

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: August 07, 2019

CASE NO(S):

PL171234

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:
Subject:

First Capital (Appleby) Corporation
Request to amend the Official Plan - Failure of
the City of Burlington to adopt the requested
amendment

Existing Designation:
Proposed Designated:
Purpose:

Community Commercial
Site specific – *To be determined*
To permit two 17-storey residential
condominium (apartment) buildings to be
integrated with existing commercial
development

Property Address/Description:
Municipality:
Approval Authority File No.:
OMB Case No.:
OMB File No.:
OMB Case Name:

5111 New Street
City of Burlington
505-01/14
PL171234
PL171234
First Capital Corporation v. Burlington (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:
Subject:

First Capital (Appleby) Corporation
Application to amend Zoning By-law No.
2020 - Neglect of the City of Burlington to
make a decision

Existing Zoning:
Proposed Zoning:
Purpose:

CC1- 402
CC1 - Modified
To permit two 17-storey residential
condominium (apartment) buildings to be
integrated with existing commercial
development

Property/Address/Description:	5111 New Street
Municipality:	City of Burlington
Municipality File No.:	520-05/14
OMB Case No.:	PL171234
OMB File No.:	PL171235

Heard: August 2, 2019 by telephone conference call

APPEARANCES:

Parties

Counsel

First Capital (Appleby) Corporation
("Applicant"/"Appellant")

Eileen Costello and David Neligan

City of Burlington ("City")

Blake Hurley

Loblaw Companies Limited

Barnet Kussner

MEMORANDUM OF ORAL DECISION DELIVERED BY S. TOUSAW ON AUGUST 2, 2019 AND ORDER OF THE TRIBUNAL

PROCEEDINGS

[1] This fourth Pre-hearing Conference was held to make arrangements for a hearing on the merits. Attending on the call were counsel for the Parties, and Jeremy Skinner and Tom Battaglia on behalf of the Participants.

[2] The Applicant/Appellant seeks amendments to the City's Official Plan and Zoning By-law to permit two mixed use residential buildings on an existing commercial property known as the Appleby Mall.

[3] The Parties requested that a 10-day hearing be scheduled in accordance with the draft Procedural Order ("PO") and Issues List ("IL") submitted on consent. The Parties also submitted a draft Work Plan ("WP") demonstrating the need for the requested length of hearing.

[4] All Parties agree to continue working on settling various issues with a view to reducing the length of the hearing where possible. If settlement progress is made, the Parties are asked to advise the Tribunal 60 days before the hearing if scheduled hearing days can be released.

[5] Hearing dates were scheduled and the PO with IL and draft WP were approved as set out below.

ORDER

[6] The Procedural Order with Issues List is approved as set out in Appendix 1.

[7] The draft Work Plan, for guidance at the hearing, is set out in Appendix 2.

[8] The hearing will commence at **10 a.m. on Monday, October 26, 2020** for **10 days**, at:

**Burlington City Hall
426 Brant Street
Burlington, Ontario**

[9] No further notice will be given.

[10] This Tribunal Member is not seized but may be spoken to for case management purposes.

"S. Tousaw"

**S. TOUSAW
MEMBER**

f there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

A constituent tribunal of Tribunals Ontario - Environment and Land Division
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

APPENDIX 1

PROCEDURAL ORDER

1. The Tribunal may vary or add to these rules at any time, either on request or as it sees fit. It may alter this Order by an oral ruling, or by another written Order.

Organization of the Hearing

2. The hearing will begin on **Monday, October 26, 2020 at 10 a.m.** at: Burlington City Hall, 426 Brant Street, Burlington, Ontario.
3. The length of the hearing will be about **ten (10) days**. The length of the hearing may be shortened as issues are resolved or settlement is achieved.
4. The parties and participants (see **Attachment 1** for the meaning of these terms) identified at the prehearing conference are listed in **Attachment 2** to this Order.
5. The Issues are set out in the Issues Lists attached as **Attachment 3**. There will be no changes to this list unless the Tribunal permits, and a party who asks for changes may have costs awarded against it.
6. The order of evidence shall be heard as listed in **Attachment 4** to this Order.

