municipal decision be appealed. Secondly, no evidence was provided by Mr. Zelinka to equate the term "areas" with "lots" or "parcels" and with his interpretation, he suggests that the terms are interchangeable. Thirdly, policy 9.3.3 titled "Service Commercial Areas" requires the reader to reference Schedule I-1 which identifies those areas that are designated "Service Commercial." Schedule I-1 does not identify lotting patterns or parcel fabric within the Service Commercial areas. If Mr. Zelinka's interpretation was correct, the Service Commercial Area along Culloden Road near Highway 401, for example, would have some demarcation of the parcels along this road but none is made. Fourthly, no applications for consent have been made by Southside when this hearing was conducted and if Mr. Zelinka's interpretation was indeed correct, one would think his client would take steps to file applications in accordance with that interpretation. Finally, it does not accord with the earlier Board decision which resulted in this policy. As such, I prefer the consistent interpretation provided by the three Planners opposite: Versteegen, McKay and Lowes wherein each opined that the maximum gross leasable floor area for the Southside lands is 50,000 sq. ft.

In closing submissions, Counsel for the Appellant reminded me that I must have the earlier Board decision in mind when arriving at my decision. I have. There were two decisions rendered by the Board, differently constituted, which resulted in modifications to the County's Official Plan. The first decision provided the decision with reasons concerning the appeals of OPA 64 and 79. It was amended slightly following its issuance. The second decision provided the modified official plan policies as an attachment. Those policies, resulting from OPA 79 were included into the official plan

and appear in the extracts provided at this hearing. The Board decision issued in July 2006 stated:

> The Appellant [Southside] wishes to have the County of Oxford Official Plan, particularly section 9.3.3.1 thereof, amended so that no Retail Market Impact Study would be required for developments on the highway commercial lands retained by it which do not exceed 50,000-square feet. That section now requires a market study at 25,000-square feet, and, in addition, market studies and "Major Official Plan Amendment" for proposals exceeding 50,000-square feet.
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> The Board heard evidence from the County's planner, Ron Versteegen, that the Retail Impact Study provisions were imposed to create a "level playing field" for all those who may subsequently wish to develop highway service commercial lands in future. However, the Board is satisfied on the evidence that no other highway service commercial lands are planned in the Town of Ingersoll, or are likely to be developed at any time in the foreseeable future. [Ex. 2, tab 59, pg. 1106]

From this excerpt, it is evident that the Board in that earlier disposition is addressing a change in policy where a retail study would be required for proposal exceeding 50,000 sq. ft. gfa rather than 25,000. Mr. Zelinka confirmed that the Board's earlier decision does not alter the 50,000 sq. ft. gfa limit. When asked if Southside had challenged the Board's earlier decision wherein the 50,000 sq. ft. gfa was included in policy 9.3.3.1, Mr. Zelinka confirmed that no challenge had been launched.

For the foregoing reasons, I determine that the planned function for the Southside property is as one of the service commercial areas in the Town with a limit of 50,000 sq. ft. gfa.

Now I must move to the second arm of the analysis which requires I determine if the Sifton proposal negatively impacts or undermines Southside's planned function. I conclude that it does not. I rely on the evidence of the market analysts on this point. James Tate, Rowan Faludi and Hermann Kircher were each qualified and accepted as experts in market analysis. Mr. Tate had been retained by Sifton to conduct a market analysis; Mr. Faludi was retained by the County to conduct a peer review of Tate's findings and conclusions. Mr. Tate described in detail his data, research and assumptions to conclude that there was sufficient demand for the Sifton proposal at 140,000 sq. ft. which took into account 50,000 sq. ft at the Southside site. Mr. Faludi

supported these findings. To be specific, Mr. Tate addressed projected market retail demands by looking at a population forecast to the year 2016. This timeframe was agreed upon by all the market consultants. He also reviewed the expenditure potential for both Non-Food Oriented Retail ("NFOR") and Food Oriented Retail ("FOR"). The conclusion that growth was available was also agreed upon by all the market analysts.

