

Conservation Review Board
Commission des biens culturels



ISSUE DATE: March 24, 2016

CASE NO.:

CRB1503

PROCEEDING COMMENCED UNDER subsection 32(14) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Objector:	Laurel Armstrong
Objector:	Beth Ross
Owner:	W.N. Anderson and Jean Elizabeth P. Anderson
Subject:	Notice of Intention to Repeal Designation By-Law No. 90-59
Property Address:	135 Essex Street
Legal Description:	Lot 148, Plan 459
Municipality:	Town of Goderich
CRB Case No:	CRB1503
CRB Case Name:	Armstrong v. Goderich (Town)
Heard:	February 23, 2016 in Goderich, Ontario

APPEARANCES:

Parties

Counsel/Representative⁺

W.N. Anderson and Jean Elizabeth P. Anderson

Maurice Jenkins⁺

Town of Goderich

Gregory F. Stewart

Laurel Armstrong and Beth Ross

Beth Ross⁺

Participants

Barry Page, Heather Lyons, James Donnelly, John Thompson and Bob Davis

Self-represented

REPORT OF THE BOARD DELIVERED BY STUART W. HENDERSON AND ROBERT V. WRIGHT

OVERVIEW

BACKGROUND

[1] This Report concerns the Objection to a Notice of Council's Intention to Repeal Heritage Designation By-law 59 of 1990 (also "By-law 90-59") regarding 35 Essex Street (the "Cottage") in the Town of Goderich (also, the "Town"), Ontario. William and Jean Anderson, the "Owners" of the Cottage, asked Town Council to de-designate the Cottage as a property of cultural heritage value or interest under s. 29 of the *Ontario Heritage Act* (the "OHA") and Ontario Regulation 9/06: Criteria for Determining Cultural Heritage Value or Interest ("O. Reg. 9/06").

[2] The matter was referred by Town Council to the Conservation Review Board (the "Review Board") for a hearing and its Report pursuant to s. 32(17) of the *OHA*.

[3] The essential facts, and the designation of the Cottage for its historical value or interest, are not in dispute. The essence of the dispute is, as counsel for the Town put it, a "philosophical difference" of view between the Town Council, as it was composed in November 2014, and the Town's Municipal and Marine Heritage Committee (the "Heritage Committee") regarding the basis for the de-designation of a heritage property in Goderich.

[4] Laurel Armstrong and Beth Ross (the "Objectors") jointly objected to the proposed de-designation. Ms. Ross represented both of the Objectors at the hearing. Their witnesses were: Ms. Armstrong (one of the Objectors), James Wallace, and Dr. Gary Davidson (qualified by the Review Board as an expert witness).

[5] The Owners notified the Review Board in advance of the hearing that they would not be appearing in person at the hearing but would be represented by Maurice Jenkins.

The Owners did not call any evidence at the hearing. They did send a written submission to the Review Board and the Objectors, also in advance of the hearing, that is referred to below.

[6] The Town was represented at the hearing by counsel, Gregory F. Stewart. The Town's only witness was Dwayne Evans (the Planning Coordinator for the Town).

[7] The Review Board also heard presentations from the following participants: Barry Page, Heather Lyons, James Donnelly, John Thompson and Bob Davis.

[8] The list of exhibits entered as evidence at the hearing is attached as Appendix 1 to this Report. One of the exhibits is an Agreed Statement of Facts filed by the parties. The Review Board incorporates the content of this statement as findings of fact for the purposes of this Report. It is attached as Appendix 2.

[9] The following is a summary of the chronology of the request for de-designation of the Cottage, based on the Agreed Statement of Facts:

- in the 1970s, Town Council began to pass legislation to designate the historic downtown square. Since then, the Town has approved Heritage Conservation District Plans for the downtown core area (in 1982, 1992 and 2014);
- the Cottage was built at some point in the 1880s. It is located in an area of the Town's lakefront that eventually had various cottages and holiday and recreation structures. "Over time, largely in the mid-1900s, the cottages and resort buildings in the area were gradually replaced by permanent, year-round residences. Very few of the original summer cottages remain";
- the Cottage was designated in 1990 at the request of the owner, Nick Hill.

