

Conservation Review Board
Commission des biens culturels



ISSUE DATE: May 17, 2016

CASE NO.: CRB1508

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

Objector:	Bryan Trothen
Owner:	George Ayers
Subject:	Notice of Intention to Repeal Designation By-Law No. 9269
Property Address:	166 Brock Street South
Legal Description:	PIN 43256-0005 (LT); PT PARK LT 5 E/S BROCK ST, PL 2 SARNIA CITY; PT 1, 25R1482, SARNIA
Municipality:	City of Sarnia
CRB Case No:	CRB1508
CRB Case Name:	Trothen v. Sarnia (City)

Heard: April 18, 2016 in Sarnia, Ontario

APPEARANCES:

Parties

George Ayers

Bryan Trothen

City of Sarnia

Counsel

Self-represented

Self-represented

Scott McEachran

Participant

Wayne Wager

Self-represented

REPORT OF THE BOARD DELIVERED BY DANIEL NELSON AND LAURIE SMITH

OVERVIEW

[1] This report concerns an objection to the City of Sarnia's intention to repeal a heritage designation by-law ("By-law 9269") under s. 32 of the *Ontario Heritage Act* ("OHA").

[2] The property in question is located at 166 Brock Street South, Sarnia, Ontario (the "Property") and was designated under the *OHA* by the City of Sarnia ("City") in 1986.

[3] In May 2015, George Ayers, the owner of the Property, submitted a request to the City to repeal By-law 9269. The matter was considered by the Sarnia Heritage Committee ("Heritage Committee") and by staff in the Planning Department, both of whom recommended against repeal. On September 14, 2015, City Council passed a motion consenting "to the application to de-list the property". Notice of Council's intention to repeal By-law 9269 was issued on September 19, 2015 and duly served and published.

[4] On October 16, 2015, Bryan Trothen objected to the proposed repeal. The City referred the matter to the Conservation Review Board (the "Review Board") for a hearing and Report pursuant to s. 32(17) of the *OHA*.

[5] A hearing was convened on April 18, 2016 (the "Hearing"). On the morning of the Hearing, the parties, the participant, legal counsel for the City, and the Review Board panel members conducted a brief site visit of the Property.

[6] At the Hearing, the owner, Mr. Ayers, was self-represented and called no witnesses other than himself. The City was represented at the Hearing by legal counsel Scott McEachran. The City did not call any evidence, but provided oral submissions. The objector, Mr. Trothen, was self-represented. He called Max Williams, a planner

with the City, to provide evidence at the Hearing. Wayne Wager, a person added by the Review Board as a Participant, was also self-represented and offered only his own testimony at the Hearing.

[7] The list of exhibits entered as evidence at the Hearing is attached as Appendix 1 to this Report. Included in the exhibits is an Agreed Statement of Facts filed by the parties at the commencement of the hearing. The Review Board incorporates the content of the Agreed Statement of Facts as findings of fact for the purposes of this Report.

[8] The parties agreed on the following Statement of Facts:

1. At George Ayers' (the owner) request, 166 Brock St. was designated to be of architectural value or interest by the City of Sarnia by-law #9269 in 1986.
2. The reasons for designation outlined in the bylaw are as follows:

This two storey brick home is recommended for designation for architectural reasons. The house which was built in the 1860's displays a fine example of Ontario farmhouse architecture of that era. The eaves, bargeboard, front porch and masonry work are representative of this architectural style.

3. Mr. Ayers submitted a letter to the Heritage Committee May 5, 2015, requesting the repeal of by-law #9269.
4. The Heritage Committee considered the matter August 5, 2015 and recommended City Council not repeal the by-law.
5. Council considered the matter September 14, 2015 at its regular council meeting. The report before Council was written by planning staff and recommended that Mr. Ayers' application be denied. Mr. Ayers spoke in opposition to staff recommendations. Council consented to repeal by-law #9269.
6. An appeal was received from Mr. Trothen on October 16, 2015.

ISSUE

[9] The issue before this Review Board is whether By-law 9269, which designates the Property as a property of cultural heritage value or interest under s. 29 of the *OHA*, should be repealed in accordance with s. 32 of the *OHA*.

RELEVANT LEGISLATION AND REGULATION

[10] *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.

...

Ontario Regulation 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 OWNER

[11] Mr. Ayers has owned the Property since about 1983. He provided the Review Board with a written statement of his position, which he read from during the Hearing (Exhibit 6).

