

**Pilon, Janet**

---

**Subject:** ADDENDUM - OLT Appeals - Procedural Clarification on Delegated Authority - Item 5.3 Feb 8 Council Agenda

**From:** Lakewood Beach Community Council

**Sent:** February 5, 2023 11:13 AM

**To:** DL - Council Only <[dlcouncilonly@hamilton.ca](mailto:dlcouncilonly@hamilton.ca)>; [clerk@hamilton.ca](mailto:clerk@hamilton.ca)

**Subject:** ADDENDUM - OLT Appeals - Procedural Clarification on Delegated Authority - Item 5.3 Feb 8 Council Agenda

Honourable Mayor Horwath and City Council,

Since penning the Jan 30<sup>th</sup> correspondence, we believe we have found additional information you might find helpful and which partially answers our initial questions. It appears:

(a) there is no process in place on whether or not Council approves settlement agreements prior to them being presented to the OLT for decision; and

(b) there is also no Direction from Council for Staff to engage in dispute resolution discussions on perhaps all appeals presently at the OLT.

We have gone back through 2022 Planning Committee and Council Agendas and although we haven't found an in-camera reference in our specific case, we have found many publicly released in-camera Directions to Staff on other appeals in the City. (*which by the way Kudos on the enhanced transparency*)

The wording has been consistent during 2022 to present day, such that in cases when Council has decided to oppose (deny applications eg: 186 Hunter, 522 Winona Road, & a handful of other), the Directions to Staff have not included dispute resolution options (mediation/settlement). The wording has been:

1. oppose the appeal to the OLT
2. that the OLT be provided the reasons for Council's opposition
3. that Staff are authorized to retain outside professionals to successfully defend the City's position before the OLT

It is obvious to us, that the wording above is such that Council has only been directing Staff to proceed to a full hearing; and that there is no direction to update Council on the proceedings and/or seek approval for any alternative options. Both of those omissions in a Council approved Staff Direction are problematic, in our respectful opinion.

This email has removed any reference to our specific matter since our updated request is for Council to consider formulating a clear and transparent procedural by-law for all OLT appeals on a go-forward basis.

To help, we are attaching Collingwood's procedures which you may wish to consider using as a guide; or simply duplicate since it is very clear and very well-written and could save resources.

With respect,

Lakewood Beach Community Council



## STAFF REPORT P2022-01

Strategic Initiatives Committee 1/10/2022

Amendments: No

**Submitted to:** Strategic Initiatives Committee  
**Submitted by:** Summer Valentine, Director of Planning, Building and Economic Development  
**Subject:** Ontario Land Tribunal (OLT) Appeals Process

### **PURPOSE**

The purpose of this report is to update Council on the volume, status and resources being directed to outstanding Ontario Land Tribunal (OLT) appeals and to clarify the process to be followed when new appeals are submitted.

### **RECOMMENDATION**

THAT Report P2022-01 "Ontario Land Tribunal (OLT) Appeals Process" dated January 10, 2021 be received;

AND FURTHER THAT the general process outlined in Report P2022-01 be followed when new major OLT appeals are received related to applications under the *Planning Act* and *Ontario Heritage Act* for which the Town is the approval authority;

AND FURTHER THAT staff continue to monitor the resources allocated to OLT matters and report back to Council on budget and workload implications, including the ability of staff to deliver on legislated development review and approvals functions and priority projects identified in the Town's approved Community Based Strategic Plan and budget plan.

## **1. BACKGROUND**

The Province of Ontario maintains an appeal system through provisions of the *Planning Act* and *Ontario Land Tribunal Act* that is unique within Canada in its function and characteristics. Most applications under the *Planning Act* include a legal right to file appeals to the Ontario Land Tribunal (OLT) to either a decision of the approval authority or lack of a decision within specified time frames. When an application is appealed to the OLT the entire process is taken out of the

hands of local elected officials and placed in the hands of a provincially-appointed Tribunal, usually represented by a single presiding member. The OLT also addresses appeals under the *Ontario Heritage Act*.