It was designated by Town By-law No. 90-59 as being of architectural and/or historical significance based on it being an excellent example of a *circa* 1880 lakefront cottage in the Picturesque style. It was noted that the Cottage was on its original site and largely unaltered in appearance;

- Nick Hill, the then owner of the Cottage, was an architect interested in historic preservation who performed considerable restoration work to return the Cottage to its characteristic, historic state;
- the Cottage was purchased by the current Owners in the 1990s. It had maintained its historical characteristics and designation of historical significance;
- in the summer of 2014, the Owners notified the Heritage Committee of their request to remove the heritage designation. The Heritage Committee met with Mr. Anderson in September 2014 but, after further correspondence in October 2014, the Owners confirmed that they were continuing with their request to remove the designation;
- the Heritage Committee recommended to Town Council that it refuse the request to de-designate the Cottage “due to the unique nature of the property and its role in representing an important era in Goderich’s history as a summer resort”;
- at its November meeting, Town Council declined the Heritage Committee’s recommendation and in December the Town published a formal Notice of Council’s Intention to Repeal Heritage Designation By-law 59 of 1990 concerning the Cottage; and

- in January, 2015, Beth Ross and Laurel Armstrong served a Notice of Objection to Council's Intention to Repeal Heritage Designation By-law 59 of 1990.

ISSUE

[10] The issue is whether By-law No. 90-59, which designates the Cottage as a property of cultural heritage value or interest under s. 29 of the *OHA* and the O. Reg. 9/06 criteria for determining cultural heritage value or interest, should be repealed in accordance with s. 32 of the *OHA*.

RELEVANT LEGISLATION AND REGULATION

[11] *Ontario Heritage Act*

Definitions

1. In this Act,

...

"heritage attributes" means, in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest;

...

PART IV - CONSERVATION OF PROPERTY OF CULTURAL HERITAGE VALUE OR INTEREST

Definition

26. (1) In this Part, "property" means real property and includes all buildings and structures thereon.

Same

(2) In sections 27 to 34.4, "designated property" means property designated by a municipality under section 29.

...

Designation by municipal by-law

29. (1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

(a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and

(b) the designation is made in accordance with the process set out in this section.

...

Consultation

(2) Where the council of a municipality has appointed a municipal heritage committee, the council shall, before giving notice of its intention to designate a property under subsection (1), consult with its municipal heritage committee.

...

Referral to Review Board

(7) Where a notice of objection has been served under subsection (5), the council shall, upon expiration of the thirty-day period under subsection (4), refer the matter to the Review Board for a hearing and report.

Hearing

(8) Pursuant to a reference by the council under subsection (7), the Review Board, as soon as is practicable, shall hold a hearing open to the public to determine whether the property in question should be designated, and the council, the owner, any person who has filed an objection under subsection (5) and such other persons as the Review Board may specify, are parties to the hearing.

Place of hearing

(9) A hearing under subsection (8) shall be held at such place in the municipality as the Review Board may determine, and notice of such hearing shall be published in a newspaper having general circulation in the municipality at least ten days prior to the date of such hearing.

Review Board may combine hearings

(10) The Review Board may combine two or more related hearings and conduct them in all respects and for all purposes as one hearing.

(11) Repealed: 2005, c. 6, s. 17 (4).

Report

(12) Within thirty days after the conclusion of a hearing under subsection (8), the Review Board shall make a report to the council setting out its findings of fact, its recommendations as to whether or not the property should be designated under this Part and any information or knowledge used by it in reaching its recommendations, and the Review Board shall send a copy of its report to the other parties to the hearing.

Failure to report

(13) Where the Review Board fails to make a report within the time limited by subsection (12), such failure does not invalidate the procedure.

...

Repeal of designating by-law, owner's initiative

32. (1) An owner of property designated under this Part may apply to the council of the municipality in which the property is situate to repeal the by-law or part thereof designating the property.

Decision of council

(2) After consultation with its municipal heritage committee, where one is established, the council shall consider an application under subsection (1) and within ninety days of receipt thereof shall,

- (a) refuse the application and cause notice of its decision to be given to the owner and to the Trust; or
- (b) consent to the application and,
 - (i) cause notice of the intention to repeal the by-law to be served on the owner and the Trust, and
 - (ii) publish notice of the intention to repeal the by-law in a newspaper of general circulation in the municipality.

...

Objection

(14) Any person may, within 30 days after the date of publication of the notice of intention under subclause (2) (b) (ii) or (11) (b) (ii), serve on the clerk of the municipality a notice of objection to the repeal of a by-law, or a part of a by-law, designating property as property of cultural heritage value or interest.

Content of notice of objection

(15) A notice of objection shall set out the reason for the objection.

...

Referral of objection to Review Board

(17) If a notice of objection is served on the municipality under subsection (14), the council shall, upon expiration of the 30-day period referred to in that subsection, refer the matter to the Review Board for a hearing and report.

Application

(18) Subsections 29 (7) to (13) apply with necessary modifications to the hearing and report by the Review Board required under subsection (17).