[12] Mr. Ayers asked the City to designate the Property in 1986 because the Provincial government offered financial support for designated properties. He believes that this support is no longer available. He argued that the Property should not have been designated in 1986 because other nearby houses have similar designs and layout and the Property is not the last example of its design. He submitted photographs to show that his house had a three-sided bay window that was removed before 1983 (Exhibits 11 and 12), that a similar nearby house was built without a three-sided bay (Exhibit 8), and that a third nearby house retains its three-sided bay (Exhibit 9).

[13] In Mr. Ayers' submission, the Property does not have architectural value because of its location on a "major north bound traffic artery." He believes that the Heritage Committee does not value the Property, providing a screenshot of a map on the City website to show that the Property is not included in a heritage walking tour (Exhibit 7).

[14] Mr. Ayers stated that Vision '74 Inc., a nursing home located adjacent to the Property, withdrew an offer to purchase the Property when they learned of the heritage designation. He feels that the value of the Property would be enhanced if it was owned by the nursing home.

[15] In an effort to sell the Property, Mr. Ayers recently undertook a number of upgrades and repairs to the house. He is concerned about the potential cost of repairs to features that are referred to in the heritage designation.

[16] Mr. Ayers alleged that former City planner Jane Cooper, incorrectly advised the Heritage Committee that they could not consider anything other than the heritage features of the house, in recommending whether to repeal the designation.

[17] On cross-examination by Mr. Trothen, Mr. Ayers confirmed that he purchased the Property in about 1983 and lived in it until 2003-04. He now lives in another house owned by his wife. Mr. Ayers confirmed that the Property has been vacant for more than 10 years but is still "liveable". He continues to insure the Property and pay taxes and utilities. He confirmed that the current porch is not the porch that was on the house in 1986 when the Property was designated.

[18] Mr. Ayers further confirmed that he applied for a provincial grant for repairs to heritage features on two occasions; on both occasions he carried out the repairs and received reimbursement from the City.

[19] According to Mr. Ayers, he has had three offers for the Property since he put it on the market last year: one from a buyer whose financing failed; one from Vision '74 Inc. which was later withdrawn; and one from a member of the Heritage Committee that he rejected for being "too low."

[20] On cross-examination by Mr. McEachran, Mr. Ayers confirmed that Vision '74 Inc. owns the parcel of land to the east of the Property, that it had acquired the backyards of several abutting properties, including his own, and that on learning of the heritage designation it revised its offer to purchase to add a condition that the designation be removed.

[21] On cross-examination by Mr. Wager, Mr. Ayers admitted that in his 1985 request to have the Property designated (Exhibit 13), he did not refer to financial assistance as a reason for designation. Mr. Ayers confirmed that the bargeboard and yellow-brick masonry are still on the building and that at least one of the two grants he received from the City was for cleaning the exterior brick.

CASE FOR THE CITY

[22] The City offered no evidence other than the disclosure materials provided at the outset of this matter.

[23] Mr. McEachran submitted that because s. 29 of the *OHA* says that council "may, by by-law, designate a property", council may also consider other factors when it does or does not designate a property. In his view, a council can also consider "community viewpoint" and an owner's viewpoint is part of "community viewpoint."

[24] Mr. McEachran argued that, because the *OHA* does not say what factors to consider when repealing a designation under s. 32, common sense dictates that we should look at the same factors when designating. In his view, the three factors Council should consider are: the criteria in Ontario Regulation 9/06 ("O. Reg. 9/06"); the owner's

viewpoint; and the community interest. He believes that even though we have no evidence of what Council considered in making their decision, we can assume that they considered all three of these factors, and it was within Council's purview to use their discretion when deciding to designate or "undesignate" the Property.

CASE FOR THE OBJECTOR

[25] Mr. Trothen objects to Council's decision to repeal the designation by-law because he does not agree with Council's decision-making process. He feels that the Council decision was made without any discussion of the heritage reasons for the designation, the recommendations of Heritage Committee and the Planning Department, the City's policy on heritage designation, or the precedent this decision might set for repeal of other designations.

[26] Mr. Trothen called Mr. Williams as a witness. Mr. Williams has been a planner with the City for 12 years and is the staff liaison person for the Heritage Committee. He is familiar with heritage practice in the City and with the *OHA*. He is the author of the September 2015 Planning Department report that incorporates the Heritage Committee's recommendations and recommends against repeal of the designation (Exhibit 5).

