

2014-LO1

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: August 7, 2014

CASE NO(S): PL131116

PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Greenhills SC Ltd.
Appellant:	Upper Thames River Conservation Authority
Subject:	Proposed Official Plan Amendment No. OPA 557
Municipality:	City of London
OMB Case No.:	PL131116
OMB File No.:	PL131116

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Costco Wholesale Corp.
Appellant:	Greenhills SC Ltd.
Appellant:	Upper Thames River Conservation Authority
Subject:	By-law No. By-law Z.-1-132226
Municipality:	City of London
OMB Case No.:	PL131116
OMB File No.:	PL131117

Heard: July 24, 2014, in London, Ontario.

APPEARANCES:

Parties

Counsel

PenEquity Realty
Corporation/Goal Ventures
Realty Inc. *et. al.*

S. Snider

City of London

N. Hall

Costco Wholesale Corp.

I. Andres

City Clerk No. 2599
Subject Re: Appeal - PL131116
- OPA 557 - Re: Appeal -
PL131117 - ZBA - 02-8120
 AUG 12 2014

Ref. J. Nehercott
 C.C. C. Smith C. Saunders
N. Hall

Ref to: JN CS CS NH (NW)
 SCANNED

Upper Thames River
Conservation Authority

B. Card

Participants

Geoffrey Faul

Stuart Kernohan

Annamarie Valustro

**MEMORANDUM OF ORAL DECISION DELIVERED BY J. P. ATCHESON ON
JULY 24, 2014 AND ORDER AND CONTINGENT ORDER OF THE BOARD**

[1] This was a prehearing in the matter of appeals by the Upper Thames River Conservation Authority ("UTRCA") to the Council of the City of London adopting Official Plan Amendment No. 557 ("OPA-557"), which would have the effect of permitting a cinema use outside of the Downtown Area in a New Format Regional Commercial Node at a property known municipally as 3130 and 3260 Dingman Drive.

[2] Costco Wholesale Corp. ("Costco") and the UTRCA ("Appellants") have also appealed the Council of the City of London's passing of Zoning By-law Amendment No. Z-1-132226 for the above noted property

[3] The Board with the consent of the parties consolidated the OPA 557 and Zoning By-law Amendment No. Z-1-132226 appeals for the purpose of a hearing.

[4] The Board with the consent of the parties' present granted participant status to Mr. Faul and Mr. Kernohan. Ms. Valustro originally requested party status to the proceeding. It became evident after questioning from the Board that Ms. Valustro had not made any submission either written or oral to City Council during the required public meeting. She expressed concerns with the public review process regarding the environmental studies undertaken as part of application. The Board granted Ms. Valustro participant status in order that she could address her concerns to the Board.

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[5] The Board in summarizing Ms. Valustro's concerns heard that she does not believe the review of the natural heritage studies have been open and transparent by the approving authorities.

[6] Counsel for the PenEquity Realty Corporation ("Applicant") advised the Board at the commencement of the hearing that they had reached a settlement as set out in Minutes of Settlement dated June 24, 2014, Exhibit 3, with the UTRCA. The settlement was endorsed by Counsel for the City and Costco with the caveat that the Costco endorsement was in principle as they still had outstanding traffic issues to resolve.

[7] The substance of the settlement with the UTRCA is that certain modifications be made firstly to OPA 557 as follows:

- i) The addition of a block to be designated "Open Space" under City of London Official Plan, Schedule "A" as set out and incorporated into Schedule 1 attached hereto;
- ii) The removal of the "Unevaluated Vegetation Patch" overlay on Schedule B-1 as set out in Schedule 2 attached hereto.

and secondly that Zoning By-law Amendment No. Z-1-132226 be modified such that

- i) The addition of a block zoned "OS5" as set out and incorporated into Schedule 3 attached hereto;
- ii) The deletion of holding conditions "h-153" (natural heritage compensation agreement), "h-157" (permit issued by the Upper Thames River Conservation Authority) and "h-158" (completion of Ontario Wetland Evaluation).

