

Agenda Item #	Page #

File: O-8131
OZ-7825/PL110251
Planner: N. Musicco

TO:	CHAIR AND MEMBERS PLANNING & ENVIRONMENT COMMITTEE
FROM:	JOHN M. FLEMING MANAGING DIRECTOR, PLANNING AND CITY PLANNER
SUBJECT:	APPLICATION BY: 1242778 ONTARIO LIMITED. 1761 WONDERLAND ROAD NORTH 1242778 ONTARIO LIMITED MEETING ON JULY 23, 2013

RECOMMENDATION

That, on the recommendation of the Managing Director, Planning & City Planner, the following report on the decision by the Ontario Municipal Board relating to the appeals by Alan Patton on behalf of Loblaw Properties Limited, FCHT Holdings (Ontario) Corporation, Barvest Realty Inc., Sunningdale Developments Inc. and Auburn Developments from a decision of Municipal Council concerning 1761 Wonderland Road North, **BE RECEIVED** for information.

PREVIOUS REPORTS PERTINENT TO THIS MATTER
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- O-8131 – Report to Planning and Environment Committee – January 22, 2013
- OZ-7825 – Report to Built and Natural Environment Committee – OMB Appeal Received.
- OZ-7825 – Municipal Council Decision – December 20, 2010.
- OZ-7825 – Report to Built and Natural Environment Committee - December 13, 2010.

BACKGROUND

The attached Ontario Municipal Board decision relates to an application by 1242778 Ontario Limited initiated on September 29, 2010 to amend the Official Plan and Zoning By-law to permit a wide range of retail and commercial uses with a special provision to include a “Supermarket” use with a maximum total gross floor area of 3,600 m² and a maximum front yard setback of 3m (9.84 ft.) from Wonderland Road North as well as holding provisions to ensure that urban design is addressed at site plan and to ensure that appropriate access arrangements have been made to the satisfaction of the City Engineer.

On January 24, 2011, Municipal Council adopted the Staff recommendation and amended the Official Plan and Zoning By-law. On February 25, 2011, an appeal was submitted on behalf of Loblaw Properties Limited, FCHT Holdings (Ontario) Corporation, Barvest Realty Inc., Sunningdale Developments Inc. and Auburn Developments against Council’s decision to approve the above Official Plan and Zoning By-law amendments.

On May 14, 2011, the applicant submitted new information related to the application for Municipal Council to consider. On July 24, 2012, Municipal Council reconsidered its decision in light of the information and material and made a written recommendation to the Ontario Municipal Board that the Official Plan that is the subject of the appeal be further amended.

On December 14, 2012, the appellants withdrew their appeals against Municipal Council’s decision to adopt the above Official Plan amendment (it should be noted that the appeals against Municipal Council’s decision to pass the above Zoning By-law amendment were not withdrawn). The withdrawal of this appeal caused the decision of Municipal Council made on

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

January 24, 2011 to come into force and effect and subsequently removed the OMB's jurisdiction to hear the recommendation of Municipal Council made on July 24, 2012, to further amend the Official Plan amendment.

As a result, on January 13, 2013 Municipal Council's adopted a subsequent Official Plan amendment to re-institute the recommendation to the Ontario Municipal Board, made on July 24, 2012, by way of Council Resolution. On February 18, 2013, an appeal was submitted on behalf of Loblaw Properties Limited, FCHT Holdings (Ontario) Corporation, Barvest Realty Inc., Sunningdale Developments Inc. and Auburn Developments against Council's decision to approve the above Official Plan amendment. This matter was consolidated with the previous appeal and the OMB hearing commenced on February 19, 2013 and concluded on February 28, 2013.

The Ontario Municipal Board dismissed the appeal thereby bringing into force and effect the decision of Municipal Council to amend the Official Plan and Zoning By-law. A copy of the OMB decision dated May 15, 2013 is attached to this report as Appendix "1".

PREPARED BY:	SUBMITTED BY:
NICOLE MUSICCO PLANNER II, COMMUNITY PLANNING AND URBAN DESIGN SECTION	JIM YANCHULA, MCIP, RPP MANAGER OF COMMUNITY PLANNING AND URBAN DESIGN SECTION
RECOMMENDED BY:	
JOHN M. FLEMING, MCIP, RPP MANAGING DIRECTOR, PLANNING AND CITY PLANNER	

July 8, 2013

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Decision Report_OZ-7825_July 23 2013.doc

Agenda Item #	Page #

File: O-8131
OZ-7825/PL110251
Planner: N. Musicco

Appendix "1"

ISSUE DATE: May 15, 2013
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PL110251

Ontario
Ontario Municipal Board City Solicitor's Office

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 (jointly): Loblaw Properties Ltd. et al
Subject: Proposed Official Plan Amendment No. OPA #488
Municipality: City of London
OMB Case No.: PL110251
OMB File No.: PL110251

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

Appellant (jointly): Loblaw Properties Ltd. et al
Subject: By-law No. Z-1-111977
Municipality: City of London
OMB Case No.: PL110251
OMB File No.: PL110252

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

Appellant: Auburn Developments Inc.
Appellant: Barvest Realty Inc.
Appellant: FCHT Holdings (Ontario) Corporation
Appellant: Loblaw Properties Limited; and others
Subject: Proposed Official Plan Amendment No. OPA 546
Municipality: City of London
OMB Case No.: PL110251
OMB File No.: PL130167