[27] Mr. Williams testified that when the Heritage Committee received Mr. Ayers' request to repeal the designation in May 2015, it asked Mr. Williams to suggest to Mr. Ayers that he re-list the Property for sale. The Heritage Committee considered the request again in August 2015, hearing presentations from Vision '74 Inc. and Mr. Ayers before recommending against repeal.

[28] Mr. Williams' understanding is that City Council must take both O. Reg. 9/06 and the Provincial Policy Statement ("PPS") into consideration in considering designation or repeal of designation. He understands that s. 2.2.6 of the PPS has been interpreted by tribunals and courts to mean that preservation of heritage features "in effect trumps the

property rights of the individual” and that decisions around designation should be dealt with based on historical context, not financial considerations.

[29] Mr. Williams testified that the Property was originally designated for its historical and architectural features. His interpretation is that as long as the house remains standing, it retains its historical value as a house built in 1867. He testified that Mr. Ayers was given a copy of By-law 9269 and it is registered on title to the Property. He understands that features described in a designation by-law are the features that should be protected, and it is the responsibility of the owner to maintain those features. Mr. Williams is satisfied that all of the features named in the 1986 designation were present in 2015, with the exception of the porch.

[30] Mr. Williams confirmed that the City has a policy that it will only designate properties with the consent of the owner. The City recently passed a property standards by-law to ensure that properties are maintained.

[31] Mr. Williams advised that the map of heritage properties on the City’s website is taken from a walking tour brochure created in 2005 for a heritage conference. It was never intended to include all designated properties; rather, it was designed to provide a one-hour tour within reasonable walking distance of the conference location.

[32] Under cross-examination by Mr. Ayers, Mr. Williams testified that his understanding is that the house was constructed in 1867, based on the information in the designation file, and substantiated by Mr. Ayers.

[33] Mr. Trothen submitted that the Property has design value as an example of a mid-Victorian Ontario farmhouse in its design and construction, and historical value as evidence of the growth of the urban footprint as the village expanded. He submitted that the house is nearly 150 years old and predates incorporation of the City and further submitted that it is the only building of its design type designated by the City, and reflects an early phase in the growth of the City. He believes that, as an example of a

home of “ordinary working-class people,” it is equally deserving of protection as other, grander buildings.

[34] In Mr. Trothen’s view, the consent of the owner to designation and repeal of designation is desirable but not necessary or required under the *OHA*. He argued that the Heritage Committee concluded in 1986 that the Property had heritage value, the City acted on their advice and enacted By-law 9269, and Mr. Ayers was satisfied with that designation for almost 30 years. Mr. Trothen argued that Council overturned the designation in September 2015 at Mr. Ayers’ request, without any evidence that the Property had lost its original cultural heritage value and without any reference to the reasons for designation. In his view, Council was acting at the convenience of a proposed buyer and was influenced by its “good works” in the community. In his opinion, “designation by-laws should be passed only after the most active and vigilant assessment and once passed, should be just as vigorously defended.”

PRESENTATION BY THE PARTICIPANT

[35] Mr. Wager is Chair of the Sarnia Heritage Committee and has been a member of the Heritage Committee for over 20 years. He testified that when he discovered that Mr. Ayers was considering “de-listing” his property, he contacted him, visited the Property and advised him to submit a written request. Mr. Wager agreed to help Mr. Ayers with “wordsmithing” the request, but made it clear that he would not necessarily support the request. Mr. Wager visited the site a number of times over the next few months. In his opinion, despite deterioration in some areas of the house, the architectural and historical value of the Property still exist. Mr. Wager testified that both he and the other members of the Heritage Committee concluded at their August 6, 2015 meeting that they did not support the request for repeal of the designation. They also noted that the front porch, a designated feature in the 1996 designation, had been removed.

[36] On cross-examination by Mr. Ayers, Mr. Wager clarified that he agreed to help Mr. Ayers with his request for repeal because he believes that applicants should always present their best case.

[37] On cross-examination by Mr. Trothen, Mr. Wager testified that the interior of the house contains dirt and mould throughout, and there is water in the basement and furnace room. He does not agree with Mr. Ayers that the house is liveable but he believes it is salvageable.

[38] The Review Board asked Mr. Wager if the City has some kind of grant or tax rebate program as one of the tools available to the Heritage Committee. Mr. Wager testified that the City participated in a provincial grant program for designated properties that ended about 10 years ago. He testified that within the last year, the City passed a by-law under provincial enabling legislation, providing some form of tax relief for designated heritage properties and establishing a cost-sharing program in which owners of designated properties can apply for a grant of up to \$3,000 for repairs.

