

Ontario Land Tribunal

655 Bay Street, Suite 1500
Toronto ON M5G 1E5
Telephone: (416) 212-6349
Toll Free: 1-866-448-2248
Website: olt.gov.on.ca

**Tribunal ontarien de l'aménagement
du territoire**

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VIA EMAIL

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FRIENDS OF OLDE BERLIN TOWN

Hal Jaeger and Neil Baarda
Email: Obtfriends@gmail.com;

*Representatives for Friends of Olde
Berlin Town*

30 DUKE STREET LIMITED

Jennifer Meader
Email: jmeader@tmalaw.ca

Counsel for 30 Duke Street Limited

CITY OF KITCHENER

Katherine Hughes
Email: Katherine.Hughes@kitchener.ca

Alex Ciccone
Email: Aciccone@garrodickfield.ca

Counsel for the City of Kitchener

REGIONAL MUNICIPALITY OF WATERLOO

Andy Gazzola
Email: AGazzola@regionofwaterloo.ca

*Counsel for the Regional Municipality of
Waterloo*

Dear Counsel:

**RE: Section 23 Request for Review
Decision and Order of Members Yasna Faghani and Gregory J. Ingram
issued September 17, 2025
OLT Case No.: OLT-22-002377 (Formerly PL210104)**

The Ontario Land Tribunal ("Tribunal") acknowledges receipt of the Request for Review ("Request") by Friends of Olde Berlin Town ("Requestor") regarding the Decision and Order of Members Yasna Faghani and Gregory J. Ingram issued September 17, 2025 ("Decision"), in the above-captioned case number, OLT-22-002377. The Request was submitted on October 15, 2025, pursuant to section 23 of the *Ontario Land Tribunal Act, 2021* and Rule 25 of the Tribunal's Rules of Practice and Procedure ("Rules"). The

Tribunal subsequently directed the Parties to file responding and reply submissions in this matter.

The Tribunal Rules to Dispose of a Request

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

Background

This matter relates to appeals of non-decisions of the City of Kitchener (“City”) for applications for an Official Plan Amendment (“OPA”) and Zoning Bylaw Amendment (“ZBLA”) submitted by 30 Duke Street Limited (“Appellant”). The Appellant also submitted an application for a Heritage Permit, which was refused by the City, and subsequently also appealed to the Tribunal. The proposal before the Tribunal includes the development of a 19-storey rental apartment building with 167 units with no parking spaces. The Requestor is an incorporated neighbourhood association that was granted Party status by the Tribunal and participated in the Phase 1 hearing relating to the Planning Appeals. The appeal of the Heritage Permit was not the subject of this hearing, and was instead bifurcated to Phase 2.

At the hearing, spanning April 22, 2025 to May 8, 2025, the Tribunal heard evidence from 6 experts, considered the legislative requirements, and reviewed a number of participant statements. The Tribunal ultimately allowed the appeals and approved the OPA and ZBLA.

The Request

The Request alleges that the Tribunal acted outside of its jurisdiction, violated rules of natural justice or procedural fairness, and erred in fact and in law, in relation to various grounds. These are summarized as follows, that the Tribunal:

1. is outside of the Tribunal’s jurisdiction (Rule 25.7.a), in prescribing the means by which the City must implement regulations under designations and zoning;
2. is in violation of the rules of natural justice or procedural fairness (Rule 25.7.b) by
 - a. not permitting evidence based on the in-effect designations and zoning despite the question of compatibility being at the heart of the matter, and without permitting due consideration of the Clergy Principle;
 - b. not permitting evidence that the Requestor could have procured via the City’s Expert Witnesses had they not been barred from fulsomely examining the witnesses;
3. included errors of law (Rule 25.7.c). by not applying the required tests by substituting ‘whether an unacceptable adverse impact would arise and whether such can be mitigated’ instead of

- a. conformity to the City's OP and
 - b. conformity to the Heritage District Plan (HDP); and
4. included multiple errors of fact such that, if corrected, would likely have led to a different outcome (Rule 25.7.c).