Requirements Before the Hearing

7. Any person intending to participate in the hearing should provide a telephone number to the Tribunal as soon as possible (*preferably before the prehearing conference.*) Any such person who will be retaining a representative should advise the other parties and the Tribunal of the representative's name, address and phone number as soon as possible.
8. Expert witnesses in the same field shall have a meeting before the hearing to try to resolve or reduce the issues for the hearing. The experts must prepare a list of agreed facts and the remaining issues to be addressed at the hearing, and provide this list to all of the parties and the municipal Clerk.
9. A party who intends to call witnesses, whether by summons or not, shall provide to the Tribunal, the other parties and to the Clerk a list of the witnesses and the order in which they will be called. This list must be delivered on or before **Friday, August 21, 2020**.
10. An expert witness shall prepare an expert witness statement, which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in section 14. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Tribunal may refuse to hear the expert's testimony. For greater certainty, each

expert witness statement must comply with the minimum content requirements specified in Rule 7 of the Tribunal's Rules of Practice and Procedure. If the expert witness has prepared any report(s) that he/she intends to rely on at the hearing, and which did not form part of the submissions made to the City, such report(s) shall be provided to the other parties at the same as the delivery of expert witness statements, as in section 14.

11. A witness or participant must provide to the Tribunal and the parties a witness or participant statement on or before **Friday, September 25, 2020**, or the witness or participant may not give oral evidence at the hearing.
12. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence, as in section 14.
13. If the applicant intends to seek approval of a revised proposal at the hearing, the applicant shall provide copies of the revised proposal, including all revised plans and drawings, to the other parties on or before **Friday, July 24, 2020** (60 days before Expert Witness Statements as stated in Section 14). The applicant acknowledges that any revisions to the plans after that date without the consent of the other parties may be grounds for a request to adjourn the hearing.
14. On or before **Friday, September 25, 2020**, the parties shall provide copies of their witness and expert witness statements to the other parties.
15. On or before **Friday, October 9, 2020**, the parties shall provide copies of their visual evidence to all of the other parties. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing.
16. Parties may provide to all other parties and file with the Clerk a written response to any written evidence on or before **Friday, October 9, 2020**.
17. A person wishing to change written evidence, including witness statements, must make a written motion to the Tribunal.
18. A party who provides a witness' written evidence to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Tribunal on or before **Monday, October 19, 2020**, that the written evidence is not part of their record.
19. Documents may be delivered by personal delivery, facsimile or registered or certified mail, or otherwise as the Tribunal may direct. The delivery of documents by fax shall be governed by the Tribunal's Rules (Rule 7) on this subject. Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.
20. The Parties shall prepare a Joint Document Book to be filed with the Tribunal on or before **Monday, October 19, 2020**. One (1) paper copy must be filed with the Tribunal.

All parties must be served with the Joint Document Book in paper or an accessible electronic format.

21. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Tribunal's Rule 17 applies to such requests.

This Member is not seized.

So orders the Tribunal.

ATTACHMENT 1

Purpose of the Procedural Order and Meaning of Terms

The Tribunal recommends that the parties **meet to discuss this sample Order before the prehearing conference** to try to identify the issues and the process that they want the Tribunal to order following the conference. The Tribunal will hear the parties' comments about the contents of the Order at the conference.

Prehearing conferences usually take place only where the hearing is expected to be long and complicated. If you are not represented by a lawyer, you should prepare by obtaining the Guide to the Local Planning Appeal Tribunal, and the Tribunal's Rules, from the Tribunal Information Office, 15th Floor, 655 Bay Street, Toronto, M5G 1E5, 416-327-6800, or from the Tribunal website at <https://elto.gov.on.ca/>.

Meaning of terms used in the Procedural Order:

Party is an individual or corporation permitted by the Tribunal to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an **unincorporated group** wishes to become a party, it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorisation from the party.

NOTE that a person who wishes to become a party before or at the hearing, and who did not request this at the prehearing conference, must ask the Tribunal to permit this.

Participant is an individual, group or corporation, whether represented by a lawyer or not, who may attend only part of the proceeding but who makes a statement to the Tribunal on all or some of the issues in the hearing. Such persons may also be identified at the start of the hearing. The Tribunal will set the time for hearing this statement. **NOTE** that such persons will likely not receive notice of a mediation or conference calls on procedural issues. They also cannot ask for costs, or review of a decision as parties can. If a participant does not attend the hearing and only files a written statement, the Tribunal will not give it the same attention or weight as submissions made orally. The reason is that parties cannot ask further questions of a person if they merely file material and do not attend.

Written and Visual Evidence: **Written evidence** includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. **Visual evidence** includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.

Witness Statements: A **witness statement** is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness' opinions on those issues; and a list of reports that the witness will rely

on at the hearing. An **expert witness statement** should include his or her (1) name and address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing. A **participant statement** is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any, which the participant will refer to at the hearing.

