

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: September 17, 2026

CASE NO(S).:

OLT-25-000847

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

Applicant/Appellant: 2691715 Ontario Limited and Mizrahi Developments
Subject: Request to amend the Official Plan – Refusal of request
Description: To permit a residential development consisting of 75 Dwellings
Reference Number: UHOPA-25-010 / RHOPA-25-009
Property Address: 159 and 163 Sulphur Springs Road
Municipality/UT: Hamilton/Hamilton
OLT Case No: OLT-25-000847
OLT Lead Case No: OLT-25-000847
OLT Case Name: 2691715 Ontario Limited and Mizrahi Developments v. Hamilton (City)

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

Applicant/Appellant: 2691715 Ontario Limited and Mizrahi Developments
Subject: Application to amend the Zoning By-law – Refusal of application
Description: To permit a residential development consisting of 75 dwellings
Reference Number: ZAC-25-020
Property Address: 159 and 163 Sulphur Springs Road
Municipality/UT: Hamilton/Hamilton
OLT Case No: OLT-25-000881
OLT Lead Case No: OLT-25-000847

PROCEEDING COMMENCED UNDER subsection 19(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by: City of Hamilton
Motion for: Dismissal Without a Hearing

Heard: February 10, 2026 by Video Hearing

APPEARANCES:

Parties

2691715 Ontario Limited and
Mizrahi Developments

City of Hamilton

Counsel

Roberto D. Aburto
Colin Poulin

Patrick MacDonald
Melanie Benedict

DECISION DELIVERED BY BITA M. RAJAEI AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This event was the first Case Management Conference (“CMC”) before the Tribunal with respect to appeals under sections 22(7) and 34(11) of the *Planning Act* (“Act”) by 2691715 Ontario Limited and Mizrahi Developments (“Applicants”) resulting from the refusal by the Council of the City of Hamilton (“City”) , on October 1, 2025, of applications for an Official Plan Amendment (“OPA”) and Zoning By-law Amendment (“ZBA”) relating to lands located at 159 and 163 Sulphur Springs Road in the City (“Subject Property”). The purpose of the applications is to permit a residential development consisting of 75 dwellings.

[2] At the CMC, the Tribunal canvassed Counsel, who confirmed that there were no issues with the service of the notice of CMC. The Tribunal is in receipt of the Affidavit of

Service sworn by Amanda Russo on January 9, 2026, which was marked as Exhibit 1, and confirms that notice was adequately served. As such, no further notice is required.

[3] On January 12, 2026, the City filed a Notice of Motion to Dismiss (“Motion”) with respect to these appeals. The Motion was heard at the CMC. As described below, the Motion has been granted by the Tribunal.

STATUS REQUESTS

[4] The Tribunal was tasked with adjudicating a number of Participant Status requests, received from the following:

- a. Marie Covert
- b. Mary Love
- c. Karen Mathewson
- d. Greenbelt Foundation
- e. Joanne Lewis
- f. Seth Floyd
- g. Joanne Turnell (who submitted three (3) requests in total, on behalf of: herself, “Joanne Turnell”; “Friends of the Ancaster Springs”; and “Ancaster Springs”)
- h. Jean Mackay
- i. John Sibley
- j. Doreen Stermann
- k. George Turnell, Ancaster Factor

[5] They raised a number of concerns with the proposal, including: the appeals should be dismissed as they have no merit; the Applicant is attempting to remove a parcel from the Greenbelt; the Applicant is contravening a number of provincial policies; environmental concerns (species at risk); intensification is being emphasized instead of conservation despite the Subject Property being in a highly sensitive natural heritage area; potential for negative precedent-setting; traffic and road capacity limitations; limited municipal servicing; and impairments to community character and heritage.

[6] The Applicants did not have concerns with the requests for the most part, but raised two concerns. First, the Applicants' Counsel submitted that Mr. Floyd's statement advised that "penal avenues" should be pursued against the Applicants, which was outside of the scope of these appeals. Thus, that portion of the statement should be struck. Second, Joanne Turnell had submitted 3 requests in total between herself and Ancaster Springs, and this was not appropriate. Rather, these should be struck, and she should be given an opportunity to resubmit a single statement. Moreover, she raised issues regarding conflict of interest, which are not appropriate.

[7] The City had no concerns with the Participant status requests, and concurred that the solutions the Applicants' Counsel had proposed were reasonable.

[8] The Tribunal heard from Ms. Turnell to clarify whether she sought Participant status in her own name or on behalf of Ancaster Springs. Ms. Turnell explained that, while she represented concerns within the community, she was seeking Participant status in her own name and not on behalf of Ancaster Springs.

[9] The Tribunal determined that these individuals had an interest in the matter and would assist the Tribunal in understanding the potential impacts of the OPA and ZBA on the local community. The Tribunal granted Participant status to those listed at paragraph [4] of this Decision. The Tribunal directed that, if the file was not dismissed and the matter continued, the Participants submit their statements by the deadlines identified in the Procedural Order to be issued, and specifically that Joanne Turnell and Seth Floyd submit revised statements in accordance with the concerns raised by the Applicant. Specifically, Seth Floyd was advised to limit his comments to those pertaining to the development and within the bounds of these appeals, and Joanne Turnell was to submit one statement in her own name.