The Request proposed three avenues of relief, in order of preference, that

- a. the Decision be rescinded and the Applications rejected and/or the Appeals dismissed;
- b. the Decision be altered via the adoption of the Requestor's suggested amendments (noted in Appendix A) to the Decision-ordered ZBLA; or that
- c. a re-hearing be ordered.

Disposition

I have carefully reviewed the Decision, and the Request with the affidavits of Neil Baarda and Hal Jaeger, along with Responses from the City and Appellant (and accompanying affidavit from Jessica De Marinis), and the Requestor's Reply.

I have concluded that the Request fails to establish a convincing and compelling case sufficient to warrant the exercise of my review powers which are authorized by Rule 25.

I would also briefly note that while the Requestor and the Appellant disagreed in their materials on the appropriate manner of relief, I see no reason to make a determination on that aspect of the Request given the outcome of dismissal.

Note regarding Request for Minor Corrections

As an initial point, the Requestor has provided in Appendix D to their Request a list of what they purport to be minor corrections, that could be addressed through operation of Rule 24.4.

I am not persuaded that the eleven items identified fall within the limited scope of Rule 24.4. That Rule is intended to permit the correction of a technical or typographical error, an error in calculation, or a similar minor error. It is not designed to facilitate the refinement of wording or the reworking of analysis to better align with a party's preferred articulation of the issues.

Several of the proposed "corrections" reflect a highly granular critique of language choices or reasoning, rather than the identification of obvious clerical or mechanical mistakes. Others would require contextual revisions or substantive rephrasing that amount, in effect, to partial rewrites of the Decision. Rule 24.4 does not provide a mechanism for such fine-tuning, nor is it intended to operate as an iterative editing process following the release of reasons.

Accordingly, though without prejudice to any subsequent request under Rule 24.4 being submitted by any Party (including the Requestor) to address any purely technical or typographical errors, the requested “minor corrections” set out in Appendix D are refused.

On the issue of jurisdiction

The Requestor submits that the Tribunal exceeded its jurisdiction by concluding, at paragraph 48 of the Decision, that it was “not persuaded that height is regulated in the ZBL by the combination of FSR and setback regulation.” The Requestor argues that a plain reading of the rear yard setback provision, together with the applicable FSR limits and lot size, establishes an indirect regulation of height, and that all land-use witnesses agreed on this point. On this basis, the Requestor asserts that the Tribunal improperly substituted its own preference for a discrete height cap and thereby failed to properly assess whether the proposed 59-metre height constitutes good planning and conforms to the Official Plan.

I do not accept this characterization of the Decision or the alleged jurisdictional overreach. The Requestor’s argument rests on a decontextualized reading of paragraph 48, and on a conflation of two distinct concepts:

1. that zoning regulations may, as a practical matter, influence or constrain building height; and
2. that the Zoning By-law expressly regulates height as a prescribed standard.

The Tribunal did not deny the former. Rather, it addressed the latter.

At paragraph 48, the Tribunal explained why it was not persuaded that height is regulated in the Zoning By-law in the sense of being expressly capped or prescribed as a discrete standard. The Tribunal’s observation that the City could have but did not impose a direct height limit was not an expression of preference for a particular regulatory technique. It was an interpretive point, made to distinguish between zoning provisions that directly regulate height and those that regulate other aspects of built form (such as density and setbacks) that may have incidental effects on height. The Tribunal was entitled to draw a distinction between indirect practical constraints and an explicit regulatory standard, and to explain why it did not accept the submission that height, as such, is regulated by the Zoning By-law.

Additionally, even if this was a denial of the former of the two propositions noted above, I disagree with the idea that the Tribunal had “no discretion to conclude otherwise”. While witnesses may express a common view about the functional effects of provisions, the interpretation and effect of provisions in a zoning by-law is a matter for the Tribunal, not for expert consensus.