Decision of council

(19) After considering the report of the Review Board, the council shall, without a further hearing,

- (a) refuse the application and cause notice of its decision to be given to the owner; or
- (b) consent to the application, pass a by-law repealing the by-law, or the part of the by-law, that designated the property as property of cultural heritage value or interest and cause,
 - (i) a copy of the repealing by-law to be served on the owner of the property and the Trust,
 - (ii) the reference to the property in the Register referred to in subsection 27 (1) to be deleted,

- (iii) notice of the repealing by-law to be published in a newspaper of general circulation in the municipality, and
- (iv) a copy of the repealing by-law to be registered against the property in the proper land registry office.

Decision final

(20) The decision of the council under subsection (19) is final.

...

O. Reg. 9/06: Criteria for Determining Cultural Heritage Value or Interest

Criteria

1. (1) The criteria set out in subsection (2) are prescribed for the purposes of clause 29 (1) (a) of the Act. O. Reg. 9/06, s. 1 (1).

(2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

1. The property has design value or physical value because it,
 - i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
 - ii. displays a high degree of craftsmanship or artistic merit, or
 - iii. demonstrates a high degree of technical or scientific achievement.

2. The property has historical value or associative value because it,
 - i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,
 - ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
 - iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

3. The property has contextual value because it,
 - i. is important in defining, maintaining or supporting the character of an area,
 - ii. is physically, functionally, visually or historically linked to its surroundings, or
 - iii. is a landmark.

CASE FOR THE OBJECTORS

[12] Ms. Armstrong, one of the Objectors, is a resident of Goderich. She supports conservation of the Town's heritage properties, owns a designated home in Goderich and is knowledgeable about tourism in the area. She is concerned about the health and future of the community and, in particular, its economic development. She said that

every dwelling has a story to tell and that the Cottage “catches the eye” and tells the stories of a lake front cottage property and people who grew up there. Ms. Armstrong said that the Cottage is also strongly associated with Nicholas (“Nick”) Hill, an architect and planner and the owner who applied for the original designation of the Cottage. Ms. Armstrong described the success of heritage walking tours in bringing visitors to the community and that the Cottage is a feature on one such walk described in the pamphlet “Four Heritage Walks”.

[13] Mr. Wallace is a lifelong resident of Goderich. He said that Town Council’s mandate has been to preserve heritage since the 1970s and that the Cottage is important because it is a “slice of community history”. He added that the Cottage was built as a summer residence only, that there are only two such buildings in the western area of Goderich, and that the Cottage is the only one with a heritage designation. Mr. Wallace said that he knew Nick Hill well and his strong interest in, and contributions to, heritage conservation.

[14] Dr. Davidson was qualified by the Review Board panel to give opinion evidence as an expert planner. He has also written and presented about heritage on numerous occasions. He testified about the relationship of planning and the removal of the heritage designation of the Cottage.

[15] Dr. Davidson was a close friend and colleague of Mr. Hill, who died in 2001. He said that Mr. Hill was at the forefront of heritage conservation planning in southern Ontario in the 1970s, and elsewhere in Canada. After Mr. Hill purchased the Cottage, Dr. Davidson helped him with some of its restoration work. The Review Board panel is mindful of this relationship but in qualifying him as an expert witness the panel was, and is, satisfied that Dr. Davidson met his duty as an expert witness. Dr. Davidson signed the Acknowledgement of Expert’s Duty form and filed it with the Review Board. The panel found Dr. Davidson to be knowledgeable and forthright in his testimony.

[16] Dr. Davidson testified that as the Town Council has not provided any reason why the designation of the Cottage should be removed that relates to the designation criteria, he has considered the matter on a planning basis.

[17] Dr. Davidson testified that the *Planning Act*, R.S.O. 1990, c. P.13 “sets the stage” for the preservation of heritage properties. Section 3(5) of the *Planning Act* provides:

A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,
(a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
(b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

[18] Dr. Davidson testified that the Provincial Policy Statement, 2014 (the “PPS”) policy 2.6.1 provides that significant built heritage resources and significant cultural heritage landscapes shall be conserved, and that this is reflected in the County of Huron and Goderich Official Plans. He then referred to s. 24(1) of the *Planning Act*, which provides:

Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

[19] In Dr. Davidson’s opinion, in addition to there being no heritage reasons to remove the Cottage’s heritage designation, repealing By-law No. 90-59 would be contrary to the *Planning Act*, the PPS, and the County and Town Official Plans.

[20] Ms. Ross submits, for the Objectors, that the Cottage has heritage value as a unique structure that is largely intact, and for its context in the community. She argues that the Cottage contributes to the Town’s sense of place and identity and is consistent with the criteria for cultural value or interest in O.Reg. 9/06. She submits that the Town has not provided any evidence to address these criteria and that the criteria apply to an

application to de-designate a property under s. 32 of the *OHA*, just as they do a designation under s. 29.

