Why would the OLT consider the planning argument when the reason to appeal was the failure to make a decision?

Your question gets to the heart of the issue, and I think there is a potentially important argument here that deserves closer examination.

The developer appealed because Council had not made a decision. So why should the OLT proceed to decide whether the proposed development is good planning?

The answer is that Ontario's Planning Act distinguishes between the reason an appeal becomes available and the authority the OLT exercises once the appeal is properly before it.

However, in the 202 Second Street case, there is an additional complication that I think could be significant: the developer apparently requested the referral that resulted in Council not making a decision.

That raises a legitimate question about the circumstances in which the developer subsequently invoked the non-decision appeal process.

Why the OLT can consider planning merits
For a zoning amendment, section 34(11) of the Planning Act allows the applicant to appeal when Council fails to make a decision within the statutory period.

Once properly appealed, section 34(11.0.2) gives the Tribunal substantive powers, including:

- dismissing the appeal;
- amending the zoning by-law; or
- directing that the by-law be amended in accordance with its order.

In other words, the OLT is not simply being asked to rule that Council was late. It can ultimately decide the zoning application itself.

That is why the heritage and floodplain evidence can become relevant to the ultimate outcome.

But here is the issue I would pursue

The July 22 Council motion is unusual in the circumstances.

If the developer requested that Council refer the applications to 2027, and Council granted that request, we should ask:

- Did the developer expressly request that Council postpone its decision?

- Did the developer understand that the referral meant there would be no immediate approval or refusal?

- Did the developer subsequently rely on that very absence of a decision to appeal?

- Did the developer have a statutory right to appeal at that point, notwithstanding its request?

These are not necessarily grounds for defeating the appeal, but they are legitimate questions about the appeal's procedural history.

My view of the strongest argument

I would be careful not to assume that the developer's request automatically invalidated its appeal. The Planning Act does not make that consequence automatic.

But I would investigate whether the developer's conduct amounts to an agreement to defer the process, a waiver of an existing right, or something relevant to the Tribunal's exercise of its jurisdiction.

There is also a timing question: had the statutory appeal period already expired before the July 22 referral? That could materially affect the argument.

I would put this question to the developer's counsel at the OLT:

If your client asked Council to refer the applications to 2027, and Council granted that request, on what basis does your client now claim that Council's failure to make a decision justifies an appeal to the Tribunal?

I think that is a worthwhile line of inquiry.

The critical documents to obtain are the developer's written request for referral, the July 22 Council minutes and the actual OLT Notice of Appeal. Those documents will tell us much more than the wording of the motion alone.

I would establish this procedural issue before investing heavily in the substantive heritage and floodplain arguments.