[39] The Review Board permitted Mr. McEachran to ask Mr. Williams to confirm the details of the tax rebate and cost-sharing by-law for designated properties. Mr. Williams confirmed that the by-law was passed in September 2015, applications for cost-sharing grants were received in January 2016, and cheques were recently issued to seven successful property owners. Mr. Williams confirmed in response to a question from Mr. Trothen that Mr. Ayers is eligible to apply for the tax rebate and cost-sharing program.

ANALYSIS

[40] In making its recommendations regarding the repeal of the designation By-law 9269, the Review Board must determine the relevant factors to consider.

[41] Mr. McEachran, the City solicitor, argued that City Council is entitled to consider three factors in determining whether to repeal the designation of a property:

- the criteria set out in O. Reg. 9/06;
- the viewpoint of the owner; and
- the community interest.

[42] This approach is, in his view, rooted in the decision of the Ontario Divisional Court in *Tremblay v. Lakeshore (Town)*, [2003] O.J. No. 4292, 68 O.R. (3d) 109 (the “*Tremblay* decision”) insofar as the court noted the importance of balancing the interests of the municipality, the owner, and the community. Mr. McEachran defended this process by noting that City Council had reviewed the recommendations of the Heritage Committee and the Planning Department; considered the viewpoint of Mr. Ayers; undertook considerable debate; and thereupon exercised its discretion under the *OHA* to repeal the designation.

[43] The *Tremblay* decision, however, does not state that the City’s decision-making process is a balancing act of these interests. Rather, it says at para. 27: “...the very purpose of the Act must be to balance the interests of the public, community, and the owner.”¹ It is the *OHA* that sets out the process of balancing those competing interests and that is done through the mechanisms set out in the *OHA*. It does not create some new and unformulated balancing mechanism, as proposed by the City. The balancing of interests is accomplished by complying with the *OHA*.

[44] The City, in defending this process before the Review Board, appeared to be advancing a common misunderstanding of the role of the Review Board and the function of hearings held pursuant to the *OHA*. The Review Board does not investigate the decision-making process of municipalities or review the method by which

¹ See Appendix 2 for an extract of the *Tremblay* decision.

municipalities exercise the discretion given to them under the *OHA*. It is not a form of quasi-judicial review.

[45] Rather, the Review Board is, in the famous words of Sir. John A. MacDonald (in another context), a “chamber of sober second thought”. It is the duty of the Review Board, upon receiving an objection pursuant to the *OHA*, to conduct a public inquiry into the designation or repeal of designation of a property, to receive evidence regarding same, and, after carefully reviewing such evidence, to write a report with a recommendation on the matter to the municipality and allow the municipality, in light of this analysis by the Review Board, to reconsider, if applicable, its position.

[46] Therefore, it is the responsibility of the Review Board in this case to review all of the evidence before it and make a recommendation to City Council as to whether or not to repeal the designation on the Property. City Council must consider the report of the Review Board and shall either refuse the application or consent to the application pursuant to s. 32(19) of the *OHA*.

[47] Under s. 29 of the *OHA*, a municipal council may designate a property to be of cultural heritage value or interest if the property meets one or more of the prescribed criteria set out in O. Reg. 9/06 (as referenced above), and providing that the council follows the process set out in s. 29.

[48] Section 32 of the *OHA*, which sets out the process of repeal of designation, does not expressly refer to O. Reg. 9/06 or any other criteria; it requires only that the municipal council “consider” an owner’s application (request) for repeal and consult with its municipal heritage committee before deciding to refuse or consent to all or part of the request. Section 32(18) provides that s. 29(7) to (13) regarding designation apply with necessary modifications to the hearing and report by the Review Board regarding repeal of designation, where council consents to the request to repeal and receives an objection. However, these sections do not provide criteria to the municipality for making the decision to repeal a designation or provide criteria to the Review Board for making

recommendations on a proposed repeal of a designation. The Review Board must, therefore, determine what factors are relevant in light of the purposes of the legislation.

[49] Other Review Board reports have held that the central question in a s. 32 repeal case is whether the property continues to hold cultural heritage value or interest. In CRB1101 (2011), 957 Bank Street (Horticultural Building, Lansdowne Park), Ottawa, the Review Board observed at p. 26:

In a s.29 bylaw repeal proceeding, the Review Board typically anticipates at least one Party to argue that a property no longer holds sufficient cultural heritage value or interest to warrant continuing protection under the Act.