[8] The Board heard uncontradicted evidence from both Mr. Gary A. Epp, a qualified Ecologist and Carol M. Wiebe a qualified Land Use Planner, that the amendments being proposed as set out in the Minutes of Settlement to both OPA 557 and Zoning By-law

Amendment No. Z-1-132226 represented good planning for this part of the municipality and should be approved. They further opined that the modifications and the resulting OPA would be consistent with the 2014 Provincial Policy Statement (“PPS”).

[9] It was their evidence that OPA 557 as modified be approved and that the modification to Zoning By-law Amendment No. Z-1-132226 be approved in principle subject to confirmation from the parties that satisfactory arrangements have been made to address the potential traffic generated by the proposed changes in Zoning By-law Amendment No. Z-1-132226, including the vehicular access points, and the likely impact of such traffic on City streets, pedestrian and vehicular safety, and on surrounding properties.

[10] The parties on consent requested that the Board withhold its final order in respect to the changes to Zoning By-law Amendment No. Z-1-132226 note above pending final disposition of the appeal of Costco. It being understood that in the event that Costco’s appeal is not resolved, Zoning By-law Amendment No. Z-1-132226, as amended by this contingent Order, shall be reopened to adjudicate the appropriateness of the development as it relates to the potential traffic generated by the proposed changes in Zoning By-law Amendment No. Z-1-132226, including the vehicular access points, and the likely impact of such traffic on City streets, pedestrian and vehicular safety, and on surrounding properties.

[11] Ms. Valustro in her submission suggests that the studies associated with an unevaluated vegetation patch 10102 on the site as shown on Schedule “B-1” to the City Official Plan and the “AECOM Subject Lands Status Report for Patch 10102 (Exhibit 2, Tab 4) and the “Ecosystem Creation Plan/ECP Summary” (Exhibit 2, Tab 5) had not been properly vetted by the City the UTRCA and the Ministry of Natural Resources and Forestry (“Ministry”) and as such the public interest in patch 10102 was not being protected. The other participants told the Board that they supported the settlement being proposed but wished to maintain their participants status in the event the Zoning By-law appeal went on to a hearing.

[12] The substance of the changes being proposed by the modification to OPA 557 would among other things create an ecosystem enhancement area in the southwest corner of the property in exchange for the removal of patch 10102. The ecosystem enhancement area would be developed as set out in the Ecosystem Creation Area Plan (Exhibit 2, Tab 5), would be zoned Open Space, and dedicated to the UTRCA.

[13] Mr. Epp confirmed that his studies had been peer reviewed and accepted by the City, the UTRCA and the Ministry. He opined that the end result would be an ecological net gain for the area together with improvement to the Dingman Creek watershed. He sees the modification to the OPA 557 as set out in a draft order (Exhibit 6) as sound ecological planning consistent with the 2014 PPS and the natural heritage policies of the City of London's Official Plan.

[14] Ms. Wiebe who was retained by the Applicant to assist in an initial evaluation of the site and who has been involved in the planning applications to the City and the partial settlement now before the Board testified with respect to the current official plan designation noting that the site is designated as "New Format Regional Commercial Node on Schedule "A" Land Use by the City's Official Plan. She opined that the modifications being proposed to OPA 557 would secure the settlement reached with UTRCA and would ensure that the Ecosystem Creation Area Plan area came into the public domain. She testified that in her opinion this was an improvement over the original OPA, that the result was good planning for this part of the municipality consistent with current provincial policy and the natural heritage policies of the City's Official Plan and should in her opinion be approved as a two-step Order of the Board. She confirmed in questioning from the Board her client was prepared to have the modified OPA come into force and effect without any contingent approval of the Board. Counsel for the UTRCA and the City indicated that their clients support the settlement as it finds effect in the draft order found at Exhibit 6.

[15] Counsel for Costco indicated that his client appeal was only to the Zoning By-law Amendment. He noted his client's concerns were with respect to traffic matters and that

his clients were working with both the City and the Applicant to settle these outstanding matters. He further indicated that his client took no issue with the modification to and the approval of OPA 557 as set out in the Draft Order Exhibit 6. He also indicated that his client took no issue with the modification to the proposed Zoning By-law Amendment on the understanding that if the talks failed the contingent Order would become moot and the zoning amendment would be brought on for a hearing .He advised the Board on this basis his client support the directions and modification found in the Draft Order.