[21] Relying upon Dr. Davidson's expert opinion evidence, Ms. Ross submits that repealing By-law No. 90-59 would be a breach of the *Planning Act*, the PPS, and the County and Town Official Plans, which all say they will "protect and promote" heritage resources such as the Cottage.

[22] Regarding Town Council's approach to deferring to the wishes of current owners as to the heritage designation of properties (discussed below), Ms. Ross argues that such "flexibility" is completely inappropriate where a property has already been designated, as is the case here. She argues that the Cottage's heritage designation has been in effect for 25 years and was in place when the current Owners purchased the property. She further argues that the previous owner, Mr. Hill, worked hard to have the property designated and that the de-designation would undo all of that effort and disrespect the rights of the community at large.

CASE FOR THE OWNERS

[23] As indicated above, the Owners did not testify themselves or call any witnesses. Their one-page letter, sent to the Review Board in advance of the hearing, concludes as follows:

The Heritage Program is important for the preservation of our shared history and the edification of our upcoming generations. It should not be handicapped by inappropriate intervention.

Succinctly, Heritage Designation should be a privilege to be enjoyed.
Not a penalty to be endured.

CASE FOR THE TOWN

[24] Mr. Evans was the only witness called by the Town. He is the Town's Planning Coordinator, beginning in 2014. The Town did not seek to qualify him as an expert witness.

[25] Mr. Evans said that the Town has a long history of promoting preservation of properties of cultural heritage value or interest. He talked about the 2011 tornado that destroyed buildings in the downtown area of Goderich and Guidelines that Town Council adopted in regards to a 2013 study of the Heritage Conservation District. He said that the Heritage Committee worked with owners and that this resulted in 256 properties being included in the 2014 Heritage District Conservation Plan.

[26] Mr. Evans said that two things underlie the Town Council's approach to heritage designations: (1) preservation; and (2) serious consideration of the wishes of owners.

[27] On cross-examination by Ms. Ross, Mr. Evans agreed that the Town Council had appointed people to the Heritage Committee based on their knowledge, interest and qualifications regarding heritage matters, and he acknowledged that Town Council did not seek or obtain another opinion regarding the de-designation of the Cottage.

[28] Mr. Evans repeated on a number of occasions that Town Council has a high regard for the interests of property owners and engaging them when dealing with heritage designation matters. He described, by way of example, how Council granted exclusions to four properties from designation under the 2014 Heritage District Conservation Plan for the downtown core.

[29] Mr. Evans did not give any evidence-in-chief regarding the criteria for determining cultural heritage value or interest under O. Reg. 9/06.

[30] On behalf of the Town, Mr. Stewart submits that there is no guidance in the *OHA* about de-designating a property and that the Town Council that decided this matter wanted to engage property owners and have serious regard to their wishes. He says that is how Town Council chose to administer this, and similar, matters, and that if a new Council disagrees with that philosophy then it can change direction.

[31] Mr. Stewart says that while he is aware that some Review Board decisions say that the designation process is “flipped” when considering the de-designation of a heritage property, he argues that those decisions are not based on any provision in the *OHA* and submits that they need not be followed, and should not be applied, by this panel of the Review Board.

[32] Mr. Stewart further argues that if de-designation is a high hurdle, it creates a strong disincentive to owners requesting, or agreeing to, the heritage designation of properties in the first place.

PRESENTATIONS BY PARTICIPANTS

[33] The hearing generated substantial local interest. At the beginning of the hearing the Review Board panel invited members of the public in attendance to make presentations if they wished. A number of people did so.

[34] Mr. Page is a Goderich resident and a past Chair of the Heritage Committee. He supports the Objectors. He describes the Cottage as a rare surviving structure of that type and he spoke about the connection between heritage properties and the potential of the tourism industry in Goderich. Mr. Page gave his view that the advantages of heritage designation far outweigh the disadvantages.

[35] Heather Lyons has been a member of both Town Council and the Heritage Committee. She is a contributor to an Ontario government publication entitled

“Strengthening Ontario’s Heritage”. She owns a property a street away from the Cottage, which she describes as “good for business and good for heritage.”

[36] James Donnelly spoke in favour of the de-designation of the Cottage. He indicated that he has been a member of Town Council, is the current Deputy-Mayor, and a former Superior Court Justice, but began his presentation by saying that he was speaking in his personal capacity. The minutes of the Town Council meeting at which the motion to repeal By-law 90-59 was passed unanimously reflect that Mr. Donnelly was one of the Town Councilors at that meeting. He stridently expressed the view that the “power to take” by heritage designation has a corresponding obligation to be fair and that, in his view, the Town Council followed a policy of being fair and even-handed in this matter. He likened heritage designation to expropriation, with de-designation of the Cottage by repeal of the By-law being a surrogate for compensation.

