

Ontario Land Tribunal

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Tribunal ontarien de l'aménagement du territoire

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VIA EMAIL

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Dear Counsel:

**RE: Section 23 Request for Review
Decision and Order of Vice-Chair Vincent issued August 17, 2021
Case No. PL170462**

This is the Ontario Land Tribunal's ("Tribunal") disposition of the Request for Review ("Request") of the Decision and Order of Vice-Chair Vincent, issued on August 17, 2021 ("Decision"), in the above-captioned case number PL170462. The Request is submitted by Osler, Hoskin & Harcourt LLP, on behalf of 1463291 Ontario Inc., operating as Dunpar Development Inc. ("Appellant"), pursuant to section 23 of the *Ontario Land Tribunal Act, 2021* ("OLTA").

In accordance with Rule 25.5, the Tribunal directed the Town of Oakville ("Town") and the Appellant to file responding and reply submissions respectively, to advise of their positions with respect to the relief sought in the Request.

Pursuant to s. 3(4) of the *OLTA*, I have been delegated authority by the Chair of the Ontario Land Tribunal to dispose of all aspects of the Request.

The Tribunal Rules to Dispose of a Request

Rule 25 of the Tribunal's *Rules of Practice and Procedure* ("Rules") sets out the process to review a decision or order. Rule 25.7 provides that a request may only be granted if it raises a "convincing and compelling case" that one of the grounds in this Rule is applicable. This Rule reflects the high threshold which has been established by the Tribunal to review or reconsider a decision.

Background

The Appellant had appealed against the refusal by the Town of applications to amend the Official Plan and Zoning By-law in order to permit the lands known as 1020-1042 Sixth Line to be redeveloped for the development of townhouse units.

In its decision issued August 23, 2019 ("Interim Decision"), the Tribunal did not approve the proposed development, but did not dismiss the appeal. Rather, the Tribunal accepted evidence that the proposed development could be revised, and took "no issue with redesignating the site to permit a medium density infill townhouse development provided the issues identified in this decision with respect to fit and intensity are addressed."

In the Decision, the Tribunal found that the concept plan as revised and filed did "little to address the shortcomings previously identified to be of concern." Additionally, the Tribunal noted that the proposal "fails to satisfy that fundamental requirement of whether it constitutes good planning at the intensity proposed." The Appeals were subsequently dismissed.

The Request

A Request for Review was initiated seeking either a rehearing or, in the alternative, an approval of the Official Plan Amendment while withholding the Zoning By-law Amendment.

The Request raised two main grounds, both alleging that the Appellant was denied procedural fairness. The Request also raised a third point relating to their alternate requested remedy, ultimately questioning the Member's discretion in refusing both the amendments to the Official Plan and the Zoning Bylaw, rather than approving the OPA while withholding or refusing the ZBA.

The Town's Response

The Town suggested that the analysis and findings in the 2021 Decision reflect the Tribunal's consideration of the same issues and concerns that had been identified in the Interim Decision, and that the Appellant had a full opportunity to respond to the matters

identified as issues to be determined in the appeal. The Town further submitted that the Decision sufficiently demonstrates that the changes to the application in response to the Interim Decision were both considered by the Tribunal and determined to be inadequate to address previous concerns.

The Town further submitted that the request for alternative relief, in the form of an approval of an amendment to the Official Plan and continuation of the hearing related to the application for zoning by-law amendment is not based on any of the grounds for review set out in the Rules and is otherwise not appropriate.

The Requestor's Reply

The Requestor noted in their reply that the Chair has broad discretion, and this broad discretion would provide the jurisdiction to partially allow the appeal for an Official Plan Amendment in disposing of this Request.

Disposition

I have carefully reviewed the Decision, the content of the Request, and the materials filed in response and reply. I have concluded that the Request fails to establish a convincing and compelling case that there is an error of fact or law in the Decision that is sufficient to warrant the exercise of my review powers which are authorized by Rule 25.

Procedural Fairness of the Legal Test and Sufficiency of Reasons

Relying on Rule 25.7(b), the Request asserts that the Tribunal failed to apply the correct legal test, resulting in a procedurally unfair decision.