The Requestor also submits that by referencing other instances where height caps are imposed, the Tribunal improperly imposed a preference for a “singular discrete height limit.” This submission misconstrues the Decision. The Tribunal did not suggest that a

height cap was required, preferable, or should have been adopted here. It merely noted, as a factual matter, that where municipalities intend to regulate height directly, they often do so explicitly. I fail to see how this reference in the Decision can be read as a “demand” that the City regulate height differently.

I also disagree with the Requestor’s further submission that the Tribunal’s conclusion would result in height not properly being considered in the rest of the Decision. This appears contrary to my reading of the Decision, where the Tribunal addressed the appropriateness of the proposed height in multiple sections of its reasons, including in the context of transition, built form, and compatibility. The Tribunal’s conclusion that the Zoning By-Law does not impose an express height limit did not preclude, and did not replace, an evaluative planning judgment about whether the proposed height is appropriate in the circumstances. The Requestor has not identified how the Tribunal’s reasoning on height regulation prevented or distorted that analysis.

The argument at its core reflects a disagreement with the Tribunal’s interpretation and reasoning, not an excess of jurisdiction. This ground of the Request is therefore dismissed.

Procedural fairness of limiting evidence

The Request contends that the Tribunal violated the rules of natural justice and procedural fairness by not permitting evidence based on the “in-effect” designations and zoning for surrounding properties, and by managing the timing and scope of admissibility rulings in a manner said to prejudice the Requestor. I would disagree with these submissions.

First, and more generally, the Tribunal is the master of its own procedure. In exercising that function, the Tribunal must balance fairness to all parties, while ensuring an efficient and orderly hearing. That balance often requires case-management determinations about the scope and timing of evidence, the organization of opening submissions, and the use of expert witness statements. The procedural steps described by the Requestor include directing that evidentiary objections be argued at an appropriate stage, requiring that experts generally confine their evidence-in-chief to their filed witness statements, and assessing whether new or expanded subject matter is properly within the issues and the witness’s disclosed opinions. These are all ordinary tools of hearing management.

More specifically, the Requestor’s suggestion that the Tribunal “refused to rule” on admissibility until Mr. Barton had begun his evidence, thereby creating “extreme prejudice,” is not borne out by the context. The Tribunal indicated that admissibility would be addressed at an appropriate procedural juncture. Then, when the issue crystallized in the course of witnesses being called and objections made, the Tribunal made a ruling. Managing the timing of rulings so they are made with a concrete evidentiary context is part of fair hearing management, not a denial of fairness.

I am satisfied that the requisite level of procedural fairness was afforded. The Tribunal exercised its authority to manage the hearing in a manner that balanced fairness, avoided

prejudice, and maintained an orderly process. This ground of the Request is therefore dismissed.

As an additional point, I would also address the Requestor's argument of inconsistency on the part of the Tribunal by pointing to paragraph 48 of the Decision, where the reasons refer to the newer planning instruments as not applicable to the Applications while noting that those instruments include an explicit height cap. There is no inconsistency. As noted above regarding the "jurisdiction" argument, the Decision references the instruments to illustrate a general interpretive point. Using non-applicable instruments illustratively is not the same as admitting and weighing them as controlling context for surrounding lands.

Procedural fairness of limiting cross-examination of witnesses

The Requestor submits that the Tribunal violated procedural fairness by (a) declaring the Requestor to be a party of common interest with the City, (b) barring the Requestor from posing leading questions to the City's expert witnesses, and (c) limiting the Requestor's questioning of those witnesses to clarification rather than expansion of their opinions. The Requestor further argues that these rulings were made too late in the hearing to permit adjustment of case strategy and that, as a result, the Requestor was denied the ability to adduce key evidence, and that this violated the requirement to provide a degree of flexibility to a self-represented party. I do not accept that this amounted to an error.

As noted in reference to other allegation of a violation of procedural fairness, the Tribunal is master of its own procedure. The balancing exercise undertaken by the Tribunal includes managing the order of witnesses, the scope of examinations, and whether and how parties of like or common interest may examine a witness called by another party. It is well within ordinary hearing management for the Tribunal to (a) identify parties whose positions substantially align, (b) restrict those parties from asking leading questions of a supportive witness, and (c) confine their examination to clarification rather than expansion or re-litigation of opinions already given. Those constraints guard against duplication, preserve the integrity of pre-filed witness statements, and protect parties of opposite interest from unfair surprise.