[50] In CRB1305 (2014) 1105 Front Road South, Amherstburg, the Review Board stated at para. 53:

The Review Board does not accept the owner's argument that the change in the Town's Heritage Tax Rebate program is sufficient grounds to approve his application for by-law repeal. The property holds cultural heritage value or interest to the Town and is worthy of protection despite the change to the rebate program and despite any inaccuracies or lack of completeness in the description of heritage attributes in the bylaw. The Review Board finds that the presence of cultural heritage value or interest is the most important factor to consider in this hearing under s. 32.

[51] In *Armstrong v. Goderich (Town)*, 2016 CanLII 27018 ("*Armstrong*"), the Review Board found at para. 58 that:

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.

[52] In light of the *Tremblay* decision, the Review Board went on to say at para. 60 of *Armstrong*:

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.

[53] In the present case, the Review Board agrees that the appropriate test for it to apply when deciding whether all or part of a designation by-law should be repealed under s. 32, is whether the Property retains cultural heritage value or interest, as described in the designating bylaw, and as prescribed by O. Reg. 9/06. Recognizing that O. Reg. 9/06 did not exist in 1986 when the Property was designated, the Review Board considers it appropriate to apply the criteria currently set out in O. Reg. 9/06 to ascertain whether cultural heritage value or interest continues to exist in the Property.

[54] Upon receiving a request from Mr. Ayers in 1985, the City investigated the Property and determined that it did, indeed, have architectural significance. In its Report to Council, dated December 12, 1985, (as provided to the Review Board in the City's disclosure materials), the City Planner, Lee Anne Doyle, wrote:

Mr. George Ayers, the owner of 166 S. Brock Street, submitted an application for Designation on May 7, 1985. During the past few months, the LACAC [now the Heritage Committee] has collected and documented historical and architectural information regarding the property...In addition, several members have conducted exterior site inspections. Based upon the Committee's evaluation, the total grading of the subject property falls within Group B - buildings which are of importance in the grading scale. Therefore, LACAC feels the property is worthy of designation.

[55] As a consequence, the Property was appropriately designated under s. 29 of the *OHA* in 1986.

[56] Mr. Ayers testified that he has listed the Property for sale and has, in his view, been unsuccessful owing to the existence of By-law 9269. Yet, by his own testimony, there have been two offers notwithstanding the designation, one of which was too low,

in his view, and one of which collapsed because the buyer could not secure financing. The only remaining offer was from the adjacent nursing home which was, presumably, eager to acquire the Property for expansion purposes. A letter from Mr. Ayers' realtor (Exhibit 14) suggests that the Property's heritage designation needs to be removed for sale, yet the bulk of the letter discusses the fact that crumbling brickwork due to lack of maintenance and a leaky basement are a hindrance, neither of which is a result of its designation status.

[57] The Review Board in *Armstrong, supra*, and the Divisional Court in the *Tremblay* decision make it clear that the object of the *OHA* is to conserve and protect the heritage of Ontario and that there may be, as a consequence, an infringement of an owner's property rights and the economic interests that naturally arise therefrom. The Ontario Legislature, however, chose not to include the economic interests of the owner as a criterion in evaluating and protecting Ontario's heritage. It could easily have done so. The Review Board finds that economic factors, including the financial cost of maintaining and repairing the Property are not relevant in determining whether the by-law should be repealed. Maintenance and repair of a property are required by the City's property standards by-law, and are not specific to properties with cultural heritage value or interest. Nevertheless, the Review Board notes that Mr. Ayers is in the position of being eligible for the City's tax rebate and cost-sharing program for designated properties. As he was able to do with the former provincial grant program, Mr. Ayers might be able to offset some of his costs through this new City program.

[58] Mr. Ayers also argued in his written and oral submissions that he requested designation solely to obtain City and/or provincial repair and restoration grants and that the existence of the grants and the designation created some form of contract or commitment between the Province and himself. In cross-examination, Mr. Ayers testified however, that only two grants were ever received, presumably in the immediate years following designation in 1986 although this was not made clear to the Review Board. Mr. Ayers also identified that one of those two grants was for brick cleaning.

The Review Board finds that no such contract or *quid pro quo* obligation was formed by designation of the Property and is, in any event, not relevant to the matter at hand.