Additional Information

Summons: A party must ask a Tribunal Member or the senior staff of the Tribunal to issue a summons. This request must be made before the time that the list of witnesses is provided to the Tribunal and the parties. (See Rule 13 on the summons procedure.) If the Tribunal requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Tribunal is not satisfied from the affidavit, it will require that a motion be heard to decide whether the witness should be summoned.

The order of examination of witnesses: is usually direct examination, cross-examination and re-examination in the following way:

direct examination by the party presenting the witness;

direct examination by any party of similar interest, in the manner determined by the Tribunal;

cross-examination by parties of opposite interest;

re-examination by the party presenting the witness; or

another order of examination mutually agreed among the parties or directed by the Tribunal.

ATTACHMENT 2

PARTIES:

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53. Diane C. Potter

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54. Larkin Old

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55. Sinan Ozlu

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56. Keven and Theresa Mifflin

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57. Wendi Jackson

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58. Janis Harris

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59. Andy Hain

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60. Janice McCaslin

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61. Emilio Alejandre

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62. Nick Badame

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63. Mary Barrass

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64. Kelly Bomans

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Burlington, ON L7L 5J6

65. Ryan Cavanagh

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66. Robert Clarke

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Burlington, ON L7L 5J6

67. Alan and Jacki Coulter

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68. Joseph Doiron

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69. William J. Garvey

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71. Thomas Pratt

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73. Robert Luyk

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ATTACHMENT 3

ISSUES LIST

City of Burlington Issues:

- 1) Is the subject proposal for amendments to the City's Official Plan and Zoning By-law to permit two residential buildings (12 & 17 storeys) with 324 residential units and retail/commercial uses at grade (the "Subject Proposal") consistent with the Provincial Policy Statement given the location and context of the subject lands, and considering the level of intensification proposed, specifically considering policies 1.1.3.2, 1.1.3.3, 1.1.3.4, 1.4.3, 4.2, 4.7?
- 2) Does the Subject Proposal conform to the A Place to Grow: Growth Plan for the Greater Golden Horseshoe given the proposed scale of development and proposed transition of built form to adjacent areas, specifically considering policies 1.2.1, 2.2.1(4), 2.2.2(3), 5.2.5(6), 5.2.5(8)?
- 3) Does the Subject Proposal conform to policies in the Regional Official Plan with respect to servicing and site contamination/remediation?
- 4) Does the Subject Proposal conform to or maintain the intent of the relevant and applicable policies of the City's Official Plan, specifically considering the following policies, including subsections and subparagraphs to those policies:
 - Part I – 3.0(h)
 - Part II – 2.8, 3.0, 6.5, 6.6
 - Part III - 2.2.1, 2.2.2, 2.5.1, 2.5.2, 4.0, 4.4
 - Part VIII – Definitions of terms referenced in the aforementioned policies
- 5) Does the Subject Proposal represent an appropriate level of density and intensification for the subject lands and does the proposed density and intensification conform with or maintain the intent of the City's Intensification Strategy as implemented through the City's Official Plan, specifically considering policies: Part I, 3.0(h); Part III, 1.0, 2.0, 2.1, 2.2, 2.3, 2.4, 2.5; 4.4, and any subsections and subparagraphs to those policies?
- 6) Is an increase beyond "as of right" development standards required for the site in order for the City to achieve its Growth Plan conformity targets?
- 7) Does the Subject Proposal protect the primary commercial/retail function of the property, given that the proposed residential floor area exceeds the maximum floor area

permission of half of the total floor area of the property, as specified in the City's Official Plan policy 4.4.2(a)?

- 8) Does the Subject Proposal represent appropriate urban design in addressing matters including height, density, form, massing, bulk, scale, siting, transitions, building articulation, setbacks and spacing having regard for the site and the character of the surrounding lands?
- 9) Does the Subject Proposal comply with the general intent and purpose of the applicable Council-approved design guidelines?
- 10) Does the Subject Proposal provide for an appropriate transition in built form, height, massing, scale, siting and setbacks that is compatible with, and can be integrated with, the surrounding area, given the location and context of the subject lands?
- 11) Does the Subject Proposal provide for appropriate streetscapes with a pedestrian scale?
- 12) Does the Subject Proposal provide a sufficient parking standard? Is there sufficient justification for the proposed parking rates?
- 13) Does the design of the underground parking garage allow for appropriate ramp slopes, visibility, width and size of parking spaces (including accessible parking), drive aisle widths, structural column spacing, pedestrian crossings / connections?
- 14) Are noise mitigation measures required on the proposed development to prevent impacts from the adjacent retail operations? Is further noise mitigation required on the Subject Proposal?
- 15) Would the Subject Proposal result in unacceptable shadowing or wind impacts?
- 16) Does the Subject Proposal provide sufficient amenity area designed and intended for the leisure and recreation of future residents?
- 17) Does the Subject Proposal conform to policies in the City's Official Plan with respect to contaminated and potentially contaminated sites, specifically policies within Section 2.8?
- 18) Do the proposed height and/or density require a contribution pursuant to Section 37 of the Planning Act? If so, what are the nature and extent of appropriate facilities, services and matters to be secured through Section 37 of the Planning Act?
- 19) Are there other conditions which should be imposed by the LPAT if development is approved for the subject lands?
- 20) Does the Subject Proposal provide appropriate waste management facilities that allow

