

Divisional Court File No. \_\_\_\_\_  
Tribunal File No. OLT-23-001076

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

IN THE MATTER OF a motion for leave to appeal pursuant to section 24 of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6, from a decision of the Ontario Land Tribunal dated April 3, 2024.

AND IN THE MATTER OF a proceeding commenced under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended.

BETWEEN:

**WILSON ST. ANCASTER INC.**

Moving Party

and

**THE CITY OF HAMILTON**

Responding Party

**NOTICE OF MOTION FOR LEAVE TO APPEAL**

**THE MOVING PARTY**, Wilson St. Ancaster Inc. ("**WSAI**"), will make a motion to a judge of the Ontario Divisional Court on a date and time to be fixed by the Registrar.

**PROPOSED METHOD OF HEARING:** The motion is to be heard by video conference.

**THE MOTION IS FOR:**

- A. Leave to appeal to the Divisional Court from the decision of Member A. Mason (the “**Member**”) of the Ontario Land Tribunal (the “**Tribunal**” or “**OLT**”), dated April 3, 2024 in OLT File No. OLT-23-001076 (the “**Decision**”);
- B. WSAI’s costs of the within motion; and
- C. Such further and other relief as this Honorable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

**Test for Leave**

- 1. Subsection 24(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c.4 Sched. 6 provides that an order or decision of the Tribunal may be appealed to the Divisional Court “*with leave of that court on motion... but only on a question of law.*”
- 2. In order to obtain leave to appeal, the moving party must establish the following:
  - A. the proposed grounds of appeal raise one or more questions of law;
  - B. there is reason to doubt the correctness of the Tribunal’s decision with respect to the questions of law raised; and
  - C. the questions of law are of sufficient general or public importance to merit the attention of the Divisional Court.

**Statute at Issue**

- 3. This matter concerns an error in the Member’s interpretation and application of the *Official Plan Adjustments Act, 2023*, S.O. 2023, c. 24, Sched. 1 (the “**OPAA**”).
- 4. The *OPAA* was enacted on December 6, 2023, as Schedule 1 to the *Planning Statute Law Amendment Act, 2023*, also known as “Bill 150”. Section 3 of the *OPAA* reads as follows:

## **Effect of approval**

### **Subsequent changes to official plans**

3 (1) For greater certainty, an official plan approved under subsection 1(2), an amendment to an official plan approved under that subsection or an official plan as amended by an amendment approved under that subsection may be subsequently amended or repealed in accordance with the *Planning Act*.

### **Conformity with official plan as approved**

(2) Any decision of a municipality or the Ontario Land Tribunal made under the *Planning Act*, as well as any by-law passed or public work undertaken by a municipality, on or after the date on which the approval of an official plan or an amendment to an official plan is deemed to have been given under subsection 1(3) must conform with the official plan, as approved or amended, while that approval is in effect. [Emphasis added]

### **Building permits**

(3) Nothing done by operation of this Act has the effect of invalidating a permit referred to in section 8 of the *Building Code Act, 1992*, nor does it provide a ground under subsection 8 (10) of that Act for revoking such a permit.

5. To the best of WSAI's knowledge, the Decision represents the Tribunal's first consideration of section 3 to the *OPAA* in the context of a *Planning Act* appeal.

## **Site and Application**

6. WSAI owns lands known municipally as 392-412 Wilson Street East and 15 Lorne Avenue (collectively, the "**Site**"). WSAI is seeking to develop the Site for an eight-storey mixed-use building.

7. Approximately three months prior to the enactment of the *OPAA*, the Tribunal approved a site-specific zoning amendment that permits an eight-storey building to be constructed on the Site (the "**Settlement ZBA**"). The Tribunal's approval was based on a settlement reached between WSAI and the City of Hamilton (the "**City**").

8. WSAI further applied to the City for site plan approval under section 41 of the *Planning Act* to facilitate development on the Site in accordance with the Settlement ZBA. WSAI's site plan application was not approved by the City within the statutory timeframe. WSAI accordingly appealed its site plan application to the Tribunal pursuant to subsection 41(12) of the *Planning Act*.

9. The Tribunal conducted a merits hearing regarding WSAI's site plan appeal on January 25-26, 2024. The Member presided. Two witnesses were called to give expert opinion evidence in the field of land use planning – one for WSAI and one for the City. Both witnesses

gave evidence that WSAI's proposed site plan, drawings and approval conditions, subject to revisions being requested by the City, conformed with the Settlement ZBA and satisfied the applicable criteria under sections 2, 3(4) and 41 of the *Planning Act*.