The Requestor contends that the Tribunal's approach contradicted the Tribunal's Hearing Guide and other procedural descriptions. The Hearing Guide itself contemplates that parties of similar interest may conduct direct examination "in the manner determined by the Tribunal." The Tribunal's approach here falls squarely within that discretion and is consistent with the overarching duty to ensure fairness and efficiency.

Additionally, I would disagree that the timing of the Tribunal's rulings establish unfairness. The Tribunal indicated the parameters of like-interest examinations at a procedurally appropriate juncture i.e. after the alignment of positions between the Requestor and the City had crystallized and in the context of the witnesses being called. The suggestion that the rulings "barred" the Requestor from entering key evidence misstates their effect. The Tribunal's directions did not foreclose admissible evidence; they defined the proper route for adducing it. If Requestor wished to place additional opinion evidence on the record regarding designations, zoning, compatibility, or related foundations, the appropriate

vehicle was its own expert(s), with opinions properly disclosed, or cross-examination of experts who had addressed those matters in their witness statements. What the Tribunal reasonably curtailed was the introduction of new, undisclosed opinion and factual foundations through a supportive party's witness in a manner that would have undermined the discipline of pre-filing.

Finally, the Requestor invokes general principles encouraging flexibility for self-represented parties. The Tribunal is attentive to those principles and appears to have applied them here appropriately. Flexibility for a self-represented party does not displace the fundamental requirements of fairness to all parties, including adherence to disclosure, avoidance of prejudice, and respecting the structure and limits of expert evidence.

I see no violation of natural justice or procedural fairness present, and would dismiss this ground of the Request.

Correct Legislative Tests: Heritage District Plan

The Requestor asserts that the Tribunal erred in law by applying the incorrect legal test with respect to the Heritage District Plan ("HDP"). The Requestor asserts at Paragraph 58 of its Request and again at Paragraph 16 of its Reply, both times without any citation or support, that the required test is conformity. On that basis, the Request submits that the Decision's statement at paragraph 112 that "[t]he Revised Proposal ... is consistent with the objectives of the District Plan" is an error of law.

The Requestor's attempt to recast the standard as "conformity" with the HDP overstates the applicable test and is unsupported. I do not comprehend the Requestor's Reply pointing to ROPA 6 Policy 2.F.3 which, as quoted and underlined by the Requestor, uses the language of "be consistent with", and yet is somehow suggested by the Requestor as entailing a standard of conformity. Even the City, arguably aligned in interest with the Requestor, did not go so far as to suggest in their Response that the correct test is one of conformity. While the City agreed that the Tribunal erred, they point to Section 41.2(1)(b) of the *Ontario Heritage Act*, and note that municipalities (and the Tribunal on appeal) are prohibited from passing any by-law that is "contrary to the objectives set out in the plan".

The *Ontario Heritage Act* anchors the analysis in the objectives of the plan and in avoiding outcomes that are contrary to those objectives. Importantly, the heading of Section 41.2 reads "Consistency with heritage conservation district plan". Taken together with the reference to the language of "objectives" in the body of s. 41.2(1)(b), I see no error in the Decision. Rather, this seems to be exactly the analysis undertaken by the Tribunal, and aligns with the conclusion in paragraph 112.

I do not accept the Requestor's characterization of the governing legal standard and would dismiss this ground of the Request.

Correct Legislative Test: Official Plan

The Requestor further submits that the Decision improperly confined its analysis to adverse impacts “from a land-use lens”. The Requestor asserts that the Decision made “no investigation” into whether the proposed development and surrounding land uses and building forms are “mutually tolerant and capable of existing together in harmony,” and similarly failed to assess whether the proposal would cause “unacceptable adverse effects,” including “loss of enjoyment of normal use of property,” as contemplated by the Official Plan. On this basis, the Requestor argues that the Tribunal applied only a “partial test” and therefore failed to determine whether the Applications conform to the Official Plan.