[10] Of note, on February 11, 2026, the Tribunal received a Participant status request from Harry Skinner. Since it was submitted after the event, the Tribunal directed that,

while the Motion was being considered, the request would remain in abeyance and not be reviewed or taken into consideration with respect to the Motion. If the Motion were not granted, and the matter proceeded, then a second CMC would be scheduled and the status request considered then. Ultimately, as the Motion has been granted, there is no need to consider this status request.

MOTION FOR DISMISSAL BROUGHT BY THE CITY

Issue to be Considered and Witnesses

[11] On this Motion, the issue to be considered is: do the Applicants have the statutory right of appeal under the Act? If not, as the City submits, the Tribunal lacks jurisdiction to deal with these Appeals and must dismiss them. Counsel represented both Parties but the Tribunal, in this Decision, will refer to each Party directly when identifying each side's submissions and statements.

[12] In the material before the Tribunal, each Party provided a sworn Affidavit from a land use planner. The City provided evidence submitted by Dave Heyworth in Affidavits sworn on January 12, 2026 and January 23, 2026. The Applicants provided evidence submitted by Rachelle Larocque, in an Affidavit affirmed on January 20, 2026. The *curricula vitae* and signed Acknowledgments of Expert's Duty were also provided for each witness. Based on this information, and receiving no objections, the Tribunal qualified Mr. Heyworth and Ms. Larocque to provide expert opinion evidence in the field of land use planning.

The City's Position on the Motion

[13] The City brought this motion to ask the Tribunal to dismiss the Appeals without holding a Hearing on the merits. The City submits that the Applicants are seeking to alter the land-use designation of the Subject Property, a portion of which is within the

Greenbelt. Such an Appeal is barred by the Act, as Applicants do not have a right of appeal with respect to lands that are in the Greenbelt, and therefore the Tribunal does not have jurisdiction to hear these Appeals. The City further submits that the Applicants' response to this Motion improperly focuses on matters (such as planning merits of the instrument or the City's prior actions) that are irrelevant to the sole legal question before the Tribunal, which is whether the Act gives the Applicants a right to appeal. Those issues distract from the central question before the Tribunal, namely the question of legislative intent and whether the Act removes the Applicants' right of appeal in these circumstances. The City's request was that the Tribunal focus solely on the statutory requirements and, since these Appeals do not meet those requirements, the Tribunal should dismiss them as it lacks the jurisdiction to address them.

The Applicants' Position on the Motion

[14] The Applicants ask the Tribunal to dismiss the Motion and schedule Hearing dates for these Appeals. They submit that the Act's restrictions do not apply here because the proposed OPA and ZBA do not themselves alter the settlement boundary to include Greenbelt lands. Instead, both approvals are conditional and cannot take effect unless the Niagara Escarpment Commission ("NEC") first approves amendments to the Niagara Escarpment Plan ("NEP") that change the designation of the Subject Property. Thus, the Applicants argue that no settlement boundary expansion involving Greenbelt lands would occur as a result of the planning applications alone. Therefore, the appeals are not statute-barred. The NEP amendments being requested are likely to be approved. The proposed planning instruments have significant planning merit and should be considered. The Applicants further argue that the City is using the Motion as another attempt to delay the project after previously challenging the completeness of the applications and resisting the filing of the Appeals. The City is now improperly focusing on the timing and likelihood of future NEP amendments, which is a separate process and irrelevant to the Tribunal's jurisdiction over the Appeals. Accordingly, the

Applicants maintain that the Tribunal has jurisdiction to hear the Appeals and should dismiss the City's Motion. In the alternative, if the Tribunal is not prepared to proceed immediately, the Applicants request that the Appeals be held in abeyance pending the determination of the NEP redesignation application.

Subject Property

[15] The Subject Property is located in the Ancaster community of the City and has a total area of approximately 10.03 hectares, with about 18.18 metres of frontage. It currently contains two detached dwellings accessed by a gravel driveway, naturalized areas, and a large man-made/natural pond at the rear of the site. Under the NEP, the front portion of the Subject Property is designated Escarpment Protection Area, while the rear portion is designated Escarpment Natural Area. The lands are also subject to development control by the NEC. The property is designated as Rural and Open Space in the City's Rural Official Plan. The applications do not propose to change the designation of the Open Space lands.

[16] The Applicants emphasize that the Subject Property is already serviced and does not require an expansion of municipal services. Moreover, part of the Subject Property is already located within Hamilton's urban boundary and is surrounded on the east, south, and west by lands that are also within the urban boundary and developed for residential uses. According to the Applicants, the Subject Property is within walking distance of a variety of schools, public facilities, commercial businesses, and other community amenities, making it well situated to accommodate residential development.

Background

[17] The *Niagara Escarpment Planning and Development Act* ("NEPDA") established the NEP to protect the Niagara Escarpment and ensure that only development compatible with its natural environment occurs. The NEC is responsible for

administering the NEP and regulating development within the Niagara Escarpment Planning Area. The City submits that in accordance with section 6(2.2) of *NEPDA*, lands designated as Escarpment Natural Area or Escarpment Protection Area (such as the Subject Property) cannot be redesignated for urban uses through an individual application. In accordance with section 6(2.3) of *NEPDA*, such redesignation requests can only be considered as part of the NEP's 10-year review, which is initiated by the Minister of Natural Resources and includes public consultation. Following the review, the NEC makes recommendations, but the final decision on amendments to the NEP rests with the Minister.