### **Effect of the OPAA**

10. While WSAI was pursuing its site plan application, changes to the City's Official Plan were occurring in the background.

11. The Site is subject of the Urban Hamilton Official Plan ("**UHOP**"). The UHOP was originally adopted by the City on July 9, 2009. It was then approved by the Minister of Municipal Affairs and Housing (the "**Minister**") on March 16, 2011.

12. The City undertook an update to the UHOP in 2022. This update was implemented through City Council's adoption of Official Plan Amendment No. 167 on June 8, 2022 ("**OPA 167**"). OPA 167 was then submitted to the Minister for approval. The Minister approved OPA 167 on November 4, 2022, but in doing so, the Minister imposed a number of modifications.

13. One of the modifications imposed by the Minister was the addition of a policy that would permit mixed-use development of up to eight storeys within the City's various Community Nodes if certain urban design criteria could be demonstrably satisfied (the "**Minister's Community Nodes Modification**").

14. When the Tribunal approved the Settlement ZBA, the Minister's Community Nodes Modification was in effect. In approving the Settlement ZBA, the Tribunal was satisfied that the urban design criteria prescribed by the Minister's Community Nodes Modification were met by WSAI's proposed building design. The City did not contest that the Settlement ZBA conformed to and implemented the Minister's Community Nodes Modification.

15. The *OPAA* was introduced in the Ontario Legislative Assembly on November 16, 2023. The stated purpose of the *OPAA* was to reverse a number of modifications that the prior Minister had made when approving certain municipal official plans. There were 12 affected municipalities: the Cities of Barrie, Belleville, Guelph, Ottawa, Peterborough and Hamilton, the County of Wellington County and the Regional Municipalities of Halton, Niagara, Peel, Waterloo and York (the "**Affected Municipalities**").

16. When the *OPAA* received Royal Assent on December 6, 2023, it retroactively deleted a number of modifications approved by the prior Minister, including the Minister's Community Nodes Modification. By operation of the *OPAA*, these modifications were deemed to have never been approved.

**Effect on the *Planning Act***

17. Notwithstanding the enactment of the *OPAA*, the Tribunal's Order approving the Settlement ZBA has never been challenged by the City. The Settlement ZBA remains in effect for the Site. The City does not dispute that WSAI's site plan, subject to minor revisions requested by the City, does implement the Settlement ZBA.

18. As an in-force zoning by-law, the Settlement ZBA is deemed to conform to the UHOP pursuant to subsection 24(4) of the *Planning Act*. The Site's in-force zoning is "*conclusively deemed to be in conformity with the official plan.*"

19. In contrast, site plan applications are not required to conform with, nor are they tested against, official plan policies. Pursuant to subsection 41(12.1) of the *Planning Act*, the Tribunal's jurisdiction on a site plan appeal is to "*hear and determine the matter in issue and determine the details of the plans or drawings and determine the requirements, including the provisions of any agreement required.*"

20. There is no requirement under section 41 of the *Planning Act* that the Tribunal must be satisfied that a proposed site plan conforms with the in-force municipal official plan before site plan approval can be issued. Cases involving the application of section 41 consistently describe site plan approval as the final implementation or "micro-management" stage. Matters of official plan policy or zoning regulation, such as maximum heights, are not revisited or re-litigated at the site plan approval stage.

21. Before the Member, WSAI submitted that the *OPAA* did not affect the merits of the proposed site plan because conformity with the UHOP is not a requirement under section 41 of the *Planning Act*.

22. WSAI further submitted that the Settlement ZBA is conclusively deemed to be in conformity with the UHOP by operation of subsection 24(4) of the *Planning Act*, regardless of the *OPAA*.

23. Finally, WSAI submitted that while the *OPAA* now instructs the Tribunal on which version of the UHOP to apply in decisions requiring official plan conformity, the *OPAA* does not change the requirements for site plan approval under section 41 or undermine the deemed conformity provisions under section 24 of the *Planning Act*.

### **Findings in the Decision**

24. The Member disagreed with WSAI. The Member held that subsection 3(2) of the *OPAA* “creates a new official plan conformity test in Affected Municipalities on an appeal of a site plan control application under s. 41(12) of the [Planning] Act.”