APPEARANCES:

Parties

Loblaw Properties Limited,
FCHT Holdings (Ontario) Corporation,
Barvest Realty Inc., Sunningdale
Developments Inc., and
Auburn Developments

Counsel

A. Patton

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

- 2 -

PL110251

1830145 Ontario Limited and
1242778 Ontario Limited (York
Developments)

J. Harbell/ M.Chien

City of London

J. Page

DECISION DELIVERED BY BLAIR S. TAYLOR AND ORDER OF THE BOARD

INTRODUCTION

[1] This was a consolidated hearing of PL110251 and PL130167 involving the appeals by Loblaw Properties Limited, FCHT Holdings (Ontario) Corporation, Barvest Realty Inc. ("Barvest"), Sunningdale Developments Inc., and Auburn Developments ("Auburn") (the "Appellants") originally with regard to the original Official Plan Amendment No. 488 ("OPA 488"), the Zoning By-law Amendment No. Z-1-111977 (the "ZBA"), and Official Plan Amendment No. 546 ("OPA 546"), all passed by the City of London (hereinafter the "City") in furtherance of a development application by 1830145 Ontario Limited and 1242778 Ontario Limited (hereinafter "York Developments") for the property known municipally as 1761 Wonderland Road North (hereinafter the "Subject Lands") to be used as a supermarket of 3,600 sq m.

SUBJECT LANDS

[2] The Subject Lands at 1761 Wonderland Road North are approximately 1.07 ha in area, and have a frontage of 91.44 m onto Wonderland Road North. The Subject Lands are generally located in the north west quadrant of the intersection of Wonderland Road North and Fanshawe Park Road West, (hereinafter the "Intersection") both arterial roads in the north west area of the City.

THE NEIGHBOURHOOD

[3] In the immediate vicinity of the Subject Lands are the following land uses: to the east, an existing shopping plaza owned by one of the Appellants with a No Frills food store, owned and operated by another of the Appellants. To the north of the Subject Lands are a modest office complex and a large communications tower. South of the Subject Lands (but still within the north west quadrant of the Intersection) are two

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

modestly sized multi-tenanted retail commercial buildings and a Master Mind toy store. Still in the north west quadrant but moving further west there is the Lighthouse Inn and Black Pearl Pub, a mini storage building, and some additional retail outlets. In the south west quadrant of the Intersection is a gas station surrounded by two smaller plazas, one with an automotive character. Further south is a residential neighbourhood. At the south-east quadrant is a residential neighbourhood.

CONTEXT BACKGROUND

[4] Fanshawe Park Road West is the former Provincial Highway No. 22, which provided highway access from the west to the City. Consistent with its former highway status, there are still remnants of the highway commercial uses that had developed over the years in the general vicinity of the Intersection including the Lighthouse Inn and Black Pearl Pub, the gas station, car wash and automotive parts and repair facilities.

[5] In or about January 1, 1993, some 26,000 ha of land were by legislation annexed to the City, all around its then existing municipal boundaries. This action led to a number of community planning exercises which are relevant to this hearing. The first was the Sunningdale Community Plan of 1996, generally incorporating the No Frills plaza to Richmond Street on the east and Sunningdale Road on the north. Barvest has a vacant commercial site at the south west quadrant of Richmond Street and Sunningdale Road.

[6] The second community plan of note is the Fox Hollow Community Plan, within which the Subject Lands are located, as Wonderland Road North is the dividing line between the Sunningdale Community Plan and the Fox Hollow Community Plan.

[7] To complete the community planning exercise, in 2006, the Sunningdale North Community Plan was prepared and it generally deals with the lands north of Sunningdale Road near Richmond Street and within which Auburn has a vacant commercial site.

EXISTING RETAIL

[8] The Subject Lands are located between two Regional Commercial Nodes.

Agenda Item #	Page #

File: O-8131
OZ-7825/PL110251
Planner: N. Musicco

[9] One major city block west at the intersection of Hyde Park Road and Fanshawe Park Road West is a “big box” development. In the south east quadrant is Wal-Mart. The existing commercial development extends to the north east quadrant. Auburn has in process a development application proposing, *inter alia*, a specialty food store on a currently vacant site, which is near the New Format Regional Commercial Node.

[10] One major city block east from the Subject Lands at the intersection of Richmond Street and Fanshawe Park Road West, is the Masonville Mall in the south east quadrant. In the north east quadrant is an existing Loblaw's food store.

[11] Completing the inventory of existing retail facilities in the general vicinity is the neighbourhood commercial node one major block south of the Intersection, which is notably tenanted by a Metro food store.

CHRONOLOGY

[12] There is a long and detailed history to this hearing, which includes the following set out in point form only for the sake of brevity. The chronology begins in 2010, when York Developments proposed to the City of London to amend the Official Plan designation for the Subject Lands from “Office Area” to “Neighbourhood Commercial Node” and amend the Zoning By-law from a (holding) Restricted Office zone to a holding Neighbourhood Shopping Area Special provision and to add a supermarket to the list of permitted uses up to a maximum gross floor area of 3,600 sq m.