FINDINGS

[16] The Board after considering Minutes of Settlement, the uncontradicted evidence of both Mr. Epp and Ms. Wiebe, the statements of the participants, and the submissions of Counsel, make the following findings.

[17] In response to the submissions of Ms. Valustro who left before the conclusion of the hearing the evidence presented to the Board is compelling that the public bodies have been diligent in their review of the natural heritage studies. The UTRCA under its regulations has accepted the settlement and has issued the request permits for the environmental component of the project. The Ministry of Natural Resources and Forestry has accepted the evaluation of vegetation patch 10102 and has determined that these wetlands are not Provincially Significant (Exhibit 2, Tab 13). The City endorsed the project noting that it complies with the "H" holding direction found in the By-law amendment that deal with natural heritage matters.

[18] The balancing of public and private interests is a fundamental requirement of the *Planning Act*. The determination of and the balancing of public and private interests originally vests with and is the obligation of the Municipal Council and the other approval authorities and upon appeal, vests with this Board. It does not reside with private individuals, corporations, or local interest groups. The determination of the public interest with respect to planning matters is not a popularity contest but must instead be based upon sound planning principles and approved planning policies at both the Provincial and local levels.

[19] There is no compelling evidence before the Board that City Council, the UTRCA or the Ministry of Natural Resources and Forestry during their deliberation and review of the various environmental studies did not have the public interest in mind when they supported approved this project. It is clear from the evidence that the City utilized its "H" holding provisions of the Zoning By-law to secure the environmental issues associated with the project now before the Board.

[20] The Board is satisfied that the modification to OPA 557 should be approved and the Official Plan Amendment as modified should be approved.

[21] The Board is also satisfied the modifications to Zoning By-law Amendment No. Z-1-132226 represent good planning with the context of the settlement reached to date but that the parties need additional time to resolve traffic issues associated with the Zoning By-law Amendment.

[22] The Board will issue a contingent Order with respect to Zoning By-law Amendment No. Z-1-132226. This contingent Order shall come into effect when the parties on consent advise the Board that the outstanding matters have been resolved.

[23] Alternatively, in the event the parties cannot resolve the outstanding matters the contingent Order with respect to the modified Zoning By-law Amendment No. Z-1-132226 shall not come into effect.

[24] Any party subject to the Board's calendar may request the Zoning By-law Amendment appeal be brought forward for a hearing.

[25] No further notice is required.

[26] The Member is not seized but will be available for case management purposes.

[27] The Board's order with respect to OPA 557 and its contingent Order with respect to Zoning By-law Amendment No. Z-1-132226 form Attachment "1" to this decision.

"J. P. Atcheson"

J. P. ATCHESON
MEMBER

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario

Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

ATTACHMENT '1'

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: Greenhills SC Ltd.
Appellant: Upper Thames River Conservation Authority
Subject: Proposed Official Plan Amendment No. OPA 557
Municipality: City of London
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IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13,
as amended

Appellant: Costco Wholesale Corp.
Appellant: Greenhills SC Ltd.
Appellant: Upper Thames River Conservation Authority
Subject: By-law No. By-law Z-1-132226
Municipality: City of London
OMB Case No.: PL131116
OMB File No.: PL131117

BEFORE:

)J. P. ATCHESON

)

) August 7, 2014

THESE MATTERS having come on for a public hearing on July 24, 2014;

AND THE BOARD having received the withdrawal of the appeal of Greenhills SC Ltd. on or
about November 15, 2013;

AND THE BOARD having been advised of Minutes of Settlement dated June 24, 2014 between PenEquity Realty Corporation/Goal Ventures Inc. and the Upper Thames River Conservation Authority;

AND THE BOARD having heard the evidence of Gary A. Epp, B.Sc., M.Sc., Ph.D., Ecologist and Carol M. Wiebe, BES, Land Use Planner;

AND THE BOARD having heard the submissions of counsel for the Applicants, PenEquity Realty Corporation/Goal Ventures Realty Inc., and the remaining Appellants, Costco Wholesale Corp. and Upper Thames River Conservation Authority;