25. On this basis, notwithstanding that the Member accepted the uncontested planning opinion evidence that WSAI’s proposed site plan conforms with and implements the Settlement ZBA and satisfies the requirements of section 41 of the *Planning Act*, the Member held that WSAI’s site plan “cannot overcome a lack of conformity with the retroactively in force Legislatively Approved UHOP and the directive under s. 3(2) of the *OPAA* that any decision of the Tribunal must conform to the official plan in effect.”

26. The Member further held that subsection 24(4) of the *Planning Act* does not apply to the Settlement ZBA because the *OPAA* retroactively deems the Minister’s Community Nodes Modification to have never existed. The Member acknowledged that this interpretation makes an “orphan” of the Settlement ZBA (i.e., the Settlement ZBA provides the Site with lawful zoning permissions that now cannot be implemented). Regardless, the Member opined that such a result is not a collateral attack on the Tribunal Order that approved Settlement ZBA. The Member also asserted that the new Minister must be presumed to have intended to create “orphaned” planning instruments as a result of the *OPAA*.

### **Errors of Law**

27. The Decision represents a fundamental change to the law of planning approvals in Ontario by creating a two-tier system. Matters affecting lands outside of the Affected Municipalities will be subject to, and will benefit from, the tests, protections and requirements under the *Planning Act*. Matters affecting lands inside of the Affected Municipalities will be subject to a new, independent legal requirement imposed by the *OPAA* that decisions must demonstrate official plan conformity, regardless of what would otherwise be the tests, protections or requirements under the *Planning Act*.

28. More specifically, the Decision reads into the *OPAA* an intention to (a) impose an official plan conformity test under section 41 of the *Planning Act* and (b) undermine the conclusive deemed conformity provisions of section 24 of the *Planning Act*. There is no language in the *OPAA* expressing a legislative intent to do either.

29. Though the Member did read subsection 3(2) of the *OPAA* in its grammatical and ordinary sense, the Member wholly failed to interpret subsection 3(2) harmoniously with the scheme and objects of the *Planning Act*. The Member also ascribed to the Ontario Legislature a wholly unreasonable intention to use the *OPAA* to create a new governing legal test for all *Planning Act* decisions – one that only applies within the Affected Municipalities.

30. A more reasonable interpretation of the *OPAA* would recognize that while the object of the *OPAA* was to erase certain official plan modifications made the prior Minister and to direct *Planning Act* decision-makers to use the pre-modified versions of the Affected Municipalities' official plans, the legislative requirements and protections of the *Planning Act* otherwise remained untouched by the *OPAA*. There was no legislative intention to alter the overall scheme of the *Planning Act*.

31. The Member's application of the *OPAA* to the circumstances of WSAI's site plan appeal raises a clear question of law and there is good reason to doubt that the Member correctly interpreted and applied the *OPAA* in a manner that is consistent with the legislative scheme of the *Planning Act*.

32. The interpretation of the *OPAA* as put forward in the Decision would apply to all future *Planning Act* decisions within the Affective Municipalities, potentially creating additional "orphaned" planning instruments and other consequences not intended by the Ontario Legislature. The issue is accordingly of sufficient general importance to merit the attention of the Divisional Court.

### **Questions of Law for Adjudication**

33. WSAI respectfully asks this Honourable Court to address the following questions of law:

- A. Did the Tribunal err in holding that the *Official Plan Adjustments Act* imposes a new test of official plan conformity when assessing a site plan application under section 41 of the *Planning Act*?

- B. Did the Tribunal err in holding that section 24 of the *Planning Act* does not apply to conclusively deem an in-force zoning by-law to be in conformity with an official plan that has been amended by the *Official Plan Adjustments Act*?

**Statutory Provisions to be Relied Upon**

- 34. The *Planning Act*, R.S.O. 1990, c. P.13, as amended, including sections 2, 3(5), 24, 34, 41, 45, 51 and 53, among others.
- 35. The *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6, including section 23.
- 36. The *Official Plan Adjustments Act, 2023*, S.O. 2023, c. 24, Sched. 1, including sections 1 through 4.
- 37. Rule 61.03 of the *Rules of Civil Procedure*.
- 38. Such further grounds as Counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- A. The record before the Tribunal, including exhibits relevant to the appeal;
- B. The Decision; and
- C. Such further and other evidence as Counsel may advise and this Honourable Court may permit.



Date: April 17, 2024

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