- June 8, 2010 – York Developments forwards a development proposal summary to the City.
- June 22, 2010 - the City holds a pre-consultation meeting with York Developments.
- September 2, 2010 - York Developments submits its development application.
- The City staff report of December 13, 2010, recommends approval subject to a number of conditions.
- At the December 20, 2010, public meeting the Appellants' planner recommends against the staff report as it does not *inter alia* conform

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

- 5 -

PL110251

- to the scale of development allowed by the Official Plan within a Neighbourhood Commercial Node.
- January 24, 2011 - City Council adopted the recommendations of the staff report and approved OPA 488, and the ZBA.
 - February 25, 2011 - the Appellants by their counsel appealed both OPA 488 and the ZBA.
 - December 16, 2011 - the City's Consent Authority granted consent #1 for an easement over the southerly abutting lands for purposes of ingress and egress to the Subject Lands.
 - In May 2012, York Developments filed a re-submission with the City including a Traffic Impact Assessment Addendum, a Commercial Justification Report, and a Planning Justification Report.
 - On June 1, 2012, the City of London Consent Authority granted consent #2 for ingress and egress to the Subject Lands over the abutting lands to the south.
 - By a staff report dated July 6, 2012, modifications to OPA 488 were recommended to City Council.
 - On July 24-25, 2012, City Council resolved to advise the Ontario Municipal Board ("OMB") of the City's recommended modifications to OPA 488.
 - The Board held a pre-hearing on September 24, 2012.
 - The Procedural Order was issued November 8, 2012, requiring the exchange of witness statements by December 16, 2012.
 - December 14, 2012 - the Appellants collectively withdrew their appeals against OPA 488 (but retained their appeals against the ZBA).
 - By staff report dated January 13, 2013, City staff recommended OPA 546 to Council to implement the proposed modifications to OPA 488 that had been considered by City Council on July 24-25, 2012.
 - On January 29, 2013, the City adopted OPA 546.

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

- On February 13, 2013, the Appellants by their counsel appealed OPA 546.
- On February 20, 2013, the Board commenced its hearing of this matter and with the consent of all parties, consolidated the appeals of OPA 546.

[13] The net effect of all this is that OPA 488 is in force and effect, the Subject Lands are designated Neighbourhood Convenience Commercial ("N.C.C."), the ZBA and OPA 546 appeals have been consolidated and are before the Board, but there is no site plan before the Board.

THE HEARING

[14] The Board heard evidence on three general themes: market analysis, traffic and transportation, and land use planning.

Market Analysis

[15] As part of the York Developments re-submission in 2012, Robin Dee and Associates had prepared a Supermarket Demand and Impact Evaluation (hereinafter the "Market Report"). York Developments called Mr. Dee and he testified that in his opinion there was no risk of closure for the existing No Frills store at the Intersection due to increased competition, nor to any of the other six food stores in the Primary Study Area.

[16] Mr. Dee's evidence was that the existing No Frills store had a performance level on a sales per square foot basis that was nearly three times the industry norm, that the Primary Study Area for his report was derived from a license plate survey conducted from the parking lot of the No Frills store, that there was warranted additional food store space of 28,051 sq. ft. in 2013, rising to 45,834 sq. ft. in 2015, to 63,939 sq. ft. in 2017 and in 2021 an additional 91,620 sq. ft.

[17] He characterized the general area as a growing community with new residential development taking place generally north of the Subject Lands, and thus, by 2021, three to five new food stores would be required to meet the projected demand.

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

[18] With regard to the Barvest site at Sunningdale Road and Richmond Street and the Auburn site just north therefrom, he indicated that the supporting residential development had not yet occurred and that neither site was ripe for development.

[19] With regard to the proposed development at the Subject Lands, he stated that it would not undermine the development of or the planned function for the Community Commercial Nodes at Richmond Street and Sunningdale Road.

[20] Finally, he opined that having two approximately 3,600 sq m food stores in the N.C.C. Node would not create a "de facto" Community Commercial Node, and that there was no prohibition in the Official Plan against two food stores in a N.C.C. Node.

Traffic and Transportation

[21] The Board heard three witnesses qualified to give opinion evidence with regard to traffic and transportation: Frank Berry for the Appellants, Maged Elmadhoon for the City and Michael Flainek for York Developments.

[22] York Developments had originally retained Dillon Consulting Limited in 2010, to prepare both a Planning Justification Report and a Traffic Impact Assessment. The initial Traffic Assessment Report had a design concept for a retail store located at the rear of the Subject Lands with two access points onto Wonderland Road North, of which the second would directly align with the westerly entrance to the adjacent No Frills plaza.

[23] It would appear that City staff had concerns with the initial design concept and recommended that the retail store be brought out to the Wonderland Road perimeter to help define the street edge and that City transportation staff had concerns with the proposed access. This resulted in a second design concept that relocated the retail store to the Wonderland street edge, and proposed shared ingress and egress with the abutting property owner to the south.

[24] In the City staff report of December 1, 2010, a holding provision for site plan and for traffic and access was recommended to Council. Council passed the ZBA with the holding provision for site plan, but not for traffic and access.

[25] With the appeals filed against OPA 488 and the ZBA by the Appellants, York Developments had Dillon Consulting Limited prepare a Traffic Impact Assessment

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

Addendum which took into account the concerns expressed by staff in the December 1, 2010, staff report, and resulted in further changes to the proposed concept site plan.

[26] Succinctly put, the Traffic Addendum and proposed revised concept site plan were acceptable to City staff, but not to the Appellants.

[27] In that regard, the Board heard from Mr. Berry who reviewed the two Dillon traffic reports and the staff reports, and was familiar with the City's transportation policies and guidelines.