[18] On December 19, 2024, the Applicants submitted applications to the City for an OPA and a ZBA to permit a proposed residential development on the Subject Property. The proposal includes 75 residential units, consisting of 14 detached dwellings and 61 townhouses, as well as open space, recreational trails, private roads, and the protection of existing natural heritage features situated on the norther portion of the Subject Property. Ms. Larocque, the Applicants' planner, explained that, to implement the proposal, the OPA is seeking to redesignate approximately 6.1 hectares of the Subject Property from Open Space and Rural to Neighbourhoods – Low-Density Residential and Open Space. The ZBA is seeking to implement the OPA and rezone portions of the land from Conservation / Hazard Land – Rural Zone (P6) and Agricultural (A) to Low-Density Residential, to permit detached homes, townhouses, open space, and the protection of natural heritage features. A Draft Plan of Condominium was also submitted but has been placed on hold pending the outcome of the planning applications and is not part of the current appeal. To support the proposed development, the Applicant also submitted a separate application to the NEC on January 6, 2025, requesting amendments to the NEP, specifically for designation change of a portion of the Subject Property from Escarpment Protection Area to the Urban Area.

[19] After the OPA and ZBA applications were submitted, the City deemed them incomplete in January 2025, identifying 24 deficiencies. The Applicants challenged that decision by way of a motion to the Tribunal (“Completeness of Application Motion”), and the Tribunal ruled that the applications were complete as of May 26, 2025. On September 17, 2025, City Council refused the OPA and ZBA applications, and the Applicants appealed that denial to the Tribunal on October 21, 2025.

Detailed Submissions of Each Party

City’s Submissions

[20] Section 19(1)(d) of the *Ontario Land Tribunal Act* (“OLTA”) and sections 4.6(1)(b) and (c) of the *Statutory Powers Procedure Act* (“SPPA”) allow the Tribunal to dismiss a proceeding where the legal requirements for bringing it have not been met or where the Tribunal lacks jurisdiction. The City submits that these Appeals should therefore be dismissed without a hearing because they are barred by the Act. Namely, sections 22(7.1), 22(7.2)(a), and 34(11.0.4)(a) of the Act remove the right to appeal an official plan or zoning amendment that proposes to alter a settlement boundary such that Greenbelt lands would be included within the settlement area. These sections state:

Appeals restricted re certain amendments

22(7.1) Despite subsection (7) and subsections 17 (36) and (40), there is no appeal in respect of,

- (a) a refusal or failure to adopt an amendment described in subsection (7.2); or
- (b) a refusal or failure to approve an amendment described in subsection (7.2). 2006, c. 23, s. 11 (6).

Application of subs. (7.1)

22(7.2) Subsection (7.1) applies in respect of amendments requested under subsection (1) or (2) that propose to,

- (a) alter all or any part of the boundary of an area of settlement in a municipality if, as a result of the alteration, any land in the Greenbelt Area, within the meaning of the *Greenbelt Act, 2005*, would be included in the area of settlement;

Restricted appeals, areas of settlement

34(11.0.4) Despite subsection (11), there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to implement,

- (a) an alteration to all or any part of the boundary of an area of settlement if, as a result of the alteration, any land in the Greenbelt Area within the meaning of the *Greenbelt Act, 2005*, is or would be included in the area of settlement; or

[Emphasis added.]

[21] The City submits that the statutory test is straightforward, with two parts:

- a. The first is to establish whether the lands at issue are currently within the Greenbelt Area. In this case, the Subject Property is currently within the Greenbelt Area because the *Greenbelt Act, 2005*, S.O. 2005, c. 1 defines “Greenbelt Area” as those areas of land designated under section 2 of that act. Section 2(1)2 of the Greenbelt Act includes the following: “The Niagara Escarpment Plan Area shown on Niagara Escarpment Plan Maps 1 to 9, which are all dated April 12, 2017 and filed on that date in the offices of the Niagara Escarpment Commission.” The Subject Property is located within this NEP Area mapping and designation, and fits this criterion.
- a. The second part is to establish whether the proposed instruments request to alter the Greenbelt Area to include it in the area of settlement. In this case, the planning applications are proposing to alter the City’s area of settlement boundary such that a part of the Greenbelt Area would be included in an area of settlement. Specifically, the portion of the Subject Property which is currently designated as Escarpment Protection Area under the NEP would be added to an area of settlement in the City under the City’s Urban Official Plan.

[22] The City's submits that, therefore, since the applications propose to bring Greenbelt lands into a settlement area, these appeals are barred pursuant to sections 22(7.1) and (7.2) and 34(11.0.4) of the Act. As the City's planner, Mr. Heyworth, explained in his January 12, 2026 Affidavit (at paragraph 47), "...in order to redesignate the Impacted Lands to Neighbourhoods – Low Density Residential within the Urban OP, the Impacted Lands must either be within an appropriate designation in the NEP that permits that proposed use or be removed from the NEP entirely, which would also remove them from the Greenbelt Area." The Applicants' own evidence, according to the City, confirms both parts of the statutory test: (a) the Applicants acknowledge that the purpose of the OPA and ZBA is to add lands to the City's urban boundary, and (b) it does not dispute that portions of the Subject Property are presently within the Greenbelt Area. A plain reading of the Act prohibits these Appeals, and the Tribunal does not have jurisdiction to hear them.