Mr. Tate then addressed the impact to the local Canadian Tire store which was presumed to re-locate to the Sifton site if approved. By looking at inflow and total sales at that store, the conclusion was that a 50,000 sq. ft. Canadian Tire store was warranted. And this investigation was part of the analysis wherein Messrs. Tate and Faludi opined that a total of 190,000 sq. ft. was warranted by 2012. This conclusion was premised on the re-tenanting of the existing Canadian Tire store which would require the re-use of a 22,800 sq. ft. space. Mr. Kircher on the other hand initially intimated that the re-tenanting of this space had not been addressed by Messrs. Tate and Faludi but in cross-examination, retracted that conclusion. Where he did agree with Messrs. Tate and Faludi was to conclude that an additional 190,000 Sq. ft. of commercial retail space was warranted by the year 2012.

One of the criticisms raised by Mr. Kircher was that Mr. Tate's research had not properly taken into account the impact to the Central Area. However, in the face of this concern, Mr. Kircher had not undertaken any independent assessment so could not provide the Board with specific data to support his concerns. It was in this vein that he asserted unacceptable negative impacts associated with the re-location of the Foodland store. Although this concern had not been identified in Mr. Kircher's witness statement, he expressed concern that its re-location would cause a significant negative impact to the Central Area and the policy directive was to avoid such a situation. However, the research by Messrs. Tate and Faludi show that 35,000 sq. ft. of food space is warranted which takes into account the existing food space at the Foodland store. On this point, the Board prefers the evidence of Messrs. Tate and Faludi which appears to be more thorough and complete.

Mr. Kircher was critical of the vacancy rates for the Central Area determined by Mr. Tate. In short, he testified that the vacancy rate for the Central Area should be greater than that reported by Mr. Tate as Mr. Tate had failed to include three vacant

buildings in the core area. Mr. Kircher suggested that there could be as much as 100,900 sq. ft. of vacant commercial space in the downtown area accounting for the closures of a Pharmasave, Canadian Tire, and Sobey's. Mr. Kircher also expressed grave concerns that if the Canadian Tire store were to leave, the Giant Tiger store which he believes depends on the Canadian Tire Store, would be negatively impacted such that that particular shopping centre would be seriously vulnerable.

During his testimony, Mr. Kircher had summarized that he had solemn reservations about the potential for negative impacts to the Central Area and to the Southside lands given the Sifton proposal. But just as with Mr. Zelinka, this specific apprehension was not identified previously: not in his witness statement; not at the experts' meeting; and not in his correspondence to his client dated July 15, 2010, about a month after his retainer. If this is a critical component to Mr. Kircher's analysis, the Board is at a loss as to why it was not raised earlier.

Other missteps in Mr. Kircher's analysis was that he had erroneously included the Sears store in the Central Area as being vacant whereas it was not. Also he maintained that the Planing Mill site should be counted in the retail commercial inventory even though he acknowledged there is no plumbing available at that site. Through a cursory review of the signage, Mr. Kircher concluded that the Landlord was amenable to renovations, which presumably might have included plumbing but we don't actually know because Mr. Kircher did not do any research or make any inquiries. Although a telephone number was available, Mr. Kircher did not call to find out details about the Planing Mill site before arriving at his opinions. Finally Mr. Kircher was not aware that his client had made recent applications to the municipalities. Why his client would not have told him and why Mr. Kircher would not have known through simple inquiries with municipal staff, is unknown to the Board. This paucity of a thorough review and due diligence undermines his credibility in the Board's view. As such, the market evidence of Messrs. Tate and Faludi are preferred.

Pursuant to the reasoning enunciated above, the Board determines that both the appeal to the zoning by-law as well as to OPA 152 are dismissed.

THEREFORE THE BOARD ORDERS that the appeals are dismissed.

This is the Board's Order.

"J. V. Zuidema"

J. V. ZUIDEMA
VICE-CHAIR