[59] Both Mr. Ayers and Mr. Williams testified that, although the porch on the Property has been removed, all of the other features described in By-law 9269 are present, namely its two-storey form, brick masonry construction, eaves and bargeboard. While the house is vacant and in need of attention, Mr. Wager confirmed that it is “salvageable” and retains architectural and historical value. The Sarnia Heritage Committee and the City’s Planning Department, following Mr. Ayers’ request for repeal of designation, investigated the matter (although the nature of that investigation was not made clear). Both determined that the Property has not lost its architectural significance and concluded that By-law 9269 should not be repealed.

[60] The Review Board finds that neither the presence of other similar nearby houses, nor the location of the house on a busy street, detracts from the cultural heritage value or interest of the Property.

[61] The Review Board also notes that the wish of a potential purchaser that By-law 9269 be repealed is not relevant in determining cultural heritage value or interest.

[62] Therefore, on the basis of the evidence before it, the Review Board finds that the Property continues to have cultural heritage value or interest because of its architectural value as an example of Ontario farmhouse architecture, as stated in the 1986 reasons for designation for the Property. Expressed in terms of the current criteria of O. Reg. 9/06, the Review Board finds that the Property continues to have design or physical value because it satisfies criterion 1.(2) 1.i. as “a rare, unique, representative or early example of a style, type, expression, material or construction method”.

[63] While there was no clearly articulated evidence presented to support their opinion, Mr. Trothen, Mr. Wager and Mr. Williams each suggested that the Property has historical value as evidence of the growth of the urban footprint as the village expanded. This is in addition to its architectural value. The Review Board cannot make any specific recommendations on that criterion due to the lack of evidence on this point. In any event, it is not necessary for a property to satisfy more than one of the three criteria; one (or more) suffices under s. 1(2) of O. Reg. 9/06,

SUMMARY AND RECOMMENDATIONS

[64] Having considered the evidence and submissions at the Hearing, and for the reasons set out above, the Review Board recommends against the repeal of By-law 9269.

[65] The Review Board further recommends that By-law 9269 be revised and updated to bring it into conformity with the current language of the *OHA*, specifically s. 29(4)(b), and to include a statement explaining the cultural heritage value or interest of the Property and a description of the heritage attributes of the Property. Section 30.1(2)(a) permits a municipal council to amend a by-law “to clarify or correct the statement explaining the property’s cultural heritage value or interest or the description of the property’s heritage attributes.”

[66] The Review Board further recommends that efforts be made to document and then include any historical or associative values that are applicable.

[67] The Review Board recommends that the description of heritage attributes be revised to remove any reference to the porch.

“Daniel Nelson”

DANIEL NELSON
MEMBER

“Laurie Smith”

LAURIE SMITH
MEMBER

Appendix 1 – Exhibit List

Appendix 2 – Extract from *Tremblay v. Lakeshore (Town)* [2003] O.J. No. 4292, 68 O.R. (3d) 109

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

EXHIBIT LIST

- Exhibit 1: Statement of service of Notice of Hearing on the parties and directions for publication. CRB Case Coordinator's affidavit.
- Exhibit 2: Affidavit of Service of Public Notice of Hearing. Acting City's Clerk's affidavit.
- Exhibit 3: Agreed Statement of Facts, April 18, 2016.
- Exhibit 4: Emails between Jane Cooper and George Ayers, September 11, 2015.
- Exhibit 5: Recommendation from P. Jane Cooper, Director of Planning & Building, to Mayor Bradley and Members of Sarnia City Council, September 14, 2015.
- Exhibit 6: Statement of George Ayers.
- Exhibit 7: Photograph of City of Sarnia website, 2016.
- Exhibit 8: Two photographs of 446 George Street, Sarnia.
- Exhibit 9: Three photographs of 302 George Street, Sarnia.
- Exhibit 10: Two historical photographs of 166 Brock Street South, Sarnia.
- Exhibit 11: Photograph of 166 Brock Street South, Sarnia in the early 1950s.
- Exhibit 12: Two photographs of 166 Brock Street South, Sarnia, 2016.
- Exhibit 13: Application for designation of 166 Brock St. S., May 7, 1985.
- Exhibit 14: Letter from Andrew Howell, n.d.
- Exhibit 15: Email from Andrew Howell, April 7, 2016.

Tremblay v. Lakeshore (Town) [2003] O.J. No. 4292, 68 O.R. (3d) 109

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. The Town argues that Council's resolution was reasonable in light of the entire context of the Act: namely, that the owner can ultimately demolish the building notwithstanding the previous designation. However, reading the Act as a whole discloses an assumption that the owner may not consent. 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.

28. It was both unreasonable and patently unreasonable to impose this condition...