The Tribunal does not accept this characterization of the Decision. The Requestor’s argument draws an artificial distinction between the assessment of adverse impacts and the broader concept of compatibility, when the Official Plan expressly links the two. The Decision’s focus on matters such as shadowing, privacy, overlook, noise, and similar effects was not a narrowing of the compatibility analysis, but rather the means by which compatibility was evaluated. These considerations directly address whether different land uses and building forms can coexist without causing unacceptable adverse effects. While the Requestor asserts that the Decision’s analysis results in a definition of compatibility that would be “needlessly complex, but operationally useless,” I cannot agree with this logic.

Contrary to the Requestor’s submission, the Tribunal did consider whether the proposed development would result in unacceptable adverse effects, including impacts on the enjoyment of surrounding properties. The Decision’s findings that the proposal would not result in unacceptable shadowing, privacy loss, overlook, or other amenity impacts necessarily encompass an assessment of whether neighbouring properties would continue to be reasonably enjoyed. The Requestor’s assertion that there was “no investigation” into this issue is not borne out by a fair reading of the reasons.

The Tribunal is also not persuaded that the Decision failed to consider whether the proposed development and surrounding context are “mutually tolerant and capable of existing together in harmony.” That concept is not a free-standing or abstract inquiry divorced from physical impacts. The Tribunal’s conclusion that the development would not give rise to unacceptable adverse effects supports the finding that the proposal can exist in harmony with its surroundings.

I am satisfied that the required test was applied in substance. Accordingly, the Requestor has not demonstrated that the Tribunal failed to apply the correct legal test or that the Decision does not address Official Plan conformity. The Requestor’s critique reflects a preference for a different articulation of the analysis, not a failure to conduct it. I would therefore dismiss this ground of the Request.

Errors of Fact

The Request also alleges a number of errors of fact arising from 1) potential clarifications through cross-examination, 2) a premise relating to the Urban Design Manual, and 3) a

further list of criticisms labelled “other errors of fact” that mirror the editorial-style items collected in Appendix D.

I will address these alleged errors briefly as, even if taken as true, they plainly do not rise to the level “such that the Tribunal would likely have reached a different decision”.

First, regarding a clarification on cross-examination, I fail to see this as a misapprehension of the evidence. The Decision reflects the substance of the record, including both direct and cross-examination, and draws findings that were reasonably open on that record. A party’s post-hoc re-characterization of an answer, or preference for a different emphasis or phrasing, does not demonstrate a material misstatement of fact, let alone one that undermines the logic of the outcome.

Second, I similarly fail to see an error arising from the claim that the Decision relies on an incorrect premise respecting the Urban Design Manual simply because the City’s expert, Ms. Fahimian, identified concerns. Preference of evidence is a matter fully within the discretion of a presiding member or panel, and I see no error in the Decision with respect to this point. The reasons expressly recognize and weigh both sets of expert opinions. The Decision does not proceed on an incorrect UDM premise. It treats the Manual as guidance, acknowledges expert disagreement, and makes a contextual finding that the intent of the UDM is met because the proposal’s public realm and massing effects do not create unacceptable impacts. The references to perceived height and the absence of a discrete ZBL height cap are used in the Decision to explain why perception alone does not defeat compliance with design intent when impacts are otherwise acceptable.

Third, the “other errors of fact” list largely reprises the granular critiques and wording preferences seen in Appendix D. Read fairly and as a whole, the reasons accurately capture the key evidentiary points necessary to resolve the issues in dispute. Minor imprecision, if any, is not outcome-determinative.

These grounds are therefore dismissed.

Conclusion

For the reasons above, I find that the Request does not raise a compelling and convincing case that one of the grounds enumerated under Rule 25 is present in the Decision. I, therefore, dismiss this Request, and the Decision OLT-22-002377 remains in full force and effect.

Yours truly,



Michael Kraljevic, Chair
Ontario Land Tribunal