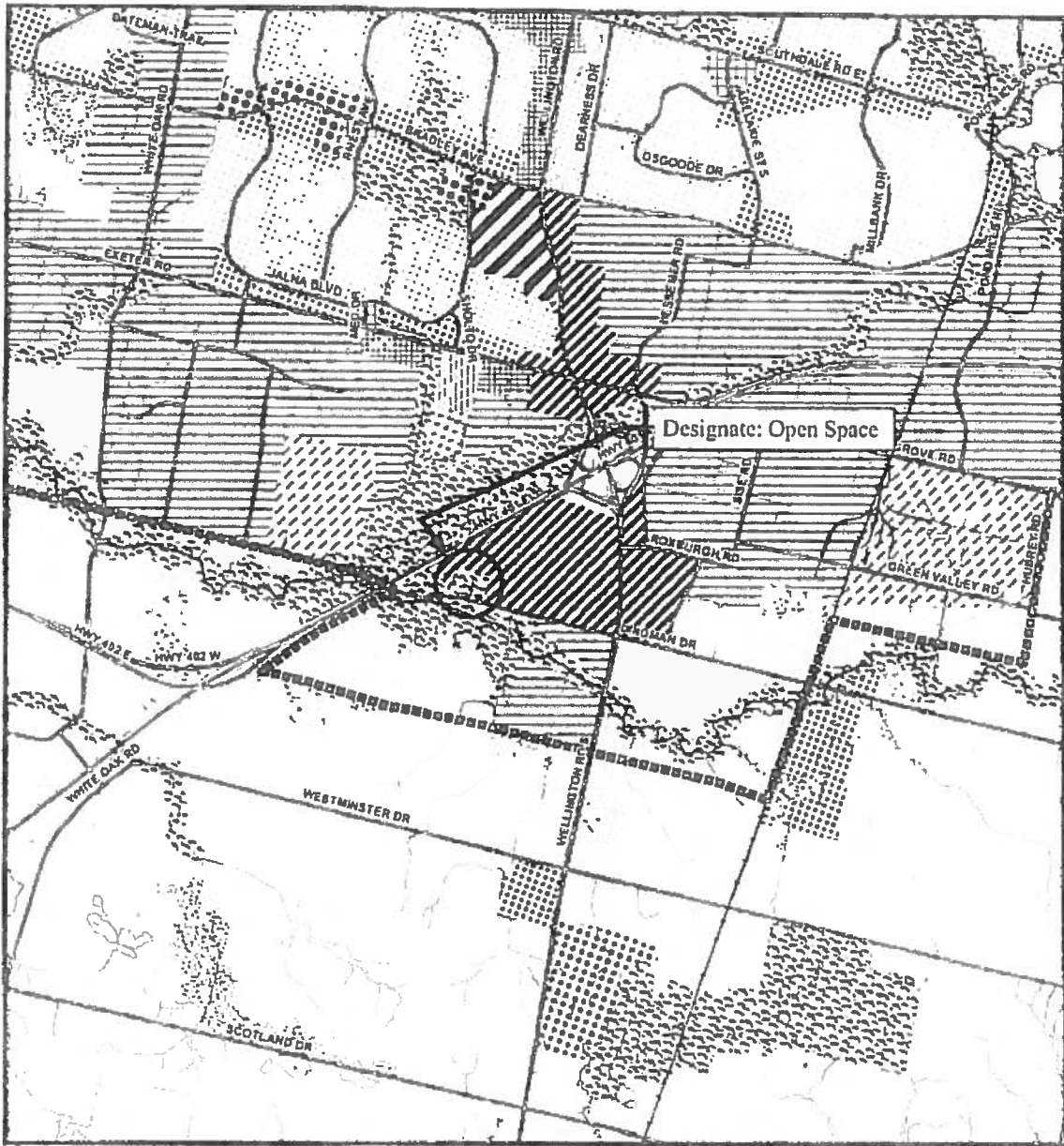
AND THE BOARD having been advised that the parties consent to an Order resolving the appeal of the Upper Thames River Conservation Authority but with such Order to be withheld as it pertains to Zoning By-Law No.Z-1-132226 pending final disposition of the Costco Wholesale Corp. appeal.