[28] Mr. Berry conducted no independent analysis; rather his evidence was based on the existing reports. He identified concerns with regard to: the levels of service, queuing lengths, pass by traffic, and the shared driveways.

[29] With regard to the levels of service, Mr. Berry referred to the Volume to Capacity ratios ("V/C ratios"). Mr. Berry noted that in the projected 2019 afternoon peak hour background conditions, five of the individual movements would have V/C ratios of 0.95 or greater, and with the site traffic added the V/C ratios for those movements would exceed 1.0: i.e. demand would be greater than capacity.

[30] With regard to the queuing lengths, he noted that the existing No Frills plaza access was 85 m from the Intersection, whereas the proposed southerly access to the Subject Lands was 55 m from the Intersection. Under the projected 2014 background conditions, the 95th percentile queue length for southbound traffic would be 82 m in the afternoon peak and 65 m on the Saturday peak. Both of these would block existing traffic for the southerly driveway. In 2019, the projected background conditions would result in queue lengths of 100 m in the afternoon peak hour, and 82 m for the Saturday peak. Again both blocking the south exit. If the site generated traffic were added to the queue lengths, they would increase to 109 m and 89 m respectively.

[31] Pass-by Trips are those trips which are already taking place in the flow of traffic, where a driver interrupts a trip for a secondary purpose and then continues the trip to the primary purpose. Mr. Berry found the assumed pass-by rate used in the Dillon reports to be unacceptably high and lower rates would have been warranted because of the lack of visibility of the proposed supermarket to drivers on Fanshawe Park Road West. The net impact of this he said would be to increase the number of "new" trips on the street system and thus increase the impact of the proposed development.

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

[32] With regard to the shared driveways, Mr. Berry was concerned in particular with the proposed shared access with the abutting property to the south. He described it at best as being awkward, with no direct access except from the North to the Subject Lands. All other points of access he stated were out of direction travel, which was not convenient. Of particular note, Mr. Berry stressed a safety concern for the proposed shared driveway in front of the Mastermind Toy Store. He said the driveway was sized as an aisle, yet would accommodate traffic volumes exceeding that of a local street.

[33] From his study, his resulting opinion was that the Subject Lands were better suited to an "Office" designation, and that the proposed development, including its conceptual urban design would create undue negative impacts on the local arterial road system and the lands of FCHT Holdings (Ontario) Corporation and Loblaw Properties Limited.

[34] The City's evidence on traffic and transportation came from its Manager, Traffic Engineering and Transportation Planning: Mr. Elmadhoon. He advised the Board that the main concern of the City had been with the northerly full access that had been proposed in the initial site plan concept. The city concerns had been addressed through the Traffic Addendum whereby the revised site plan concept had recommended restricted right in/right out at the southerly access onto Wonderland Road North with an extended median, a restricted northerly access that is one way outbound only, and the additional access through the abutting lands to the south.

[35] He testified that the proposed development would not in his opinion have negative impacts on the arterial road network if the revised access configuration and access points were utilized. Moreover, he noted that much of Mr. Berry's evidence related to "background" conditions, without the consideration of the additional turn lanes proposed, and the fact that the London 2030 Transportation Master Plan had recommended the widening of Wonderland Road North from Fanshawe Park Road to Sunningdale Road which would obviously increase traffic capacity and ease traffic congestion.

[36] Mr. Elmadhoon testified that the arterial roads at the Intersection still had capacity and that the V/C ratios cited by Mr. Berry were not of concern, as the City's policy was to improve the road where the V/C was 1.20. Further, he stated that the volume of proposed traffic from the Subject Lands was modest and would not have a major impact on the arterial roads or the Intersection and that York Developments had

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

proposed some operational changes to the Intersection that would be an interim solution until Wonderland Road North was widened as recommended in the City's Transportation Master Plan.

[37] The third and final traffic engineer to be heard was Mr. Flainek. He had been involved in the original traffic impact assessment.

[38] He advised the Board that the traffic impact assessment had been prepared on a conservative basis. For example, if the development on the Subject Lands were approved and constructed, the net increase in traffic would be less than that used in the assessment as the supermarket is expected to draw some customers that are already travelling in the area to the No Frills store. In this regard, the Board notes Mr. Dee's evidence that there would be an initial decrease on sales per square foot basis to the No Frills store of about 23.5% in 2013, and abating to about 10.9% in 2021). Notwithstanding the anticipated decrease in sales, the Traffic Impact Assessment made no adjustment for any decrease in traffic.

[39] Mr. Flainek supported Mr. Elmadhoon's evidence with regard to the acceptable levels of service at the Intersection, and that presently they operate at capacity during peak times. With the development of the new communities in North West London, the background traffic will increase. While development at the Subject Lands would add some traffic, in his opinion and shared by Mr. Elmadhoon, the primary factor affecting future traffic conditions would be the residential development in the areas north of the Subject Lands.

[40] To accommodate this, Mr. Flainek advised of three factors that had been considered. The first was the redesign of the site plan concept, especially with regard to the north access point, which would be outbound only. Secondly in the nearer term, there would be technical operational adjustments to the Intersection and Intersection traffic signals to accommodate north bound and south bound left turns. Ultimately due to the anticipated residential development in North West London, as proposed in the City transportation Master Plan, Wonderland Road North would be widened to four lanes.