I disagree with the proposition that the "proposal was assessed against a different framework than was set out in the Interim Decision." I also disagree with the interpretation that "the Tribunal has identified the elements of the test that must be met but has failed to evaluate the applications against those elements."

Rather, I am of the opinion that the Tribunal exercised its discretion by noting that the revised proposal continued to be deficient for the reasons set out in the Decision. While it may be said that the Appellant had tried to mitigate some of the concerns arising from the Interim Decision, the presence of a single deficiency is sufficient for the proposal to fail. For instance, the Decision found that there continued to be a deficiency relating to the interface with a treed allée and I have no reason to interfere with that finding.

Furthermore, the Tribunal noted that the Appellant's actions concerning the discussion of intensification over the past two years, and their abandonment of a Cultural Heritage Strategy, suggested that adequate steps were not being taken to address the original threats to cultural heritage.

Additionally, I agree with the Town's Responding Submissions, that this suggestion of the Interim Decision as a prescriptive framework understates statements made by the

Tribunal in the Interim Decision related to "fit and intensity". I also found the inclusion of Exhibits C, D, and E in the Thun Affidavit to be quite helpful. The 2018 Plan, 2021 Plan, and Assessment of similarities and differences, respectively, were useful in appreciating the findings of the Interim Decision and Decision to demonstrate there was no reviewable error in the evaluation of the revised proposal and the conclusion that it remained deficient.

Consequently, I see no merit to the Request's claim of an error amounting to a violation of the rules of procedural fairness.

Procedural Fairness arising from the application of a "test of livability"

The Request suggests that the Tribunal applied a "test of livability at paragraphs 10 and 11 of the Decision." I disagree. The Decision's references to liveability (sic) in paragraph 9, and livability in paragraph 10, are not applied as a test. Rather, I am of the opinion that the term is used as a catch-all to refer to the aspects of the Livable Oakville Plan mentioned in paragraph 15 of the Interim Decision, and paragraphs 25 and 26 of the Decision. The Guiding Principles of the Livable Oakville Plan, policy 2.2.1 outline the purpose of preserving and creating a livable community. I see no merit to the Request's claim of an error amounting to a violation of the rules of procedural fairness.

Regarding the Alternative Relief and the Dismissal of Both Appeals

The Request also implies, in requesting its alternative relief, that the Decision could have ultimately approved the requested Official Plan Amendment while withholding (or dismissing) the Zoning Bylaw Amendment. Given the Vice-Chair's finding that the Zoning Bylaw should not be approved, it was also within her discretion to dismiss the appeal of both instruments, given the interconnectedness of the Official Plan and the Zoning Bylaw. This exercise of discretion does not amount to a reviewable error.

While the Chair or designate of the Tribunal does have broad discretion to dispose of a request for review, a disposition that grants a request must point to an error such that interference by the Chair would be warranted. As stated above, Rule 25 sets out a high threshold to justify the exercise of this extraordinary power and I am not satisfied that this threshold has been satisfied.

I am cognizant of the Request's concern that the Appellant is now in the position of having to prepare and file new Official Plan Amendment and Zoning By-law Amendment applications with the Town to pursue a development proposal. This outcome arising from the Decision does not change my analysis of whether the Decision contains a reviewable error.

However, I would like to reiterate that the Tribunal has on two occasions noted that this site is suitable for intensification. This leads me to suggest that the known parties at this time, may wish to consider Tribunal-led mediation should there be future development applications. I would also encourage the Appellant to review the Town's Responding submission in preparation of a future application, as it clarifies the Appellant's concern

about “different interpretations of the Tribunal’s earlier findings.” I provide these comments as suggestions only as they are independent from my disposition to dismiss the Request.

Conclusion

For the reasons above, I find that the Request fails to raise a compelling and convincing case that one of the grounds enumerated under Rule 25 is present in the Decision. As a result, the Request is dismissed. The Decision PL170462 remains in full force and effect.

Yours truly,

“G.C.P. Bishop”

Gregory Bishop
Alternate Chair
Ontario Land Tribunal