for the functional and appropriate management of waste on-site?

21) Does the proposed development represent good land use planning?

Issues List of Loblaw Companies Limited

A. Provincial Policy Statement, 2014 (“PPS”)

1. Is the proposed residential development consistent with the PPS, including but not limited to Sections 1.1.1.c, 1.1.3.4 and 1.2.6, and more particularly in terms of the need to ensure land use compatibility between the existing commercial development and the proposed residential development on the subject lands?

B. City of Burlington Official Plan (“Official Plan”)

2. Does the proposed residential development conform with the Official Plan, including but not limited to the following policy requirements:
 - a. Would the proposed residential development adversely impact the ability of the subject lands to function as a viable Community Commercial area, in accordance with Sections 4.2.2.a)(ii) and 4.4.1.a) of the Official Plan?
 - b. Has adequate justification been given and evaluation provided for the impacts of the proposed residential development on the existing commercial development on the subject lands and vice versa, for matters including but not limited to traffic, parking, land use compatibility and environmental factors (noise), in accordance with Sections 4.4.2.a), 4.4.2.f), and 4.4.2.h) of the Official Plan?

C. Noise Issues

3. Has the Applicant adequately demonstrated through an appropriate Environmental Noise Feasibility Study that the daily operations of the existing grocery store on the subject lands will not have undue adverse impacts on the proposed residential development?
4. What mitigation measures are required to minimize such impacts and to ensure they will be implemented by the Applicant?

D. Traffic/Parking Issues

5. Has the Applicant adequately demonstrate through an appropriate Traffic/Parking Utilization Study that the proposed residential development will not have undue adverse impacts on the continued viable operation of the existing grocery store on the subject lands, including but not limited to the continuing operation of the existing seasonal outdoor garden centre?

ATTACHMENT 4
ORDER OF EVIDENCE

1. First Capital (Appleby) Corporation
2. City of Burlington
3. Loblaw Companies Limited
4. Participants
5. Reply Evidence of First Capital (Appleby) Corporation (if any)

APPENDIX 2

PL171234 - DRAFT WORK PLAN – 5111 NEW STREET

Day	Event	Details
Monday, October 26	Housekeeping	
	Motions	(if any)
	FCR Planning Witness	Evidence in Chief
Tuesday, October 27	FCR Planning Witness	Cross Exam and Re-exam
	FCR Urban Design Witness	Evidence in Chief
Wednesday, October 28	FCR Urban Design Witness	Evidence in Chief, Cross Exam and Re-Exam
	FCR Servicing Witness	Evidence in Chief, Cross Exam and Re-Exam
Thursday, October 29	FCR Noise Witness	Evidence in Chief, Cross Exam and Re-Exam
	FCR Parking/Transportation Witness	Evidence in Chief, Cross Exam and Re-Exam
Friday, October 30	City Planning Witness	Evidence in Chief, Cross Exam and Re-Exam
Monday, November 2	City Urban Design Witness	Evidence in Chief, Cross Exam and Re-Exam
	City Servicing Witness	Evidence in Chief, Cross Exam and Re-Exam
Tuesday, November 3	City Noise Witness	Evidence in Chief, Cross Exam and Re-Exam
	City Parking/Transportation Witness	Evidence in Chief, Cross Exam and Re-Exam

Wednesday, November 4	Loblaws Parking/Transportation Witness	Evidence in Chief, Cross Exam and Re-Exam
	Loblaws Noise Witness	Evidence in Chief, Cross Exam and Re-Exam
Thursday, November 5	Loblaws Planning Witness	Evidence in Chief, Cross Exam and Re-Exam
	Participants	Statements and Cross-Examination
Friday, November 6	FCR Reply Evidence	(if any)
	Submissions	