Agenda Item #	Page #

File: O-8131
OZ-7825/PL110251
Planner: N. Musicco

Land Use Planning

[41] With the withdrawal of the appeals, OPA 488 came into force and effect “on the day the last outstanding appeal had been withdrawn” (see s. 17(30)) *Planning Act*). Thus pursuant to OPA 488, as of December 14, 2012, the Subject Lands were re-designated as “Neighbourhood Convenience Commercial” in the City’s Official Plan and a cap of 23,000 sq m of total commercial development was imposed on the Intersection node. The Subject Lands remained zoned as “Holding Restricted Office”.

[42] York Developments and the City propose to amend the Official Plan (i.e. amend the provisions of OPA 488) by essentially deleting the cap, and specifically allowing a supermarket at the Subject Lands through OPA 546. To implement the development proposal, the ZBA is proposed which will on a site specific basis rezone the Subject Lands to Neighbourhood Shopping Area 5 (“NSA5”), add a supermarket as a permitted use, and allow a maximum Gross Floor Area (“GFA”) of 3,600 sq m for supermarket space.

[43] Zoning By-law Z-1 states with regard to the Neighbourhood Shopping Area (“NSA”) Zone that this zone is normally intended to implement the Neighbourhood Commercial designation in 4.3.8 of the Official Plan, and that shopping centres are the permitted form of development but stand-alone buildings may also be permitted at appropriate locations normally near the perimeter of the property to satisfy design goals to create a street edge and screen parking lots.

[44] Within the NSA zone there are a number of NSA zone variations including NSA1, NSA2, and NSA5, in which food stores are permitted, but with different maximum floor space: i.e. 500 sq m, 1,500 sq m, and 3,200 sq m respectively.

[45] With regard to the land use planning component of the hearing, the Board heard from three qualified land use planners, and one principal.

[46] Richard Zelinka gave evidence on behalf of the Appellants, as did Stephen Stapleton Vice President of Auburn Developments. Collectively the Appellants raised the following objections with regard to the development proposal:

- It would exceed the cap of 23,000 sq m of total commercial development in the node;

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

- It would not meet the planned function for a N.C.C. designation
- It would denigrate from the planned function for (other) commercially designated but presently undeveloped lands within the Fox Hollow, Sunningdale, and Sunningdale North Community Plans;
- It would create a “*de facto*” Community Commercial Node;
- It would cause unwarranted traffic and transportation issues
- The proposed ZBA could not comply with the Official Plan cap of 23,000 sq m;
- The ZBA would allow a supermarket which would have undue impacts on the surrounding land uses and on the periphery arterial roads.

[47] In support of these objections, Mr. Zelinka had prepared a calculation of all the existing total commercial GFA, within the existing subject N.C.C. which exceeded 30,000 sq m. Thus he testified that the N.C.C. node already exceeded the GFA cap that was established in the Official Plan (by virtue of OPA 488) and the proposed implementing ZBA could not comply with the Official Plan.

[48] Moreover, Mr. Zelinka opined that the City had gone through an extensive and careful community planning exercise post annexation. In this general area, there had been two community plans developed in the late 1990s, one for Fox Hollow and one for Sunningdale. As part of these community planning exercises, careful consideration had been given the residential and commercial components for both areas, the results of which were adopted by the City and brought into the Official Plan. Subsequent to this there was a third community plan completed for Sunningdale North and it too had been brought into the Official Plan.

[49] Turning to the Official Plan, Mr. Zelinka noted the Planning Objectives for all Commercial Designations in s. 4.2.1, and said that because of the community planning exercises, the policy direction to...“provide sufficient land at appropriate locations to meet the need for new commercial development” had already been met, and the Barvest lands and the Auburn lands were existing designated vacant commercial sites. Moreover he added that those sites would (unlike the Subject Lands) minimize the impact of commercial development on adjacent land uses, and on the traffic carrying capacities of adjacent City roads.

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

[50] Those community planning exercises had also he said resulted in commercial designations that in the language of s. 4.3.7.2(iii) had substantial separation from other Community Commercial Nodes, so that trade areas would not overlap. In this regard the introduction of a second food store within the N.C.C. designation at the Intersection would not be consistent with its planned function to provide for the daily or weekly convenience shopping of nearby residents.

[51] The addition of a second food store at this N.C.C. he said would create a *de facto* Community Commercial Node, which would draw customers from beyond the neighbourhood area and undermine the planned function of higher order Community Commercial Nodes, as no other N.C.C. in London had two food stores.

[52] And he adopted the evidence of Mr. Berry that the approval of a second food store would have adverse impacts on adjacent land users and on the City's arterial road system at this Intersection.

[53] Mr. Stapleton testified that Auburn had a vacant commercial site in the Sunningdale North Community, designated as Community Commercial Node (lifestyle), for which he sought a food store. In light of the extensive community planning exercise that had been undertaken it was his view that the proposed development at the Subject Lands for a food store had not been envisioned in the Official Plan, and that it would undermine the planned function for the community plans at Sunningdale Road and Richmond Street. It was his view that the subject application had not been properly considered in light of planned function for these two community plans which have not yet matured. And a change to the zoning at the Subject Lands was premature, would have a detrimental effect on the ability of the Official Plan to fulfill its policies and was not in the public interest.

[54] On behalf of the City, the Manager of Planning Review Michael Tomazincic gave evidence.

[55] He disputed the GFA calculation by Mr. Zelinka. He specifically pointed to the following:

- 715 Fanshawe Park Road West is a mini storage building of about 8,395 sq m which he testified to be an "industrial" use, but was included by Mr. Zelinka. Only 120 sq m of that total was "commercial"

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

he said relying on the exemption from development charges that had been granted by the City.