THE BOARD ORDERS that:

1. The Appeal of Official Plan Amendment No. 557 to the City of London Official Plan by the Upper Thames River Conservation Authority is allowed in part, in order to give effect to the modification set out below:
 - i) The addition of a block to be designated "Open Space" under City of London Official Plan, Schedule "A" as set out and incorporated into Schedule 1 attached hereto;
 - ii) The removal of the "Unevaluated Vegetation Patch" overlay on Schedule B-1 as set out in Schedule 2 attached hereto.
2. **THE BOARD ORDERS** on a contingent basis the appeal of Zoning By-law No. Z-1-132226 of the City of London by the Upper Thames River Conservation Authority is allowed in part, in order to give effect to the amendments set out below:
 - i) The addition of a block zoned "OS5" as set out and incorporated into Schedule 3 attached hereto;
 - ii) The deletion of holding conditions "h-153" (natural heritage compensation agreement), "h-157" (permit issued by the Upper Thames River Conservation Authority) and "h-158" (completion of Ontario Wetland Evaluation).
3. The Schedules which are attached to this Order shall form part of this Order;

4. OPA 557 is modified and approved in accordance with Schedules 1 and 2 attached hereto;
5. Zoning By-law Z-1-132226 is amended and approved on a contingent basis, in accordance with paragraph 2 above and Schedule 3 attached hereto, subject to confirmation from the parties that satisfactory arrangements have been made to address the potential traffic generated by the proposed changes in Zoning By-law Z-1-132226, including the vehicular access points, and the likely impact of such traffic on City streets, pedestrian and vehicular safety, and on surrounding properties;
6. The final Order in respect of Zoning By-law Z-1-132226 (paragraphs 2 and 5 above) shall be withheld pending final disposition of the appeal of Costco Wholesale Corporation so that in the event that Costco Wholesale Corporation's appeal is not resolved, Zoning By-law Z-1-132226, as amended by this Order, shall be reopened to adjudicate the appropriateness of the development in relation to the matters referenced in paragraph 5 above.;
7. This Order does not prejudice or limit Costco Wholesale Corporation or PenEquity Realty Corporation/Goal Ventures Inc., from seeking further amendments to Zoning By-law Z-1-132226, or the repeal of Zoning By-law Z-1-132226, in whole or in part, to address the issues raised by Costco Wholesale Corporation nor does it in any way limit or affect the jurisdiction or discretion of the Board in adjudicating Costco Wholesale Corporation's appeal;
8. The Board may be spoken to should any matter arise respecting the implementation of this Order.