[37] John Thompson is a Town resident and the husband of Ms. Ross. He is concerned that the approach of Town Council to the de-designation of the Cottage indicates that changes to the makeup of the Town Council can lead to inconsistent results regarding heritage designations. In his view this makes it very difficult to understand where the Town stands on heritage matters. Mr. Thompson’s belief is that the Owners want to be in a position to leave the Cottage to their heirs unencumbered.

[38] Bob Davis was a member of the Heritage Committee for eleven years. It is his view that the Owners have not given any compelling reason why the Cottage should be de-designated. He also queried whether the Cottage, if it is de-designated, would remain, or could be placed, on the Town Clerk’s register of properties maintained under s. 27(1.2) of the *OHA*. He said that section provides for registration of properties that have not been designated under the *OHA* but that Town Council believes to be of cultural heritage value or interest. He pointed out that the Owners cannot demolish or remove the Cottage if the property is included in the register under s. 27(1.2), unless the owner gives the council of the municipality at least 60 days notice in writing.

ANALYSIS

[39] All parties agree that the Cottage is of architectural and/or historical significance based on it being an excellent example of a *circa* 1880 lakefront cottage in the Picturesque style. The evidence confirms that the Cottage remains on its original site and is largely unaltered in appearance. The Cottage has, for twenty-five years, been designated as a property of cultural heritage value or interest. As indicated at the outset, this designation is not at issue in this proceeding.

[40] The Review Board's jurisdiction to designate heritage properties is set out in s. 29 of the *OHA*, applying the criteria for determining cultural heritage value or interest contained in O. Reg. 9/06. However, this proceeding is not a request to newly designate a property. The Owners are seeking to remove that designation and the Town Council has agreed to their request by giving Notice of intention to repeal the designating By-law 90-59.

[41] The Review Board finds on the evidence, including the Agreed Statement of Facts, that the Cottage has not in any way lost any of the attributes for which it was originally designated as being of architectural and/or historical value or interest within the meaning of the *OHA* and O. Reg. 9/06. The Review Board further finds that all of the evidence supports the Cottage retaining its designation and, if anything, the designation should be supplemented by the Cottage's association with Mr. Hill who is a recognized founder and champion of heritage conservation in southern Ontario, including the Goderich area, and elsewhere in Canada.

[42] The Review Board is mindful that this matter was referred to the Review Board for a report under the *OHA* and it is the Town Council that has final decision-making power to repeal the designating By-law 90-59.

[43] As various witnesses pointed out, removing the heritage designation will allow demolition of the Cottage in the future. Although there was no evidence that the Owners intend to demolish the Cottage, there was some evidence that they wish to

remove the heritage designation to make it easier to sell the Cottage at some future point. A future owner might proceed with demolition.

[44] As stated above, it is very clear from the evidence before the Review Board that the residents of Goderich and their Town Council share the view that heritage conservation is of fundamental importance to their community and that Goderich is known for embracing its past in order to embrace its future. The dividing line between the parties in this proceeding is Town Council's interpretation of s. 32 of the *OHA* such that the O. Reg. 9/06 designation criteria do not have to be considered and applied by Town Council when it decides upon issuing a Notice of intention to repeal a designating by-law at the instance of an owner.

[45] Mr. Stewart is correct that s. 32 of the *OHA* does not specifically refer to the heritage designation criteria in O. Reg. 09/06. However, the question remains whether the decision to issue a Notice of intention to repeal a by-law on an owner's initiative under s. 32 of the *OHA*, and this Report by the Review Board, require consideration of the O. Reg. 09/06 designation criteria.

[46] The jurisdiction of the Review Board and Town Council to deal with heritage matters is established by the *OHA*. The Town Council is legislatively mandated to refer this Objection to the Review Board for a hearing and report under s. 32(17). In turn, the Review Board is required to make its Report to Town Council "setting out its findings of fact, its recommendations as to whether or not the application should be approved, and any information or knowledge used by it in reaching its recommendations" (s. 32(9)). Importantly, s. 32(18) incorporates by reference the provisions of the *OHA* that deal with the designation of a property as follows: "Subsections 29 (7) to (13) apply with necessary modifications to the hearing and report by the Review Board required under subsection (17)."

[47] In a s. 29 hearing (emphasis added) "the Review Board ... shall hold a hearing open to the public to determine whether the property in question should be designated ...". The Review Board finds that making the necessary modification to this phrase

results in the requirement that the Review Board hold a hearing “to determine whether the property in question should be de-designated”.

[48] In addition, as s. 32 of the *OHA* incorporates by reference s. 29, and a hearing under s. 29 triggers consideration of the O. Reg. 9/06 criteria, a contextual interpretation of s. 32 can only lead to the conclusion that the O. Reg. 9/06 criteria for determining cultural heritage value or interest apply to this Review Board hearing and Report under s. 32 of the *OHA*, and the Review Board so finds.