[23] While the Applicants submitted a separate application to the NEC on January 6, 2025, seeking to amend the NEP and redesignate the Subject Property, the City submits that this does not create a current right of appeal. According to correspondence the City received from an NEC representative, that application can only be considered during the NEP's 10-year review, and it must first be included in the review's terms of reference. At the time of his hearing, the review has not yet begun, its timing and scope are unknown, and any amendment will ultimately require a decision by the Minister. The Minister's decision can also be appealed to the Divisional Court. The Applicants are treating a possible future amendment as a foregone conclusion, even though the process is outside the control of the Applicants, the City, and the Tribunal. Until the Subject Property is actually redesignated or removed from the Greenbelt Area, this Appeal remains statute-barred and premature.

[24] Moreover, the City states, the Tribunal cannot assess the applications against a possible future version of the NEP. Under section 3(5) of the Act, Tribunal decisions

must conform with provincial plans that are in effect on the date of the decision. The current NEP does not permit the proposed urban uses. The City argues that there is no legal concept of conditional or future conformity and that the Tribunal cannot base its decision on a speculative amendment that may never be approved. The timing of the 10-year review (and whether it is overdue as the Applicants claim) is ultimately irrelevant to the motion, as the appeal restrictions in the Act must be applied based on the current legal status of the Subject Property. At present, the lands remain designated Escarpment Natural Area and Escarpment Protection Area and are therefore within the Greenbelt Area. The possibility that these designations may change in the future does not alter the fact that the proposed OPA and ZBA currently seek to bring Greenbelt lands into a settlement area.

[25] Furthermore, the City argues that the merits of the proposed NEP amendment are outside the Tribunal's jurisdiction. Contrary to the Applicants' arguments, whether the development is environmentally appropriate, consistent with the purposes of the Niagara Escarpment legislation, or likely to receive approval can only be considered through the NEC and ministerial review process. Those questions should not be decided indirectly by the Tribunal through this Motion or a future Hearing on the Appeals. The City warns that allowing the Appeals to proceed based on an expected redesignation could interfere with the separate NEP process and create conflicting decisions. The Tribunal could only consider the planning instruments based on the assumption that the Subject Property will be redesignated later, and this would undermine the Minister's sole authority to decide whether urban uses should be permitted on the lands.

[26] The Applicants argue that conditions in the OPA or a holding provision in the ZBA could resolve this issue as they would delay implementation until the NEP is amended. However, the City submits, the legislation asks what the applications "propose" to do, not whether the proposed changes would take effect immediately.

Adding conditions does not change the purpose of the applications, which remains to expand the settlement boundary and permit urban development on lands that are presently within the Greenbelt Area. Allowing the Applicants to avoid the appeal restriction through conditions or holding provisions would make statutory prohibition meaningless because any applicant could then postpone the Act's prohibition to a future date. Furthermore, there is no relief available under the Act, the OLTA, or the SPPA where a statutory requirement of appeal *may* be met at some future date. Rather than a conditional approval allowing these Appeals to proceed, it must be found that the Appeals are statutorily barred.

[27] In addition, the City's planner, Dave Heyworth, testified that conditions are not normally placed directly on OPAs to achieve future conformity with provincial plans. With respect to ZBAs, the City relied on the Tribunal Decision *South Bracebridge Environmental Protection Group v. District Municipality of Muskoka (Municipality)*, 2023 CarswellOnt 16816 (OLT), wherein it was found that a holding provision may only be used where the proposed zoning is already justified in principle. It may delay development until servicing, phasing, environmental mitigation, or other clear conditions are addressed, but it cannot be used to postpone the basic question of whether the zoning conforms with the Official Plan and provincial plans. The underlying zoning by-law must be legally supportable when it is passed because conformity is not reconsidered when the holding symbol is later removed. In this case, the ZBA proposed cannot be justified in principle until such time as the necessary amendments to the NEP are granted, and thus it is not an appropriate condition.

[28] With respect to the Applicants' other arguments, the City states as follows:

- a. It disputes the Applicants' claim that it accepted the Tribunal's jurisdiction by participating in the earlier Completeness of Application Motion without raising the issue of jurisdiction. The Act does not prohibit an applicant from submitting these types of planning applications; but only restricts the right to

appeal their refusal. The City therefore had no basis to challenge the Tribunal's jurisdiction during that motion.

- b. Regarding the Applicants' arguments about the planning merits of the proposed development and the NEP amendment, allegations of political delay, and examples of conditional approvals used in other cases, the City submits that those are not relevant to this Motion. Moreover, the merits of the NEP amendment are not in the Tribunal's jurisdiction to determine. The only issue for the Tribunal to consider is whether the Appeals fall within the restrictions outlined in the Act. The requirements of sections 22(7.1), (7.2), and 34(11.0.4) of the Act are not meant to invite an in-depth subjective analysis on the planning merits of an application as the Applicants are asking the Tribunal to do. These sections simply require an assessment of whether an application before the Tribunal meets the factual requirements that bar its ability to be appealed. In this case, the factual requirements are met. The City provided the Tribunal with the case of *1095909 Ontario Ltd. v. Toronto (City)*, 2013 CarswellOnt 2564, wherein the Ontario Municipal Board (this Tribunal's predecessor), looked at a similar provision of the Act and found that the structure is meant to be an "if-then" analysis: if the preconditions in that section are met, then there is no right of appeal. The same is true with respect to these Appeals and these provisions of the Act.