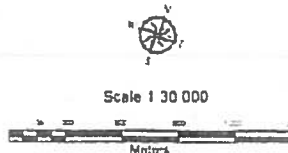
SCHEDULE 1



Legend

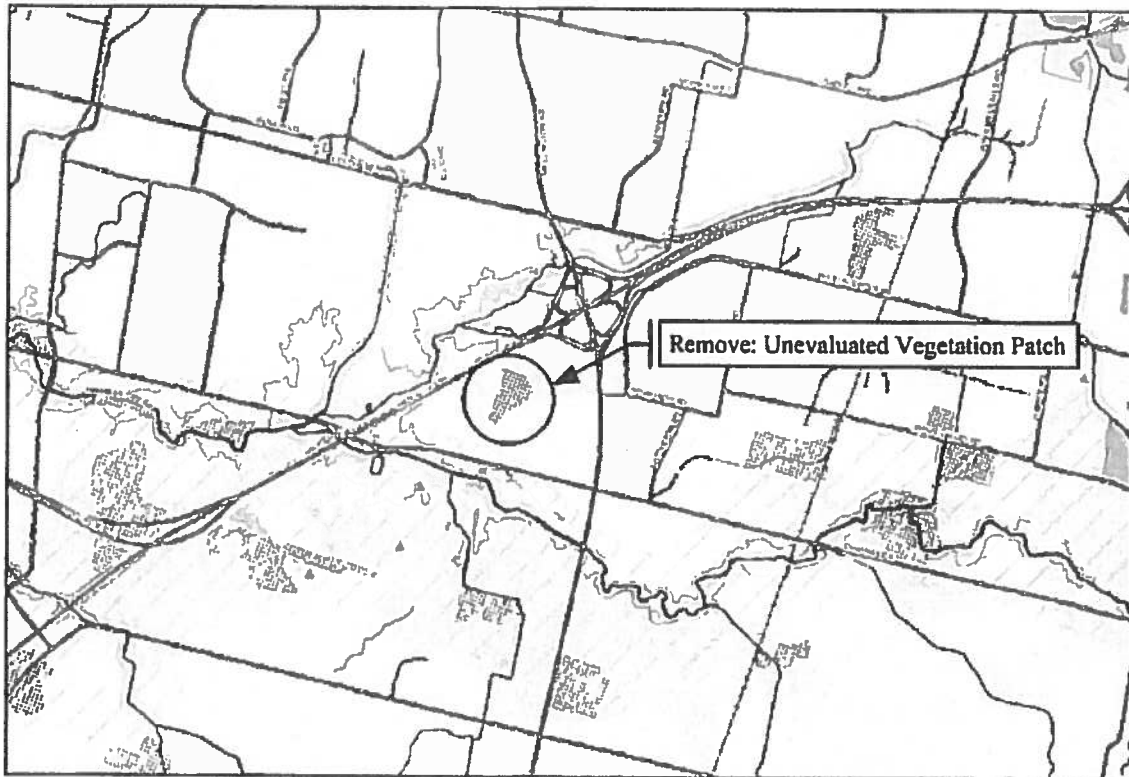
- | | |
|---|-----------------------------------|
| Downtown | Office Business Park |
| Enclosed Regional Commercial Node | General Industrial |
| New Format Regional Commercial Node | Light Industrial |
| Community Commercial Node | Regional Facility |
| Neighbourhood Commercial Node | Community Facility |
| Main Street Commercial Corridor | Open Space |
| Auto-Oriented Commercial Corridor | Urban Reserve - Community Growth |
| Multi-Family High Density Residential | Urban Reserve - Industrial Growth |
| Multi-Family Medium Density Residential | Rural Settlement |
| Low Density Residential | Environmental Review |
| Office Area | Agriculture |
| Office/Residential | Urban Growth Boundary |

CITY OF LONDON
 Department of
 Planning and Development
 OFFICIAL PLAN SCHEDULE A
 LAND USE



FILE NUMBER OZ-8120
 PLANNER CS
 TECHNICIAN
 DATE

SCHEDULE 2



NATURAL HERITAGE SYSTEM

- ESAs
- Potential ESAs
- Significant Woodlands
- Woodlands
- Unevaluated Vegetation Patches
- Significant River, Stream, and Ravine Corridors
- Unevaluated Stream and Ravine Corridors
- Provincially Significant Wetlands
- Locally Significant Wetlands
- Unevaluated Wetlands
- ▲ Potential Naturalization Areas
- ▲ Potential Upland Corridors
- Ground Water Recharge Areas

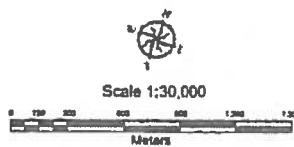
NATURAL HAZARDS

- ~ Maximum Hazard Line
- NOTE 1: Hazard Lines shown on this map are approximate. The precise delineation of hazard line mapping available from the Conservation Authority having jurisdiction.*
- NOTE 2: Flood Fringe mapping for certain areas of the city is available from the Upper Thames River Conservation Authority.*