- 761 Fanshawe Park Road West was also included by Mr. Zelinka, but was located outside the N.C.C. boundary.
- And 725 and 751 Fanshawe Park Road West (collectively 3,500 sq m) were approved by City Council, although the 1,916 m at 751 Fanshawe Park Road West was approved on April 4, 2011, after Council had already approved the proposed development for the subject Lands.

[56] Thus at the time of the City Council approval, Mr. Tomazincic's evidence was that the existing total commercial GFA was 19,191 sq m and the approval for the Subject Lands at 3,600 sq m complied with the 23,000 sq m cap.

[57] He also noted that OPA 546 proposed to eliminate the cap, and site specifically referenced approval of the development application for the Subject Lands and thereby avoid in the future this detailed accounting approach to the N.C.C.

[58] With regard to the planned function issue, Mr. Tomazincic noted that a supermarket or food store "should" form an integral part of a Community Commercial Node (s. 4.3.7.1), but it was not mandatory, and that "food stores" were a permitted use in a N.C.C node (4.3.8.3), and there were no prohibitions against more than one food store.

[59] Turning to the Official Plan vision for design, Mr. Tomazincic took the Board to s. 4.2.2 in the Urban Design Objectives for all Commercial Designations. It provides as follows:

Discourage large front yard surface parking areas; encourage street-oriented development; introduce a higher standard of landscaping; incorporate accessible pedestrian connections to transit facilities, to adjacent neighbouring residential areas, and within large commercial developments; require joint access and the co-ordination of internal and external traffic movements.

[60] He advised that in the N.C.C. designation, the form permitted in the Official Plan through s 4.3.8.4 was generally a strip plaza focus but stand-alone structures along the street edge were also permitted. Generally, he said in terms of scale, a N.C.C. would normally range in size from 1,000 sq m to 13,000 sq m, but due to the fact that

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

Fanshawe Park Road West was formerly Provincial Highway No. 22, it was an anomaly due to the previous highway commercial uses.

[61] Mr. Tomazincic testified that the revised concept plan which included the street oriented retail site, the integration of ingress and egress with the abutting lands to the south, fulfilled these design objectives, and he adopted the evidence of Mr. Elmadhoon with regard to issues of traffic and transportation.

[62] The final planning witness was Carol Wiebe on behalf of York Developments.

[63] Ms. Weibe had been retained after the appeals by the Appellants against OPA 488 and the ZBA. She was instrumental in the comprehensive re-submission by York Developments in 2012 for the Subject Lands, including the Traffic Addendum, the Market Report, and her own Planning Justification Report.

[64] Ms. Weibe's evidence was broader in scope. Her Official Plan reviewed highlighted s. 2.3.1 (iv) from the Planning Principles that ..."planning for urban growth should encourage a compact form which is conducive to the maintenance and efficient use of services and facilities" and that this policy was complimented by s. 2.4.1 (xvi) in the City Structure Policies.

A compact urban form and efficient use of serviced land shall be encouraged. Compact urban form, as used in the Plan, pertains to the development or expansion of the urban area of the City in a manner that avoids a scattered or "leap-frog" development pattern, maximizes the use of existing services, minimizes the loss of productive agricultural land, is conducive to the provision of transit, and minimizes the need for and cost of new infrastructure."

[65] When referencing the commercial policies, Ms. Wiebe noted that by OPA 438 the City had, through its five year review, created a commercial hierarchy with a series of nodes and corridors. Common objectives for all designations were:

- provide orderly distribution of commercial uses
- to minimize impacts on adjacent land uses and road
- to provide sufficient land at appropriate locations for new commercial development
- and to encourage intensification and redevelopment at appropriate locations

Agenda Item #	Page #

File: O-8131
OZ-7825/PL110251
Planner: N. Musicco

[66] Turning to the Subject Lands, Ms. Weibe noted their location as being mid-point on Fanshawe Park Road West between two Regional Commercial Nodes: the first being the new format node at Hyde Park with its main anchor tenant Wal-Mart and other large big box retailers including Lowes, Canadian Tire, and Home Sense. The second Regional Commercial Node was at Richmond Street and it was a traditional enclosed shopping centre with large retailers including the Bay, Sears, Zellers (soon to be Target), along with a multiplex movie theatre. The designation extended to the north side of Fanshawe Park Road West where other larger retailers were located including Chapters, Staples, Winners, and Best Buy, and a Loblaw's food store.

[67] She advised that the locational characteristics of the Subject Lands being mid-point between these two large but different Regional nodes attracted a lot of traffic to the area generally and more specifically a lot of pass-by traffic. Thus this N.C.C. was commercially well positioned, and also surrounded largely mature, built out subdivisions, and thus the node operated at a high level.

[68] This she contrasted to the commercial designations at Sunningdale and Sunningdale North which were green field developments, where the anticipated surrounding communities had yet to develop.

[69] With regard to OPA 546, Ms. Wiebe advised that the intent was to remove the 23,000 sq m cap and allow a "supermarket" at the Subject Lands and bring clarity and simplicity to these types of development issues in the node in the future.