[29] Based on the above, the City therefore asks the Tribunal to find that there is no right of appeal here and dismiss these Appeals without a hearing. The Tribunal's broad authority to modify planning instruments does not overcome clear statutory limits on its jurisdiction. In this case, statutory conditions restricting an appeal are met, and thus, the Tribunal has no jurisdiction to hear the matter.

Applicants' Submissions

[30] The Applicants submit that the appeal restrictions in sections 22(7.1), 22(7.2), and 34(11.0.4) of the Act do not apply here. They agree that the statutory test has two parts: the applications must propose to alter the boundary of a settlement area; and, the alteration must result in Greenbelt lands being included in that settlement area. However, according to the Applicants, neither requirement is met here. The proposed OPA and ZBA would not bring Greenbelt lands into a settlement area. Both instruments would be conditional on the NEP first being amended to redesignate part of the Subject Property from Escarpment Protection Area to Urban Area. The OPA would not take effect unless the NEP amendment is approved, and the ZBA would contain a holding provision preventing development until that approval is obtained. If the NEP is not amended, the proposed changes would have no effect and the urban boundary would not be altered. If the amendments are approved, the Subject Property would no longer be treated as Greenbelt lands when it is added to the settlement area. In other words, without the NEC's actions and amendments to the NEP, there is no alteration to the Greenbelt Area, and thus, the requested OPA and ZBA do not propose to alter the Greenbelt Area.

[31] The Applicants reject the City's argument that the words "proposes to" in the Act are enough to bar the Appeals. They argue that the provisions must be read according to their purpose and the actual legal effect of the applications. The restriction in the Act on appeals is limited to those urban boundary expansions where "as a result of the alteration, any land in the Greenbelt Area [...] would be included in the area of settlement." In this case, however, the urban boundary cannot be changed while the Subject Property remains under its current NEP designation. The proposed development could only proceed after the NEP is amended, meaning that, when the settlement boundary alteration takes effect, the lands would no longer have Greenbelt

status. In other words, the urban boundary will not be changed unless and until the lands are no longer part of the Greenbelt Area, by virtue of NEP amendments.

[32] The Applicants further submit that conditional approvals and holding provisions are common and accepted planning tools. The City's OP (specifically section F1.8) permits holding provisions where development must wait until conditions are satisfied, environmental issues are addressed, or proper phasing is established. These tools are appropriate where several approval processes are occurring at the same time and coordination with another government body is required. Moreover, the Tribunal has broad authority to modify the proposed planning instruments. Under the Act (specifically sections 22(11), 17(50), and 34(26)(b)), the Tribunal may modify an OPA, amend a ZBA, or direct the municipality to make amendments. In addition to the authority under the Act, the OLTA (at section 9(2)) allows the Tribunal to impose fair conditions and delay the coming into force of an order until specified requirements have been met. Adding a condition to the OPA and a holding provision to the ZBA would not change the essential nature of the applications and would fall within the Tribunal's statutory powers.

[33] The Applicants rely on previous Tribunal decisions in which official plan and zoning approvals were made conditional on permits, studies, boundary changes, or approvals under other legislation. The Applicant cited *Kimvar Enterprises Inc. v Simcoe (Country)*, 2007 CarswellOnt 8320 (OMB) ("Kimvar"), *Blacks Point Development Inc. v Cambridge (City)*, 2024 CanLII 102753 (OLT), and *2606609 Ontario Inc. v Kingston (City)*, 2025 CanLII 74699 (OLT). In *Kimvar*, at pages 25, it was found that, "The necessity for approvals under legislation other than the Act, which guides the Board, is not a basis upon which to find the project is premature. The Board is statutorily required to deal with any appeals that are made and come to a determination as to whether, among other things, the instruments represent good planning." Similarly, the Applicants argue, the need for a separate NEP amendment in this case does not make this planning application premature. Instead, the Tribunal may determine whether the

proposal represents good planning while imposing conditions that prevent development until all other required approvals are obtained. The Applicants say that their proposed approach would mean that the development would remain unable to proceed if the NEP amendment is refused.