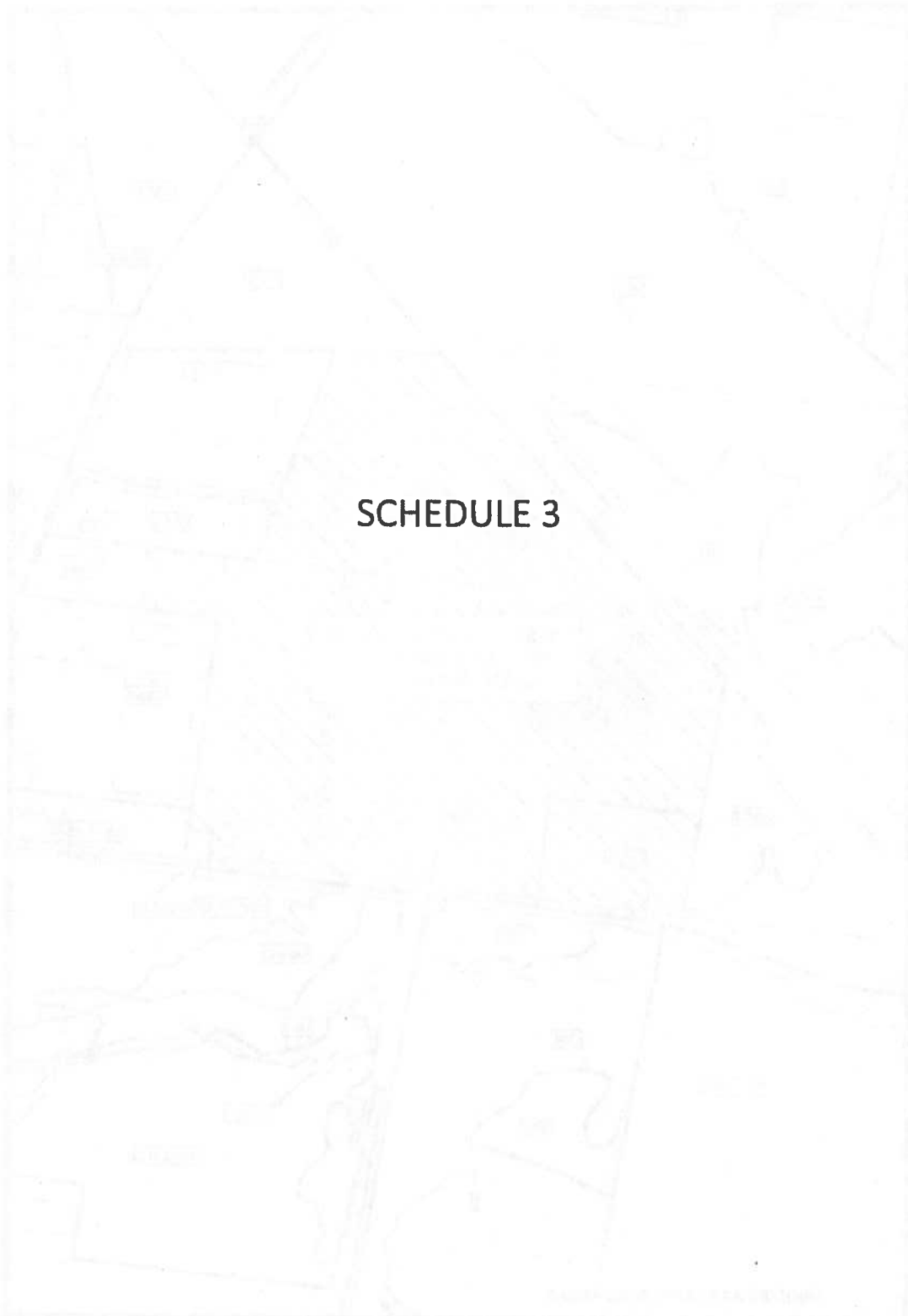
Base Map Features

- ~ Railways
- ~ Water Courses/Ponds
- ~ Streets (refer to Schedule "C")
- ~ Conservation Authority Boundary
- ~ Subwatershed Boundary
- ~ Big Picture Meta-Cores and Meta-Corridors