The OLT is a quasi-judicial forum, where lawyers typically represent interested parties. The OLT has its own legislated processes and terminology (see Resource 1). Planning staff and other subject matter experts may prepare witness statements, be subpoenaed, participate in hearing events or mediation, provide oral testimony before the Tribunal, and are often cross-examined by lawyers as cases are made before the appointed Tribunal member. For a variety of reasons, appellants, applicants and/or municipalities periodically pursue settlements, thereby avoiding what often are expensive hearings, with uncertain outcomes. A two-week hearing, for instance, can cost a municipality more than \$100,000 to prepare for and participate in the event.

Traditionally, Council direction on matters under appeal is provided in camera (or closed session) meetings, which is the appropriate forum under the *Municipal Act* to discuss matters before administrative tribunals or that involve advice subject to solicitor-client privilege. Town-led public consultation is not a requirement for applications under appeal but has occurred at the direction of Council in concert with the advice of the Town Solicitor. However, there has not necessarily been consistency in the process to follow when an OLT appeal is received because appeals were rare. Today, they are becoming more common.

In the past, the Town averaged approximately two (2) major appeals of development proposals to the OLT annually. However, the table below demonstrates that there are currently seven (7) major appeals ongoing with Town involvement (see Appendix A). Staff would note that “major” appeals would typically exclude appeals associated with Committee of Adjustment decisions. Potential explanations for this rise in litigation may include:

- the shortening of the legislative *Planning Act* timeframes within which approval authorities must issue decisions as enacted by the Province;
- limited staff resources available at approval authorities and commenting agencies;
- a more engaged public particularly during the pandemic and with the advent of virtual meetings;
- an evolving policy and regulatory landscape with a stronger focus on achieving community benefits; and
- a general increase in complexity of development applications, with the easier to develop lands within a municipality being already built upon.

## 2. INPUT FROM OTHER SOURCES

The Town Solicitor, CAO, Treasurer, and Clerk were consulted in the preparation of this report and the content reflects their feedback.

## 3. APPLICABLE POLICY OR LEGISLATION

*Municipal Act, 2001*, S.O. 2001, c.25

*Planning Act*, R.S.O. 1990, c. P. 13

*Ontario Heritage Act*, R.S.O. 1990, c. O.18

*Ontario Land Tribunal Act, 2021*, S.O. 2021, c.4, Sched. 6

*Ontario Land Tribunal Rules of Practice and Procedure, 2021*

*Procedural By-law No. 2019-075*, as amended

## 8. ACTIONS & PROCEEDINGS

### 8.1 Town's Solicitor

The Town's Solicitor is authorized to commence or to defend any proceeding, appeal, or other form of action in a court or before an administrative tribunal to meet statutory or regulatory time limits and to seek costs where appropriate in accordance with the rules of the court or administrative tribunal.

### 8.2 Report to Council

The Town's Solicitor shall report to Council at the first available opportunity on any such action taken, and Council shall determine whether the matter should be continued or discontinued.

This report aligns with Section 8.1 of the Procedural By-Law in recognizing that the initial response to an OLT appeal requires upfront and immediate action by the Town Solicitor and staff in order to meet legislative timelines and reporting to Council in advance is not typically possible. However, Section 8.2 of the By-law indicates that a report to Council should be provided at the first available opportunity to seek direction on proceeding with the matter. The balance of this report recommends a more detailed process regarding such reporting and ongoing updates throughout any major OLT appeal. Staff would suggest that further amendments to the Procedural By-law are not warranted, nor desirable at this time. Flexibility should remain for Council to update and refine the below outlined process without the need to amend the By-law.