[34] In their view, the City places too much emphasis on uncertainty about the NEC review's timing and outcome, which is not supported by evidence because:

- a. Although the NEP-amendment application can only be considered through the NEC's statutory 10-year review, that review is overdue and legally required. The last review began in 2015, and the NEPDA requires the NEP review to occur at the same time as the Greenbelt Plan review, which must take place every 10 years. On this basis, the Applicants say that the next review should have started in 2025. Although the terms of reference have not yet been established, the Applicants submit that this does not change the legal requirement to conduct the review. Regardless, uncertainty about the length or final outcome of the NEP amendment does not prevent the Tribunal from hearing the planning appeals, particularly where conditions can ensure that no development or urban boundary alteration occurs unless the NEP amendment is approved.
- b. The Applicants' proposed NEP amendment is consistent with the purpose and objectives of the NEPDA (as outlined in sections 2 and 8), and likely to be approved. The proposed development would avoid the environmentally sensitive northern portion of the Subject Property, protect natural heritage features, create naturalized buffers around a cold-water stream, and preserve or enhance recreational access. The more sensitive northern portion of the property, including the pond and nearby trails, would remain undeveloped and protected, with the intention that it be dedicated to the Hamilton Conservation Authority and connected with the Dundas Valley Conservation Area.

- c. The Applicants argue that there are many reasons that support reconsidering the current designation through the required 10-year NEP review, contrary to the City's attempts to cast doubt on the feasibility of the NEP amendment. The area has historically contained homes and maintained lawns, is not affected by wetlands, and is not suitable for viable agricultural use because of its size, soil conditions, and location beside existing residential development. The portion proposed for development has historically been used for residential purposes and contains two dwellings, landscaped areas, a swimming pool, and a tennis court. In fact, as the Applicants' planner Rachelle Larocque testified, there is no principled basis to support the existing NEP mapping, as the Subject Property, despite having been used for residential purposes, is placed in a restrictive Escarpment Protection Area designation, while environmentally sensitive wetland lands immediately to the east are designated Urban Area. Moreover, the Applicants submit, the proposal would improve environmental protection on the site. The development would remain outside the ecologically sensitive areas, include buffers and enhanced plantings, and naturalize the area around a cold-water stream that is currently bordered by maintained lawn. The northern lands, pond, and nearby trails would be preserved, and their proposed dedication could improve public recreational access.
- d. The City itself has previously used conditional approvals tied to NEC decisions. The Applicants referred to a zoning by-law for 574 Northcliffe Avenue that included a holding provision requiring NEC approvals before additional development rights could take effect. The City is therefore taking an inconsistent position by arguing that conditional approvals are inappropriate here when it has accepted similar approaches in other matters.

[35] Additionally, the Applicants argue that the City has acted inconsistently, as it did not challenge the Tribunal's jurisdiction during the Completeness of Application Motion, despite fully participating in that proceeding. The City is now raising the jurisdiction issue, only after the applications were deemed complete, for the sole purpose of causing unnecessary delay. The Applicants ask that the Tribunal focus on the wording and legal effect of the proposed planning instruments rather than the City's changing position. Pursuing the NEP amendment and the municipal planning applications at the same time does not make the Appeals premature, as concurrent approval processes are common and the Tribunal can continue dealing with the planning issues while the separate NEP process moves forward.

[36] The Applicants further argue that the Tribunal should use procedures that provide a fair, just, and efficient resolution of the dispute, as required by section 12(2) of the OLTAA. Dismissing the Appeals would waste time and resources because the Applicants would likely return with the same applications after the NEP review is completed. The City's refusal raised many planning concerns beyond the NEP designation, including infrastructure, financial sustainability, intensification, natural heritage, and climate impacts. As a result, even if the NEP amendment is approved, the remaining planning issues would still need to be decided.

[37] As an alternative, the Applicants argue that the Tribunal should place the Appeals in abeyance, pursuant to sections 16.1 and 21 of the SPPA, rather than dismiss them if it decides that the NEP redesignation must be resolved first. The Tribunal may adjourn these proceedings *sine die* until the NEP review is complete. The Applicants rely on *Dolan v Ottawa (City)*, 2016 CanLII 10078 (LPAT), in which planning appeals were adjourned until the municipality completed studies needed for a proper hearing. The Applicants submit that a similar approach would preserve the existing appeals while allowing the NEP process to finish, avoiding the expense and delay of beginning the entire application and appeal process again.

ANALYSIS AND FINDINGS OF THE TRIBUNAL

[38] The Tribunal is persuaded by the City that it does not have jurisdiction to hear the Appeals because the Applicants have no statutory right of appeal under the Act. As the City submitted and the Tribunal agrees, matters such as planning merits, prematurity, or sequencing do not apply here. This Motion raises a threshold jurisdictional issue that must be decided before anything else can be considered. The Tribunal is persuaded by the City that sections 22(7.1), 22(7.2)(a), and 34(11.0.4)(a) of the Act expressly bar appeals of OPAs and ZBAs where:

- a. the proposal proposes to alter an urban/settlement boundary; and
- b. as a result, lands within the Greenbelt (including the NEP area) would be included within that boundary.

[39] The Applicants argue that the City's interpretation of sections 22(7.2A) and 34(11.0.4) of the Act is overly rigid and ignores statutory interpretation principles, particularly the phrase "as a result of the alteration." In this case, the conditional nature of the instruments means that there is no alteration to the settlement boundary as a result of the Tribunal's decision alone. However, the Tribunal agrees with the City that a reading of the legislation shows that the statutory test is whether the "amendments requested" propose to alter the urban boundary in a way that would include Greenbelt lands. The requested amendments currently before the Tribunal propose to do just this. Thus, as the statutory right of appeal is barred, the Tribunal, being a creature of statute, does not have jurisdiction to hear the appeals. The Tribunal cannot create appeal rights where the legislature has expressly removed them, as it has done in sections 22(7.1), 22(7.2)(a) and 34(11.0.4)(a) of the Act. The Tribunal does not agree with the Applicants that this is simply a case where a concurrent but related matter is proceeding and both can happen at the same time.