[70] In terms of the ZBA, she testified that the NSA5 zone was normally the intended zone for such designations in the Official Plan. The current zoning for a holding office use did not implement the Official Plan designation and simply reflected the old Official Plan designation. The NSA5 zones allowed "food stores" as a permitted use with a maximum GFA of 3,200 sq m whereas the definition section of the zoning by-law for "supermarket" had no GFA cap. In OPA 546 and the ZBA, for certainty the City had allowed a supermarket and set the GFA at 3,600 sq m.

APPROACH

[71] The Board finds that this is a commercial competition hearing with appeals by parties who have existing commercial lands and premises, who own vacant and as of yet undeveloped designated commercial properties, and one party who has an active

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

food store application within the Fox Hollow community Plan. No members of the public, no residents' associations, and save for two of the Appellants, no adjacent or abutting land owners or tenants participated in the hearing.

[72] The case law is clear in such circumstances that the Board, as a general rule, will not interfere in the market place; that impact alone is not a cause for intervention, but rather that impact must be significant and demonstrable, and that the Board should not be used as a means to prevent competition.

ISSUES

[73] With that preamble the Board turns to the Issues, which the Board notes have not been amended notwithstanding the withdrawal of the appeals against OPA 488. Thus, with OPA 488 in force and of effect, some portions of the Issues are moot.

Issue #1

"Do the Amendments as adopted by Council on December 20, 2010 and as further amended by Council resolution on July 24-25, 2012 represent good land use planning and are they in conformity with the City of London's Official Plan?"

[74] With the withdrawal of the appeals against OPA 488, the Subject Lands are designated as N.C.C., with this node having a GFA cap of 23,000 sq m of total commercial development. On January 24, 2011 when City Council actually adopted OPA 488 and the ZBA, its clear intent was to allow a supermarket of 3,600 sq m at the Subject Lands and City Council believed its approval fell within the 23,000 sq m cap. The ZBA utilized the normally intended zone of NSA, and the NSA5 zone for a stand-alone building "normally near the perimeter of the property", permitted a supermarket of 3,600 sq m and a maximum front yard setback of 3 m.

[75] Post the January 24, 2011 City approvals of OPA 488 and the ZBA, two things occurred. First, the Appellants appealed both the OPA and the ZBA, and secondly, other desirable commercial applications within the same N.C.C node were subsequently approved.

[76] The City realized that the language of OPA 488 would lead to a "mathematical" cap exercise, and so in July 2012, proposed by resolution to have the Board modify

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

OPA 488 to essentially eliminate the cap and approve the development, and thereafter, consider other development applications in the node on a site specific basis.

[77] The Appellants presumably believing that the cap in OPA 488 had already been exceeded withdrew their appeals on OPA 488 in December 2012, just days before witness statements were due to be exchanged.

[78] This led the City to adopt in January 2013, OPA 546 to effectively implement the modifications that had been considered in July 2012, which the Appellants then appealed, resulting in this consolidated hearing.

[79] The Appellants contend that the ZBA does not meet the cap contained within the Official Plan as amended by OPA 488. They say that there already is 30,000 sq m of total commercial development and that the ZBA would be contrary to the Official Plan. The Board does not agree. The Board notes that included in the Appellants calculation of GFA is 8,395 sq m of industrial GFA. This is noteworthy as it was the Appellants' planning firm that processed that development application. Secondly, the Board notes the inclusion of commercial space that is located outside the node.

[80] Thus the Board prefers the evidence of Mr. Tomazincic in this regard, and that on January 24, 2012 the existing commercial GFA was 19,192 sq m, and the clear intent of City Council was that approval for the Subject Lands would fall within that cap.

[81] Thus as of January 24, 2012, the ZBA would have conformed to the cap in Official Plan.

[82] However with the appeals, s. 17(30) of the *Planning Act* provides that where all appeals on an official plan amendment are withdrawn, the decision of Council is final and comes into effect ... "on the day the last outstanding appeal has been withdrawn". In this case that would have been December 14, 2012. Thus the technical effective date of OPA 488 was December 14, 2012 and not the January 24, 2012 date that Council approved the OPA and the ZBA.

[83] To prevent a legal/technical argument (and a mathematical planning approach) from trumping its land use planning approvals, the City adopted OPA 546. The clear intent of OPA 546 was to approve the development on the Subject Lands and eliminate any arguments that might arise over the cap.

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

[84] Pursuant to s 2.1 of the *Planning Act*, the Board shall have regard to the decisions of Council and the supporting information and materials. In that regard the Board notes that throughout the entire decision making process, the objections of the Appellants were put to Council in both written and oral submissions.

[85] The Board has found that the clear intent of Council on January 24, 2012, was to approve the proposed development for the Subject lands and at that time, the development would have been within the 23,000 sq m cap. The Board also finds that the proposed development represents good planning, and is consistent with the Provincial Policy Statement with regard to the utilization of existing infrastructure and compact and efficient forms of development, and represents an appropriate intensification in a settlement area.

[86] The Board notes the uncontroverted market evidence of Mr. Dee that there is pent up demand for food store space, such that three to five stores are warranted by 2021. There was no market evidence by the Appellants, save indirectly with regard to a proposed new development by Auburn for a food store use, outside the New Format Regional Node at Fanshawe Park Road West and Hyde Park. The Board finds that the development of a new supermarket at the Subject Lands (which is about the same size as the existing No Frills store) would meet an existing unmet neighbourhood demand and would be in the public interest.