## 4. ANALYSIS

### Proposed OLT Process

Given the steep rise in OLT appeals and the likely continuation of that trend, it is desirable to establish a process to ensure a consistent and predictable system, with defined roles and responsibilities. Because of the litigious nature of the appeal system in Ontario, where opposing parties mount legal cases to support their objectives, establishing legal positions on behalf of the Town in consultation with the Town Solicitor is an essential component in dealing with matters under appeal. Further, costs associated with OLT appeals can be extensive and Council may not wish to participate in every case. It is therefore recommended that the following general process be undertaken when an appeal is received:

#### 1. Notice of Appeal Received

As noted in Section 3 of this report, when an appeal is received there are immediate legislative steps that need to be undertaken within 15 days after the last day for filing an appeal with the municipality, including compiling and submitting the record and notice of appeal to the OLT. The Town's Procedural By-law recognizes that detailed reporting to Council in advance of these initial steps is not usually possible. However, Council should be notified that an appeal has been received, the file(s) to which the appeal pertains, and the property location. Notice of receipt of OLT appeals would be provided to Council through regular open session departmental updates. In accordance with the Procedural By-law, the next step, consisting of a closed session report to Council, would be undertaken at the first available opportunity. Council should be aware that the discussion about appeals in open session would be limited to process and general information (e.g. address, file number, status of file, etc.).

## 2. Initial Staff Report

An initial report would be prepared and provided by staff to Council in camera and in consultation with the Town's Solicitor to:

- Summarize the application(s) under appeal, including any pertinent context and background;
- Describe the extent of development review and public consultation activities undertaken and identify any potential issues;
- Provide a staff planning opinion or indicate additional information or updated documentation needed to formulate a planning opinion;
- Indicate what type of expert witnesses would be involved in the appeal, including consultants, and identify potential parties or participants who may have an interest in the matter, including any objections to specific parties/participants being provided status by the OLT;
- Estimate the cost of participating in the appeal, including identifying staff, legal and consulting resources required and the possible impact on the ability of staff to deliver on legislated development review and approvals functions and priority projects identified in the Town's approved Community Based Strategic Plan;
- Receive direction on whether Council wishes to participate in the appeal and/or provide a position on the appeal to the OLT;
- Recommend any public engagement through either non-statutory meetings or public reports;
- Clarify what information can be shared with the public in appropriate forums and what should be kept confidential; and
- Generally discuss options such as mediation, settlement, or full hearing based on the information available.

Active staff work on applications under appeal would generally be deferred until direction is sought from Council in camera, including work on related applications that are not under appeal. Further, it should be stressed that in an appeal scenario, planning staff are in an expert witness role. Should Council's opinion of the matter differ from staff's, Council cannot direct staff or consultants to change their opinion or to represent Council's position to the OLT. However, Council may hire an expert witness(es) to support their position on the application(s). Unless a conflict was identified, the Town Solicitor would continue to represent Council and may cross examine staff who are subpoenaed to provide expert testimony.

## 3. Implement Direction of Council

Pending the direction received in step two, the Town Solicitor would either inform the OLT of the Town's withdrawal from any further participation in the appeal or the intent to be a party to the appeal. If participating in the appeal, staff and the Town Solicitor would then undertake the actions necessary to protect the Town's interests including attending hearing events, preparing issues lists and witness statements, meeting with stakeholders on a without prejudice basis, complying with orders, and undertaking public engagement (if appropriate). Should Council elect not to participate in an appeal, a notice of the OLT's decision would be requested but no further action would occur on the file(s) unless staff were subpoenaed as expert witnesses.

#### 4. Provide Periodic Updates

OLT appeals can last months or years. There may be a number of key events, such as case management conferences, mediation sessions, settlement discussions, meetings of expert witnesses, hearings, etc. Staff, in consultation with the Town Solicitor, will provide regular verbal or written updates to Council in camera as needed to ensure that Council remains apprised of the progress of site-specific cases. These updates would also offer the opportunity for Council to provide further direction, change direction, or communicate an updated position to the OLT. While efforts will be made to align OLT updates with other quarterly reporting (i.e. budget, operational and strategic plan updates), there may be situations where time sensitive matters would need to be addressed outside of that cycle.

At minimum, Council should also be provided with an annual update regarding the number, type, and status of ongoing OLT appeals as well as resources allocated to OLT matters, including budget and workload implications impacting the ability of staff to deliver on legislated development review and approvals functions and priority projects identified in the Town's approved Community Based Strategic Plan and budget plan.

#### 5. Seek Endorsement of Settlements

As noted earlier in this report, when a matter is appealed to the OLT, the decision-making authority of Council ceases. Unless an appeal is withdrawn, it is the OLT who will render a decision, including in the case of a settlement. There are no longer any legislative mechanisms to return matters to municipal Councils for decisions, even where an appeal occurred before a decision was made by the municipality. With the exception of minor technical or typographical errors, decisions of the OLT may only be reviewed under very limited circumstances comprising of acting outside of its jurisdiction, violating the rules of natural justice, making an error in law or substantial error in fact, false evidence, or new evidence becoming available. Due to the limited ability to revisit OLT decisions and that they are often in the hands of a single unelected individual with limited familiarity of the local context, it may be desirable to seek a settlement, agreed upon by all or some parties, to allow for a baseline certainty that Town interests will be appropriately addressed.

Through settlement negotiations, the Town Solicitor will make every effort to involve all parties and ultimately seek solutions that are acceptable to all parties involved, where possible. Any settlement proposed as supportable by the Town Solicitor and staff must be endorsed by Council and would be presented in camera, being clear if there remain parties who object to the settlement. If Council wishes to proceed with a settlement, staff and/or the Town Solicitor would take the necessary steps to execute the required documentation for submission to the OLT. The OLT would conduct a settlement hearing and the decision on whether the settlement represents good planning remains with the OLT. Any party that does not agree with the proposed settlement would continue to have an opportunity to present their arguments to the OLT.

#### 6. Final Reporting

At the conclusion of any appeal where direction from Council was provided to actively participate, a final update would be provided, summarizing the decision and orders of the OLT, along with any activities or next steps required to be undertaken by the Town to implement the outcome. Such reporting may include recommendations for policy or regulatory amendments or improvements that were brought to light during the appeal

process, in order to protect the public interest or advance the community's vision. The advice of the Town Solicitor would be sought to determine if the final case summary could be presented in open session and may take the form of a written staff report or verbal update.

Further refinement to the above process is anticipated after an initial implementation period. Appeals can be varied and complex and unforeseen circumstances may arise that merit deviation from the approved general process, require additional steps, or necessitate further clarification. In particular, the *Planning Act* allows for alternative dispute resolution techniques to be employed in advance of the submission of a record of appeal to the OLT. However, the legislative timelines for such a system require quick action that usually cannot be accommodated within committee/council cycles and can typically only be accomplished by delegation of responsibility to staff. Further, Council may also wish to consider mechanisms to reduce appeals of non-decisions, such as requesting that all applications nearing the end of legislative timelines be brought forward by staff for a decision before the expiry of the time frame. Lastly, Council may consider it appropriate to update the Town's Procedural By-law to prohibit public delegations on any application where the Town is the approval authority and where a statutory public meeting has already been held. This is common practice in many municipalities to ensure a fair and transparent process where certain groups or individuals, including the applicant, are not able to access additional opportunities to address Council that were not made equally available to all stakeholders.

Despite the possible improvements noted above, staff would recommend that the baseline process be put in place and tested for a period of at least six (6) months before further considerations are included.

## 5. EFFECT ON TOWN FINANCES

In recognition of the increasing number and therefore costs of OLT appeals and to align with 2020 and 2021 actual expenditures, the draft 2022 Planning Division Budget allocated an additional \$77,000 to cover anticipated OLT legal expenditures alone. The 2021 Budget allocated to OLT legal costs was \$23,000 and expenditures to date exceed \$82,000. The total budget requested in 2022 is \$100,000. If staff time and consulting costs were included, the resources being directed to OLT matters would be far more significant. Further, the cost estimates to date anticipate that most appeals could be resolved without the need for a full hearing and two new appeals were received in late 2021 that were not accounted for in the 2022 budget process.

Should any one of the ongoing appeals proceed to the full hearing stage, likely significant additional budget would be required as noted earlier in this report (i.e. costs for a two-week hearing could exceed \$100,000). Should that circumstance or any other arise where additional budget is needed, a report to Council would be brought forward requesting the funds and exploring options for financing the variance. In the general process recommended above, costs and resource needs for each new OLT appeal would be estimated and any required budget variance would be addressed as needed.

## 6. CONSIDERATIONS

Community Based Strategic Plan:	<input type="checkbox"/> N/A or <input checked="" type="checkbox"/> Explain: Consistent with CBSP
Climate Change / Sustainability:	<input checked="" type="checkbox"/> N/A or <input type="checkbox"/> Explain: Choose an item.
Accessibility:	<input checked="" type="checkbox"/> N/A or <input type="checkbox"/> Explain: Choose an item.
Communication / Engagement:	<input checked="" type="checkbox"/> N/A or <input type="checkbox"/> Explain: Choose an item.

Accountability / Transparency:  N/A or  Explain: Enhances Accountability and Transparency

## 7. APPENDICES & OTHER RESOURCES

Appendix A	Summary of Active Appeals to the Ontario Land Tribunal
------------	--

Resource 1	<a href="#"><u>Ontario Land Tribunal Rules of Practice and Procedure, 2021</u></a>
------------	--

## SIGNATURES

Prepared by:	
<i>Summer Valentine, Director of Planning, Building and Economic Development</i>	
Town of Collingwood	



## Appendix A

### Summary of Active OLT Appeals of Planning Act Applications

File number(s)	File Name	Property Address	Appeal Type	Steps Completed	Next Step(s)	Continue into 2022
D14211 Proposed Zoning By-law Amendment  D1201111 Proposed Plan of Subdivision  Tribunal Case # PL190515	Huntingwood Trails (Collingwood) Ltd.	5 Silver Creek Drive	Non-decision	Several Case Management Conferences  Approved Minutes of Settlement (appeal narrowed to west portion of property)  Procedural Order issued for hearing	Scoping of issues  Five week hearing scheduled beginning Aug. 8, 2022	Yes
D14618 Proposed Zoning By-law Amendment  D11918 Proposed Site Plan Approval  Tribunal Case # PL200276	Blackmoor Gates GP	Various - 33 Findlay Drive, 22 Campbell Street and 774 Hurontario Street	Non-decision	Partial Settlement Hearing August 3, 2021  Zoning Appeal essentially settled – order being withheld until outcome of ICBL and land use planning policy study process	Site Plan Appeal remains outstanding (hearing not scheduled)  Ongoing review of Site Plan submissions	Yes
D14618 Proposed Zoning By-law Amendment  D111320 Proposed Site Plan Approval  Tribunal Case #	Collingwood Harbour House	31 Huron Street	Non-decision	Record Submitted for Zoning By-law Amendment appeal  Case Management Conference held on Nov. 5, 2021  Record being compiled for Site Plan appeal	Two-day hearing Scheduled beginning May 26, 2022	Yes

OLT-21-001181 for Zoning By-law Amendment  Tribunal Case # not yet assigned for Site Plan				Possible consolidation of two appeals		
D14818 Proposed Zoning By-law Amendment  Tribunal Case # OLT-21-001360	Bridgewater	11644 Highway 26 West	Non- decision	Record submitted	Case Management Conference to be scheduled	Yes
Permit 2021- 00938  Tribunal Case # not yet assigned	12 Fourth Street	12 Fourth Street	Appeal of Council Decision [partial refusal heritage permit]	Record being compiled	Case Management Conference to be scheduled	Yes
CW-OP-0001 Proposed Official Plan Amendment  Tribunal Case # PL040510	Consulate Developments (Ontario) Inc. et. al.	11790, 11878 Highway 26 West	Appeal of Council Decision [official plan designation of subject property]	Appeal remains open	Inactive	Inactive, but likely to reactivate in connection with Official Plan Update process