[49] Also, unlike s. 31 of the *OHA*, s. 32 does not require the Notice of intention to repeal a by-law on council’s initiative to contain a statement of the reason for the proposed repealing by-law (see s. 31(4)(b)). Presumably this is because the reason for the proposed repealing of a by-law under s. 32 is clear – it is at the owner’s request. That a Notice of intention to repeal a by-law on the owner’s initiative under s. 32 does not require a statement of the reason does not answer the question whether a town council must give serious consideration to whether the criteria on which a property’s original heritage designation was based have so changed that the designation can no longer stand.

[50] This is not the first Review Board case to deal with the repeal of a heritage designation by-law (see, for instance, CRB1101 (2011), 957 Bank St. (Horticultural Building, Lansdowne Park), Ottawa). The Review Board’s report in CRB0906 (2010), 41 Church St., Parry Sound, provides, at p. 9:

... it was reiterated by the Review Board that priority would be given to hearing evidence and proof that the property no longer held cultural heritage value or interest as defined by Ontario Regulation 9/06, and therefore did not merit the continuing designation under s. 29 of the Act.

[51] In the CRB0906 Parry Sound report the Review Board implicitly found that the O. Reg. 9/06 criteria apply to consideration of the repeal of a heritage designation by-law. In its report, the Review Board also pointedly referred the parties to the decision of the Ontario Divisional Court in *Tremblay v Lakeshore (Town)* (2003), 68 O.R. (3d) 109 (the “Church case”). That decision gives the Court’s perspective on the purpose of the *OHA*

and the parameters for the exercise of a town council's discretion in dealing with heritage designations.

[52] The Church case dealt with a situation where the Roman Catholic Diocese of London sold a small church with a condition of the sale that the church be demolished. The parishioners sought to save the church and asked the Town of Lakeshore to designate the church under the *OHA*. Town council, however, passed a resolution that a request from the owner was a pre-condition to any heritage designation. The applicants sought judicial review and submitted that the town council had no authority to impose this condition. The Court held (emphasis added):

23. Requiring the consent of the owner is not consistent with an overall reading of the Act or its purpose. Indeed, the Act contemplates notice to the owner, possible objections, and a hearing process.

24. The object of the Act is the conservation and protection of the heritage of Ontario. This may interfere with individual property rights. Accordingly, in requiring the consent of the owner as a pre-condition to designation, the Town placed an unreasonable obstacle on its own discretionary powers thereby fettering its discretion and aborting the process intended by the Act.

...

26. The Town imposed a condition contrary to the intent of the legislation. By imposing a condition on the application that was not provided for at law, the Town aborted the decision-making process. The owner's consent is not a pre-condition. Indeed, one can think of a variety of situations where the owner would not want the heritage designation.

27. ... Moreover, the very purpose of the Act must be to balance the interests of the public, community and the owner. This balancing would not be necessary if the owner's consent were a precondition.

[53] A number of the Court's findings in the Church case are instructive in considering the interpretation of s. 32 of the *OHA* and the O. Reg. 9/06 criteria and their application to the evidence heard by the Review Board panel in this proceeding. The facts regarding the de-designation of the Cottage are analogous to the facts in the Church case. In this hearing, the only evidence of the reason Town Council issued the Notice of intention to repeal the Cottage's designating by-law is that this is the Owners' wish. This is equivalent to the issue of "consent" that was before the Court in the Church

case. It is also significant that, here, the new Owners purchased the Cottage with the heritage designation in effect and, therefore, willingly accepted its heritage designation.

[54] Of particular note in the Church case is the importance that the Court places on the object of the *OHA*: the conservation and protection of the heritage of Ontario. The Court recognizes that this may interfere with individual property rights. Such a complaint is at the heart of the submissions of the Owners and the Town in this case. The Court acknowledged that there are situations, such as here, where the owner would not want the heritage designation. The Owners of the Cottage have not given any particulars of their request to de-designate the Cottage, other than their assertion that they have the right to be free of any encumbrance in case of a possible sale of the property. Despite their years of ownership, they now describe the Cottage's heritage designation as a "handicap", "inappropriate intervention", and "a penalty to be endured." Both the Owners' perception of the Cottage's heritage designation in this case, and the lack of any evidence that there has been a fair and just balancing of the interests of the public and the community *vis-à-vis* the Owners' wishes, are in contradiction of the Divisional Court's analysis of the *OHA* and findings in the Church case.