[87] With regard to the Auburn and Barvest sites, the Board prefers the evidence of Mr. Dee, Mr. Tomazincic and Ms. Weibe that these are green field sites, they will develop in conjunction with the surrounding residential communities, and approval of the subject application will not result in a *de facto* Community Commercial Node.

[88] With regard to the traffic and transportation issues, The Board finds that it is the background traffic that is of primary concern and not the modest additional traffic that the Subject Lands would generate. City staff had initial concerns with regard to the Traffic Assessment but those concerns were mollified by a subsequent site plan concept, moving the retail store to the street edge, and effecting shared ingress and egress with the southerly abutting commercial property. The Board also finds that the Appellants' concerns with regard to the proposed ingress and egress to be reflective of a "green field" development proposal and not of an existing situation where for many years this area had supported highway commercial uses. The revised site plan concept shown to the Board conforms to the directions in the Official Plan for street edge

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

development, and integrated commercial developments, bearing in mind that the southerly commercial development preceded the proposed development on the Subject Lands.

Issue #2

“Are the Amendments appropriate, having regard to the planned function within the Fox Hollow Community Plan, the Sunningdale Community Plan and the Sunningdale North Community Plan?”

[89] All of the community plans are found within Exhibit 5. Each community plan was the forerunner of the amendments to the Official Plan. As such the community plans have no status. With regard to the planned function of the lands within each of the community plans, the Board has found the proposed development for the Subject Lands to represent good planning, to be in the public interest, to accommodate unmet market demand, and do not constitute a *de facto* Community Commercial Node.

Issue #3

“Do the Amendments as adopted by Council, including reference to urban design, create undue negative impacts on the local arterial road system and on the lands of the Appellants, FCHT Holdings (Ontario) Corporation and Loblaw Properties Limited?”

[90] The Board prefers the evidence of Mr. Elmadhoon and Mr. Flainek with regard to the traffic and transportation issues, including the urban design for the integrated access proposed between the Subject Lands and the abutting southerly commercial development. As noted above, this is not a green field situation; rather an existing situation where the Owner and City staff have attempted to implement the urban design directions outlined in the Official Plan, and avoid undue negative impact on the southerly commercial property and also on the local arterial road system.

[91] The Board has already found that the primary traffic factor is the background traffic in this developing area of the City. The evidence is that this Intersection is in a growth area of the City; that the contribution to service levels and queue lengths from this development will be modest in comparison to the anticipated residential growth that the City is already planning for in its Transportation Master Plan. The Board is satisfied that the recommendations of the Traffic Addendum accepted by the City will improve the existing operation and the Board does not find that there will be any undue negative impact on the Appellants' lands.

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

Issue #4

"In connection with the appeals to the Ontario Municipal Board of OPA 488 and Zoning By-law Amendment No. Z-1-111977:

- a) *What was the decision of Municipal Council on January 24, 2011 and what supporting information and material did Council consider in making the decision? and;*
- b) *What was the decision of Municipal Council on July 24-25, 2011 and what supporting information and material did Municipal Council consider in making a decision?"*

[92] Again, the Board notes that notwithstanding the withdrawal of appeals against OPA 488, the Issues List was not amended.

[93] With the withdrawal of appeals against OPA 488, this issue (4a) now relates to the ZBA.

[94] With regard to the ZBA, Council had before it a staff report dated December 1, 2010, with a revised site plan concept, a supplementary letter from Dillon Consulting further to its original Traffic Impact Assessment and had received oral submissions from York Developments and from Mr. Zelinka in furtherance of his letter of objection of December 13, 2011. Council approved the ZBA. The Appellants place emphasis on the fact that York Developments had applied for a 3,600 sq m "retail, organic food/organic market". The Board does not. The staff report is clear as to the application, and recommended zoning as a supermarket to implement the intent of the application.

[95] With regard to the decision of City Council in July of 2012, (Issue 4b) York Developments had prepared a re-submission to the City, including the Market Study, the Traffic Addendum, and the Planning Justification Report by Ms. Weibe. The staff report of July 6, 2012, references the York Developments supplementary materials and summarized the appeals against both OPA 488 and the ZBA. The Council minutes referenced the oral submissions of the Appellants' counsel advising against the proposed staff recommendations for modifications to OPA 488. Council decided by resolution to adopt the staff recommendations and seek the approval of the Ontario Municipal Board for modifications to OPA 488 (now embodied in OPA 546).

Agenda Item #	Page #

**File: O-8131
OZ-7825/PL110251
Planner: N. Musicco**

- 22 -

PL110251

[96] Finally for the record, post the withdrawal of the Appellants' appeals against OPA 488, a staff report dated January 13, 2013, was taken to Council. That staff report outlined the previous reports to Council on this development application, tracked Council's approval of other commercial development within the subject N.C.C., and that OPA 546 was being recommended to implement the modifications that Council had by resolution in July of 2012 sought to have the Ontario Municipal Board consider.

[97] The documentation also records that Mr. Zelinka, on behalf of the Appellants, attended before Council and made oral submissions against the adoption of OPA 546.

[98] City Council adopted OPA 546.

DECISION AND ORDER

[99] Having regard to the decision of Council and the supporting information and materials, and having considered the Provincial Policy Statement, the Board has found OPA 546 and the ZBA to represent good planning for the reasons stated above, and each are in the public interest.

[100] The Board hereby approves all of OPA 546; and dismisses the Appellants' appeal against same.

[101] The Board hereby approves the ZBA and dismisses the Appellants' appeals against same.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER