



## City of Hamilton Report for Information

**To:** Chair and Members  
Planning Committee

**Date:** February 4, 2025

**Report No:** LS24014(a)

**Applicant:** Mikmada (Paramount) Inc.

**Subject/Title:** Appeal to the Ontario Land Tribunal for Lands Located at 1065 Paramount Drive, Stoney Creek for Official Plan Amendment (UHOPA-23-005) and Zoning By-law Amendment Applications (ZAC-23-006) (LS24014(a)) (Ward 9)

**Ward(s) Affected:** Ward 9

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### Recommendations

- 1) That Report LS24014(a) respecting Appeals to the Ontario Land Tribunal for Lands Located at 1065 Paramount Drive, Stoney Creek for Official Plan Amendment (UHOPA-23-005) and Zoning By-law Amendment Applications (ZAC-23-006) **BE RECEIVED** for information;
- 2) That Confidential Appendix “A” to Report LS24014(a) **REMAIN CONFIDENTIAL.**

### Key Facts

- The Ontario Land Tribunal (the “Tribunal”) recently issued a decision dated January 7, 2025, granting the appeals for an Official Plan amendment and Zoning By-law amendment application for 1065 Paramount Drive. The City opposed the appeals in a contested hearing held between October 1 to 3, 2024.
- This report follows Council’s direction that Legal Services report back to February 4, 2025 Planning Committee to explain the legal framework to challenge a Tribunal decision generally and the likelihood of success in challenging the Tribunal’s decision on 1065 Paramount Drive.
- A Tribunal decision may be challenged by making a request to the Tribunal to review its decision or by seeking leave to appeal to Divisional Court.

- More detailed analysis of the likelihood of success in challenging the Tribunal's decision for 1065 Paramount Drive is attached as Confidential Appendix "A" and is to be considered in camera.

## **Financial Considerations**

Financial: N/A

Staffing: N/A

Legal: N/A

## **Background**

The purpose of this report is to present the options to challenge decisions of the Tribunal generally and to describe the likelihood of success in pursuing those options with respect to the Tribunal's recent decision regarding Official Plan Amendment application UHOPA-23-005 and Zoning By-law Amendment application ZAC-23-006 (the "Appeals") for the lands municipally known as 1065 Paramount Drive, Stoney Creek (the "Subject Lands").

The proposal was for a medium density, 8-storey apartment building with 191 units, along with 123 stacked townhouse units with underground parking for a total of 409 parking spaces located on the Subject Lands.

The City and the appellant agreed that the Subject Lands were appropriate for intensification for a mixed used development. The only disagreements were with respect to the scale and height of the proposed 8-storey apartment building given its potential impacts on the overall neighbourhood character and the potential adverse shadow impacts on the adjacent elementary school. The City argued that the City's Sun Shadow Guidelines were not met because one of the school playgrounds was in near total shadow for several hours, while the appellant argued that the guidelines were met because when combined, all of the school playgrounds were never shadowed over 50%.

The Tribunal granted the appeal and permitted the proposed development. They found no issues with the built form of the apartment building with respect to neighbourhood character. They found that neighbourhood character is not based only on height and built form, and that the proposal has mitigation measures to address these issues, providing lower rise townhouses that integrate well with the surrounding land uses.

The Tribunal found that the proposal met the City's Sun Shadow Guidelines, which require developments to allow for a minimum of 50% sun coverage at all times of the day. In addition, the Tribunal noted that the Hamilton-Wentworth District School Board did not submit any concerns about shadow impacts on its school and appeared willing to relocate the impacted playground if necessary.

At its meeting on January 22, 2025, Council approved a motion directing Legal Services to report back to the February 4, 2025 Planning Committee meeting on options to potentially challenge the Tribunal's decision and the likelihood of success of those options.

This report describes the legal framework to challenge Tribunal decisions generally and provides the likelihood of success in challenging this particular decision.

## **Analysis**

### Legal Framework to Challenge Decisions of the Tribunal

Section 22 of the *Ontario Land Tribunal Act, 2021* (the "Act") states that every decision of the Tribunal is final and binding. However, there are two exceptions:

- (1) Section 23 of the *Act* allows for a request to the Tribunal to review, rescind, or vary any of its decisions; and
- (2) Section 24 of the *Act* allows for a statutory right of appeal to the Superior Court of Justice – Divisional Court, with leave on a question of law.

A request for review to the Tribunal and a leave to appeal may be filed concurrently. However, a party intending to challenge a Tribunal decision will typically exhaust all remedies available under the Tribunal legislation prior to seeking leave to appeal to the Divisional Court.

### **Option (1) – Request for Review to the Tribunal**

A party to a Tribunal's decision may request the Tribunal review its own decision within 30 days of the date of when the decision was issued. Rule 25 of the Tribunal's Rules of Practice and Procedure (the "Rules") outlines the process for this internal mechanism.

A request received by the Tribunal is screened internally to determine whether it sufficiently meets the basis for review. A request deemed to be insufficient is dismissed at this preliminary stage, while a request deemed to be sufficient proceeds to the Chair of the Tribunal for consideration.

A successful request for review will require that the requestor satisfy the Chair of the Tribunal that the request raises a convincing and compelling case that the Tribunal did one of the following:

1. Acted outside its jurisdiction;
2. Violated the rules of natural justice or procedural fairness, including those against bias;
3. Made an error of law or fact such that the Tribunal would likely have reached a different decision;
4. Heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or

5. Should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

The Chair may dispose of the request by:

1. Dismissing the request for review, in which case, the decision or order remains in force and effect;
2. Order an in person, electronic or written motion for review before the Tribunal to consider the request and submissions; or
3. Grant the request for review, in whole or in part.

If the Chair orders a review, a Tribunal panel would consider the request on the same criteria as the Chair and determine whether the request should be dismissed or an order for rehearing of the decision should be issued. Where the request proceeds to a review hearing, the reviewing panel may confirm, rescind, change, alter or vary the decision.

While a request for review must be filed within 30 days of the decision being challenged, there are no timelines or other requirements for the Chair in considering the request. Further, filing a request for review does not automatically “stay” the original decision, meaning that the original Tribunal decision stands and remains in force until and unless the request for review is successful.

Requests for review are not frequently made relative to the volume of decisions the Tribunal issues, and rarely granted when made. For example, between September 1, 2023 and August 31, 2024, the Tribunal ruled on only 36 requests for review out of the hundreds of decisions issued, and only 4 of those requests were successful. The infrequency of requests and the rarity of success of those requests as seen in this data demonstrate the high bar that the Tribunal expects and applies on requests for review.

### **Option (2) – Leave to the Divisional Court**

A party to a Tribunal’s decision may seek leave to appeal that decision from the Divisional Court based on a question of law, meaning an error in the interpretation or application of the law. This is done by serving the motion to appeal within 15 days of the date of the Tribunal’s decision in accordance with Rule 61 of the Rules of Civil Procedure. The Court may grant leave to appeal if it finds that:

- (1) the proposed appeal raises one or more extricable questions of law; **and**
- (2) if so, there is good reason to doubt the correctness of the Tribunal’s decision with respect to the question(s) of law raised; **and**
- (3) if so, the question or questions of law are of sufficient “general or public importance” to merit the attention of the Divisional Court.

An “extricable” question of law means one that is separate and distinct from any mixed question of law and fact. The Divisional Court gives a high level of deference to the Tribunal on findings of fact, as the Tribunal is highly specialized in dealing with planning matters that typically rely on expert opinion evidence. As such, in considering a motion for leave the Divisional Court considers questions of law in determining whether to grant leave to appeal.

The Court may hear the motion for leave in writing or in-person, and there is no strict timeline for when the motion for leave may be heard. Like a request for review, there is no automatic stay of the original Tribunal's decision while the motion for leave proceeds, unless expressly granted by the Court.

Where the Court grants leave to appeal, the appellant must then file:

1. A Notice of Appeal setting out:
  - a. the relief sought;
  - b. grounds of appeal;
  - c. basis for the Court's jurisdiction;
2. Required supporting documents; and
3. Proof of service on opposing parties to the original proceedings;

The Court hearing the appeal may:

1. dismiss the Appeal based on finding no legal error;
2. allow the Appeal and vary the Tribunal's decision by correcting the legal error; or
3. remit the matter back to the Tribunal for a new hearing or further consideration.

Any party that is unsuccessful in seeking a motion for leave to appeal may be required by the Court to pay the costs of the opposing party, either in whole or in part. This is in contrast to the Tribunal, where costs awards are extremely rare.

#### Likelihood of Success in Challenging the Tribunal's Decision

A detailed analysis of the likelihood of success in challenging the Tribunal's decision is considered in Confidential Appendix "A" to this report. As stated in the foregoing, the test for requesting a review of the Tribunal's decision is based on a high standard which the City would be required to meet. The same is true for seeking leave to appeal before Divisional Court as there has to be significant issues of law that require the court to grant leave to the Appellant.

### **Relationship to Council Strategic Priorities**

The recommendations of this Report LS24014(a) will support Council Priority 3, Responsiveness and Transparency.

### **Previous Reports Submitted**

- [Non-Statutory Public Meeting for Urban Hamilton Official Plan Amendment Application UHOPA-23-005 and Zoning By-law Amendment Applications ZAC-23-006 Appealed to the Ontario Land Tribunal for Lack of Decision for Lands Located at 1065 Paramount Drive, Stoney Creek \(PED24028\)](#)

## **Appendices and Schedules Attached**

Confidential Appendix “A” to Report LS24014(a) – Legal analysis of the likelihood of success in challenging the Tribunal’s decision

*Confidential Appendix “A” is private & confidential in accordance with the following:*

- 239(2)(e) - *Litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board*
- 239(2)(f) - *The receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose*

### **Reason for Maintaining Confidentiality**

The City Solicitor recommends that Confidential Appendix “A” to this report be considered in camera, and it is recommended that it remain confidential because it speaks to litigation or potential litigation and provides advice that is subject to solicitor-client privilege.

**Prepared by:** Peter Krysiak, Solicitor  
Legal and Risk Management Service

**Submitted and recommended by:** Lisa Shields, City Solicitor  
Legal and Risk Management Service