[55] In addition, or in the alternative, to the Review Board's contextual interpretation above, that the *OHA*'s designation provisions in s. 29(7) to (13) are incorporated into s. 32 and that the O. Reg. 9/06 criteria apply also apply to the consideration of a de-designation, the Review Board rejects the Town's interpretation of s. 32 as being incompatible with the object of the *OHA* and would thereby produce absurd consequences. The Supreme Court of Canada held in *Re. Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 ("Rizzo"), at para. 27:

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the

legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purposes of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, supra, at p. 88).

[56] The Review Board finds that the Town's interpretation that the heritage designation criteria do not apply on the repeal of a designation by-law on an owner's initiative is contrary to the object of the *OHA* and is incompatible with the overall scheme of the designating provisions of the *OHA*. It would lead to the absurd consequence that a decision to designate a property as having cultural heritage value or interest is based on satisfying certain criteria in the *OHA* and its regulation, but no such criteria would apply to a de-designation.

[57] The Town's interpretation that the designation criteria should not be considered in a hearing and report by the Review Board under s. 32, is illogical because it would make that provision meaningless. The Review Board cannot carry out a review and make recommendations without legislative direction as to the criteria to be considered. As the Review Board's jurisdiction in heritage matters is established by the *OHA*, and the hearing and report are legislatively mandated, s. 32 should not be interpreted in a manner that gives it no purpose or effect.

[58] In addition, because discretion must be exercised in a manner that supports the purposes of the applicable legislation, and the *OHA* s. 29 criteria are clearly meant to provide guidance on designation recommendations and decisions, the Review Board finds that those criteria are also relevant to de-designation decisions, especially given that s. 32 does not specifically offer any alternative criteria but incorporates s. 29 by reference, as discussed above.

[59] Regarding the expropriation analogy raised by Mr. Donnelly, one of the presenters, which is an aspect of the Owners wanting to be in a position to sell the Cottage without the "encumbrance" of the heritage designation, the Review Board finds the argument of the Objectors more compelling: that the current Owners purchased the Cottage subject to the heritage designation and so any financial impact of the designation would have been factored in at that time, and, therefore to remove the

designation over a concern of the current Owners about the designation would likely be a windfall to them. That would not be a fair balancing of the interests of the public and the community in heritage properties.

[60] As the Church case instructs, the encumbrance issue does not prevent the new designation of properties without owner consent, so it follows that a concern over an encumbrance by an owner who willingly bought a property already designated cannot be the sole reason for de-designating a property. If a property has not lost its heritage value since the time of designation (such as through fire or a tornado, as happened to Goderich in 2011), it cannot be the case that a new owner's wish that a property be free of its heritage designation can be determinative under s. 32. To permit an owner's wishes to automatically trump heritage considerations would run counter to the object of the *OHA* and render designation a purely voluntary approach by allowing what would effectively be automatic de-designation whenever an owner makes a request under s. 32. This would lead to the absurd consequence that a person faced with a proposed s. 29 designation would simply not object to the designation (which would have led to a hearing considering the O. Reg. 9/06 criteria) and then file a s. 32 request for de-designation and be automatically successful. This too would undermine the object of the *OHA* and would also be inconsistent with the Court's reasoning in the Church case.

SUMMARY AND RECOMMENDATIONS

[61] Having considered the evidence and submissions at the hearing, and for the reasons set out above, the Review Board strongly recommends that the Town's Designation By-law 90-59 not be repealed.

[62] The Review Board further strongly recommends that the cultural heritage value or interest designation of the Cottage be supplemented by recognizing its associative value with Nicholas Hill under s. 1.(2)2 of O. Reg. 9/06. The Review Board recommends that the original Description of Heritage Attributes in the Reasons for Designation be reviewed and revised to take this into account.

“Stuart W. Henderson”

STUART W. HENDERSON
MEMBER

“Robert V. Wright”

ROBERT V. WRIGHT
VICE-CHAIR

Appendix 1 – Exhibit List

Appendix 2 – Agreed Statement of Facts

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Conservation Review Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

APPENDIX 1

EXHIBIT LIST

- Exhibit 1: Declaration of service of Notice of hearing on the parties and directions for publication. CRB Case Coordinator Affidavit.
- Exhibit 2: Affidavit of Service: Notice of public hearing. Clerk's Affidavit.
- Exhibit 3: Agreed Statement of Facts, October 28, 2015
- Exhibit 4: 4 Heritage Walks evidence
- Exhibit 5: Witness Statement of Laurel Armstrong
- Exhibit 6: Witness Statement of James Wallace
- Exhibit 7: Witness Statement of Dr. Gary Davidson with attachments
- Exhibit 8: Witness Statement of Dwayne Evans
- Exhibit 9: Heritage Conservation District Plan, with the guidelines, May 2014
- Exhibit 10: Council Minutes, November 10, 2014
- Exhibit 11: Authorization of Representation Form 1: from Mr. Anderson

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CRB1503

PROCEEDING COMMENCED UNDER subsection 32(14) of the *Ontario Heritage Act*,
R.S.O. 1990, c.O.18, as amended.