**SCHEDULE 2
TO
OFFICIAL PLAN**
AMENDMENT NO _____



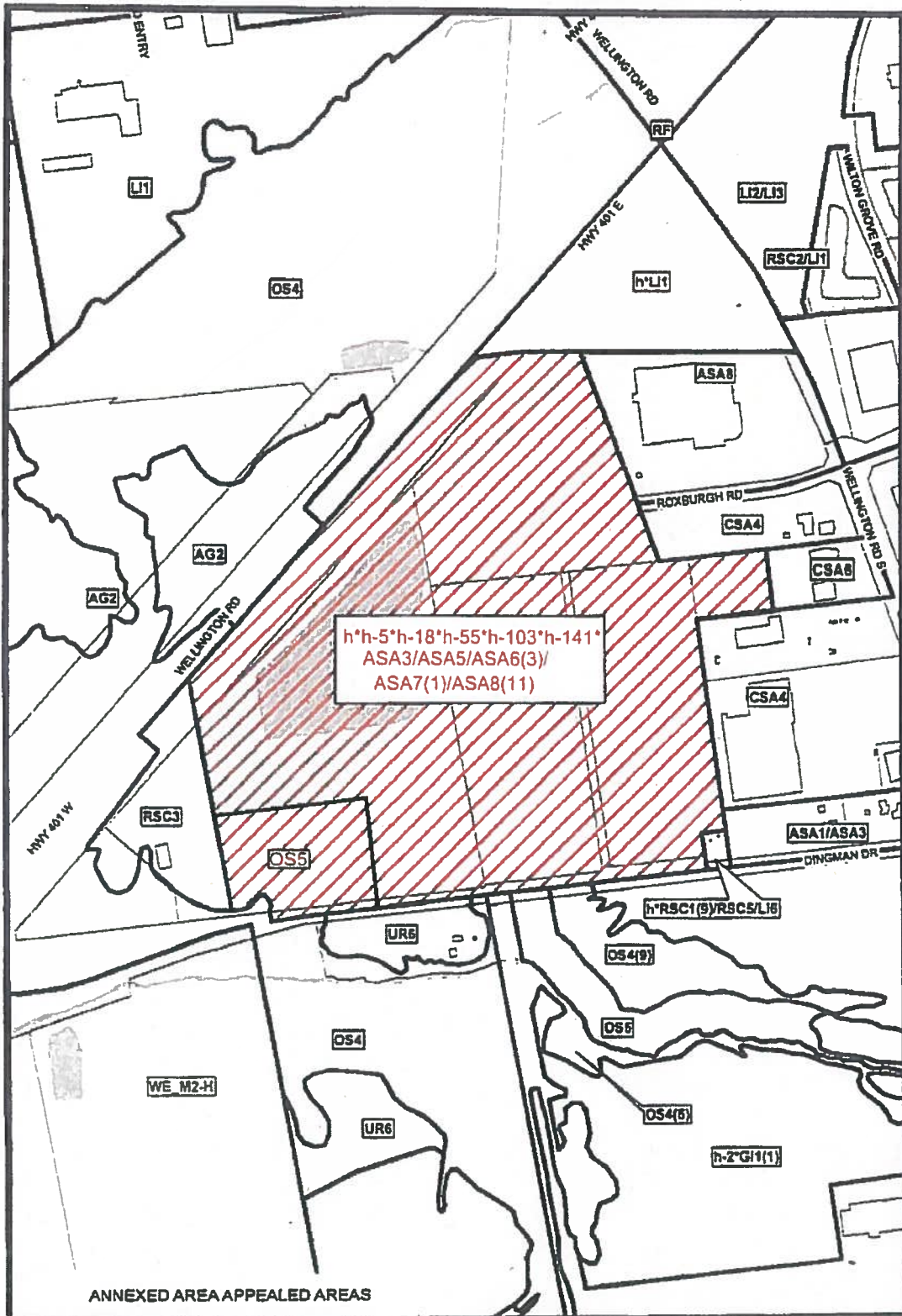
FILE NUMBER: OZ-8120
PLANNER: CS
TECHNICIAN:
DATE: 2014/07/17



SCHEDULE 3

<p>[illegible text]</p> <p>[illegible text]</p> <p>[illegible text]</p>	<p>[illegible text]</p> <p>[illegible text]</p> <p>[illegible text]</p>
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AMENDMENT TO SCHEDULE "A" (BY-LAW NO. Z.-1)



ANNEXED AREA APPEALED AREAS

File Number: OZ-8120

Planner: CS

Date Prepared: 2014/07/17

Technician:

By-Law No: Z-1-132226

SUBJECT SITE 

1:6,000

0 30 60 120 180 240 Meters