[40] Furthermore, while the Tribunal can use its discretion to accomplish many things, overcoming statutory limitations is not one of them. In other words, the Tribunal agrees with Applicants that it has procedural discretion and broad statutory authority to manage its process, impose conditions, approve contingent instruments, and determine matters in a fair, just, and efficient way. However, it can only do so in cases where it has jurisdiction, as indicated in section 8(2) of the OLTA and in a number of cases, including *Ocean Club Residences Inc. v. Toronto (City)*, 2020 CarswellOnt 11321 (LPAT), which was provided by the City. These Appeals are not one of those cases.

[41] Similarly, as it does not have jurisdiction to hear the Appeals, it also cannot consider them by way of attaching conditions or holding provisions to the instruments before it. The Tribunal is persuaded by the City that, contrary to the Applicants' position, conditional OPAs and adding holding provisions to ZBAs cannot resolve the issue here as they cannot save jurisdiction. Adding conditions or holding provisions does not change the nature or purpose of the instruments. The Tribunal finds that, even if the OPAs and ZBAs are contingent on a future NEP amendment, they still propose an urban boundary expansion which would include Greenbelt lands, and they still seek Tribunal approval before provincial decisions are made. Moreover, the Tribunal was persuaded by the City's planner Dave Heyworth's evidence that the conditions to be attached are not appropriate.

[42] The Tribunal further agrees with the City that accepting the Applicants' approach would render the statutory appeal prohibition in the Act meaningless, because any applicant could then evade it simply by attaching a condition to any instrument. As the City's Counsel pointed out, the Supreme Court has confirmed in *Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt 1, 1 SCR 27 (1998) that it "is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences", such as being "incompatible with other provisions" or with the object of the legislative enactment, which "defeats the purpose of a statute or renders some

aspect of it pointless or futile.” The Applicants’ interpretation would mean that all an applicant must do to create a right of appeal is to modify their proposed instruments so that the impact otherwise prohibited by sections 22(7.1), 22(7.2)(a), or 34(11.0.4)(a) of the Act simply occurs at some indeterminate future date through conditions or holding provisions. This interpretation would effectively render the restriction on appeals pointless or futile, since it could be easily sidestepped. Moreover, the Tribunal agrees that accepting the Applicants’ interpretation would almost certainly result in appeals involving the Greenbelt, Oak Ridges Moraine, and other provincially protected areas – a result the legislature clearly did not intend.

[43] The Tribunal is persuaded by the City and finds that, pursuant to section 3(5) of the Act, conformity cannot be deferred and proposed instruments must conform with provincial plans (such as the NEP) “in effect on that date.” In other words, this section of the Act requires the Tribunal to assess conformity with provincial plans as they exist at the time of decision, not against hypothetical future amendments. The Tribunal does not agree with the Applicants that section 3(5) conformity can be addressed through conditional approval as long as there is credible planning evidence that the prerequisite provincial amendment is possible and supportable. Rather, the Tribunal finds that a holding provision or condition can delay development but cannot delay whether the instruments themselves conform with provincial plans. The Tribunal was persuaded by case law provided by the City, such as *Albert Bloom Ltd. V. Bentinck (Township) Chief Building Official*, 1996 CarswellOnt 4502, 31 OR (3d) 317 (ONCA), that conformity must be established when the instrument is passed or approved, and that holding provisions cannot be used to defer fundamental conformity determinations. The Tribunal cannot presume what the NEP or the Minister will do. If the Tribunal were to hear the Appeals, it would face an impossible task of assessing conformity with a NEP amendment that has not commenced, is discretionary, is appealable, and may never occur, or may occur in a different form. Thus, the Tribunal would not even be able to adequately and correctly consider the instruments.

[44] The Applicants argue that dismissing the appeals would be inefficient, unfair, and contrary to the Tribunal's mandate to resolve matters justly and expeditiously. As an alternative, they ask that the Tribunal hold the appeals in abeyance or adjourn them *sine die*. However, the Tribunal again finds that it simply does not have jurisdiction to proceed. As such, the Tribunal cannot grant the alternate relief requested by the Applicants. While the Tribunal has broad procedural powers granted by OLTA and SPPA, those powers cannot be used to circumvent a statutory bar on appeals. Allowing abeyance would still require the Tribunal to accept jurisdiction here, even when it does not have it. In other words, to be able to adjourn an appeal, the Tribunal must be able to hear it. Numerous cases, such as *Rykur Holdings Inc. v. Guelph (City)*, 2018 CarswellOnt 7739 (LPAT) provided by the City, have found that the Tribunal cannot stretch its powers to provide appeal rights where none exists by legislation. Moreover, doing so would open the doors to applicants requesting prohibited appeals to be adjourned indefinitely while they wait for changes in the law. The Tribunal cannot preserve a legally barred appeal in case a future NEP amendment might be approved. The intention of sections 22(7.1), 22(7.2)(a), and 34(11.0.4)(a) is that such appeals cannot be made, not that the Tribunal can make procedural determinations to legally shelter them based on some future event that may or may not occur.