Objector: Laurel Armstrong and Beth Ross (jointly)
Owner: W.N. Anderson and Jean Elizabeth P. Anderson
Subject: Notice of Intention to Repeal Designation By-law No. 90-59
Property Address: 135 Essex Street (The Cottage)
Legal Description: Lot 148, Plan 459
Municipality: Town of Goderich
CRB Case No.: CRB1503
CRB Case Name: Armstrong v. Goderich (Town)

AGREED STATEMENT OF FACTS

1. The Town of Goderich has a long history of protecting buildings and structures of historic and heritage significance. In the 1970s, with the advent of Provincial heritage legislation, Goderich Council began to pass legislation regarding designation of the historic downtown square.
2. In 1982 Goderich approved a Heritage Conservation District Plan for the downtown Goderich square.
3. In 1992 Goderich approved a Heritage Conservation District Plan for the West Street area of Goderich in the downtown core area.
4. For the period since the creation of these Heritage Conservation Districts, Council has also implemented the designation of various buildings and structures throughout Goderich which were deemed to have historic and heritage significance.

Draft: October 28, 2014

5. In June, 2014, Goderich updated the two existing Heritage Conservation Districts and created a Third Heritage Conservation District to broaden the heritage designation around the downtown core.
6. The structure in question, 135 Essex Street (the “Cottage”) was built at some point in the 1880s. It is stated to be an excellent example of a lakefront cottage in the area in the Picturesque style.
7. The Cottage is located in a neighbourhood on the lakefront in Goderich that was originally developed for cottages in the late 1800s. It eventually had various cottages and holiday and recreation structures.
8. Over time, largely in the mid-1900s, the cottages and resort buildings in the area were gradually replaced by permanent, year-round residences. Very few of the original summer cottages remain.
9. In 1990 when the Cottage was designated, it was owned by Nick Hill, an architect interested in historic preservation who performed considerable restoration work to return the Cottage to its characteristic, historic state.
10. In 1990, by Town of Goderich By-law 59 of 1990, the Cottage was designated by the Town as being of architectural and/or historical significance based on it being an excellent example of a circa 1880 lakefront cottage in the Picturesque style. It was noted that the Cottage remained on its original site and was largely unaltered in its appearance.
11. The Cottage was subsequently purchased in the 1990s by William and Jean Anderson, who are the present owners. At the time of purchase by Mr. and Mrs. Anderson, the Cottage maintained its historical characteristics and had been designated as being of historical significance.
12. In the summer of 2014, Mr. Anderson contacted the Municipal and Marine Heritage Committee (the “Committee”) advising them of their wish to have the historic designation removed from the property.
13. At its meeting on August 5, 2014, the Committee discussed the request from Mr. Anderson and, as a result, requested that Mr. Anderson attend the Committee meeting to be held on September 2, 2014 to discuss the request to remove the designation on the property.
14. Mr. Anderson attended the Committee meeting on September 2, 2014 and engaged in a lengthy discussion regarding the request to have the designation removed. As a result of the discussion, Mr. Anderson agreed to further consider his request and advise the Committee of his position by their next meeting which was scheduled for October 7, 2014.
15. On September 10, 2014, the Committee wrote to Mr. Anderson urging him to reconsider his request to de-designate his property and outlining factors which the Committee felt made a continuation of the designation important and beneficial.

16. Prior to the October 7, 2014 Committee meeting, Mr. Anderson contacted the Committee confirming the wish of he and Mrs. Anderson to continue with the request to remove the designation from the Cottage.
17. At its meeting of November 4, 2014 the Committee passed the following motion:
“That Council refuse the request to de-designate the property at 135 Essex Street due to the unique nature of the property and its role in representing an important era in Goderich’s history as a summer resort.”
18. At the regular Council meeting on November 10, 2014, Council considered the recommendation of the Committee. By a unanimous vote, Council declined the recommendation from the Committee that the de-designation be denied.
19. On December 24, 2014, the Town published formal Notice of Council’s Intention to Repeal Heritage Designation By-law 59 of 1990 concerning the Cottage, 135 Essex Street.
20. On January 21, 2015 Beth Ross and Laurel Armstrong served a Notice of Objection to Council’s Intention to Repeal Heritage Designation By-law 59 of 1990.

All of which is respectfully submitted this day of October, 2015.

**DONNELLY MURPHY LAWYERS
PROFESSIONAL CORPORATION**

Per: _____
Gregory F. Stewart
Council for the Town of Goderich