[45] The Tribunal understands that the Applicants will have to restart the process all over again if the NEP amendment is approved. The Applicants stated that the Parties will almost certainly return to the Tribunal after the NEP amendment, resulting in duplicated proceedings, increased costs, and wasted public and private resources. Moreover, restarting the process from scratch will cause significant financial prejudice to the Applicants. However, this does not overcome the bar that currently exists in the legislation. The Tribunal agrees with the City that the Applicants chose to proceed with the OPA and ZBA despite knowing that the NEP review had not started, there was no guarantee the amendment would be approved, and the outcome was uncertain. Thus, any inefficiency or financial prejudice is somewhat self-inflicted and could have been

foreseen. Furthermore, the Tribunal finds that allowing the Appeals to proceed would be more inefficient, not less. As the Applicants pointed out, there are numerous issues in dispute here, apart from the NEP matter. Therefore, it is feasible that a long hearing of the merits would be required, which may ultimately be rendered moot if the Minister ultimately refuses the NEP amendment. Thus, the Tribunal would be forced to process appeals that legislation intended to exclude, with the risk that its decision would become moot. Holding the Appeals in abeyance would be more efficient only for the Applicants, not for either the Tribunal or the City. In short, although holding the Appeals in abeyance might be more efficient for the Applicants, considerations of efficiency cannot override an express statutory restriction on the right of appeal.

[46] With respect to the examples in case law the Applicants provided, the Tribunal finds that those cases involved situations where a right of appeal clearly existed, and addressed sequencing or implementation in cases where the Tribunal had jurisdiction. The Tribunal agrees with the City that none of the cases the Applicants provided deal with statutory appeal prohibitions, Greenbelt lands, or using conditional instruments to manufacture appeal rights. Those cases did not require the Tribunal to function outside of its jurisdiction. Likewise, the example of 574 Northcliffe Avenue, cited by the Applicants as one where the City allegedly took a different position than in this case, is distinguished as it involved temporary uses and existing buildings. Moreover, even if the Tribunal accepts the Applicants' arguments that the City took a different approach on 574 Northcliffe Avenue, the Act specifically prohibits appeals of this nature, not the City's initial decision on such matters. Additionally, regarding the Applicants' arguments about the planning merits of the instruments, the incorrect designation of the Subject Property although it has historically been used for residential purposes, and the (high) likelihood that the NEP amendment will be approved, the Tribunal does not find that those overcome the bar imposed by legislation. All may be true, but the Tribunal cannot consider them in this particular Motion.

[47] While the Tribunal was persuaded by the Applicants that the last NEP review began in 2015 and that the 10-year deadline required by NEPDA to commence a review appears to have lapsed, this does not have bearing on the decision that the Tribunal is to make on this Motion. The Tribunal cannot control when that review takes place. It can only notice that no review has taken place or even commenced. As a result, while the Applicants have submitted an NEP amendment application, the application is not anywhere near being assessed or reviewed. Thus, the Tribunal cannot be guided by any timelines applicable in the NEP process, nor would it have been sufficient to overcome the express limitation in the Act.

[48] As a final note, the Applicants argued that recent changes to the Act and the Provincial Planning Statement (PPS) show a provincial intention to permit greater flexibility for privately initiated urban boundary expansions and to support the construction of more housing. Thus, the City's interpretation of the Act is too restrictive and the Applicants' reading of the Act should be accepted, namely that the appeal restrictions only apply where the actual result of an amendment would be the inclusion of Greenbelt lands within a settlement area. However, the Tribunal disagrees. Indeed, the Act and the PPS were recently amended, and thus, the province recently had the opportunity to amend these sections but chose not to do so. The fact that sections 22(7.1), 22(7.2)(a), and 34(11.0.4)(a) are specifically worded in this way, and not changed to be more permissive, indicates the intention that these types of appeal be restricted. In other words, while appeal rights were recently deliberately expanded, a clear exception and protection for Greenbelt lands was maintained. A plain reading of the legislation highlights that.

[49] In short, the Tribunal finds that the legislation intended to take away appeal rights that involved urban boundary expansions that included Greenbelt lands. The Tribunal must respect the limits imposed by statute, and in fact does not have the option to do otherwise. Approval of NEP amendments to facilitate the OPA and ZBA is not an

ancillary or parallel approval process; rather it is a fundamental underpinning factor that is necessary for the applications to proceed. Without the NEP amendment, appealing the denial of the applications is not legally permissible, and therefore the NEP amendment is the first step before anything else occurs and not a condition to be considered after the fact. Accordingly, as requested by the City, the Appeals must be dismissed pursuant to sections 4.6(b) and (c) of the SPPA and section 19(1)(d) of the OLTA, as they are statute-barred and beyond the Tribunal's jurisdiction.

ORDER

[50] **THE TRIBUNAL ORDERS** that the Motion brought by the City of Hamilton is granted and the appeals brought by 2691715 Ontario Limited and Mizrahi Developments pursuant to sections 22(7) and 34(11) of the *Planning Act* are dismissed.

"Bita M. Rajae"

BITA M. RAJAE
MEMBER

Ontario Land Tribunal

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The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal ("Tribunal"). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.