

Conservation Review Board
Commission des biens culturels



ISSUE DATE: February 06, 2018

CASE NO.: CRB1713

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

Objectors: David Benson, Patricia Pook, Susan Simpson, John Taylor
Owner: Helen Campbell
Subject: Notice of Intention to Repeal Designation By-law No. 130-2012
Property Address: 90 Park Street (Haddington Villa)
Legal Description: Part of Park Lot 1, Plan Old Survey as IN 549913; Together With 549913 Save and Except Easement Therein Re: 438820
Municipality: Municipality of Chatham-Kent
CRB Case No: CRB1713
CRB Case Name: Benson v. Chatham-Kent (Municipality)

Heard: In writing

APPEARANCES:

Parties

Counsel*/Representative

Helen Campbell

Kathy Cowper

Municipality of Chatham-Kent

David V. Taylor*

David Benson

Self-represented

Patricia Pook

David Benson

Susan Simpson

David Benson

John Taylor

David Benson

REPORT OF THE BOARD DELIVERED BY DANIEL NELSON AND LAURIE SMITH

OVERVIEW

[1] This Report concerns objections under s. 32(14) of the *Ontario Heritage Act* (“OHA”) by David Benson, Patricia Pook, Susan Simpson and John Taylor (“Objectors”) to a Notice of Intention to Repeal the Designation By-law No. 130-2012 (“By-law”) for the property at 90 Park Street in the Municipality of Chatham-Kent (“Property”). The matter was referred to the Conservation Review Board (“Review Board”) for a hearing pursuant to s. 32(5) of the OHA.

[2] Having considered the evidence, and for the reasons given in this Report, the Review Board recommends that the By-law not be repealed.

BACKGROUND

[3] The Property was designated by the Municipality of Chatham-Kent (“Municipality”) by By-law No. 130-2012 on June 25, 2012. At that time, the owner, Helen Campbell (“Owner”), was in support of the heritage designation.

[4] On August 21, 2015, the Owner made a request to repeal the By-law under s. 32(1) of the OHA. The Municipality refused the request for repeal on October 26, 2015. The matter was referred to the Review Board for a hearing and was heard as file number CRB1510. The Review Board held a hearing in writing on January 3, 2017. In a report issued on January 31, 2017 (*Campbell v. Chatham-Kent (Municipality)*, 2017 CanLII 5240 (ON CONRB) (“*Campbell*”), the Review Board recommended that the By-law should not be repealed.

[5] The Municipality considered the Review Board's report and, at a Council meeting on March 20, 2017, passed a motion to repeal the By-law. The Objectors filed objections under s. 32(14) and the matter was again referred to the Review Board for a hearing as file number CRB1713.

[6] At the pre-hearing conference held on July 27, 2017, the parties requested that the hearing be held in writing.

[7] On October 6, 2017, the Review Board issued a procedural order that the hearing be held in writing, with a hearing date of January 8, 2018 and set deadlines for written submissions from the parties.

[8] On August 10, 2017, the parties submitted an "Agreed Statement of Facts and Agreed Issues List and Approved Timeline" ("Agreed Statement") to the Review Board. The Agreed Facts in the Agreed Statement can be summarized as follows:

- a. On June 25, 2012, the Municipality passed the By-law designating the Property as having cultural heritage value and interest under the OHA.
- b. The criteria for determining cultural heritage value are contained in O. Reg. 9/06 under the OHA. The following criteria are pertinent to the Heritage Report:
 - i. The property is representative or an early example of a style, type, expression, material or construction method;
 - ii. The property has direct associations with an event, person, activity, organization or institution that is significant to a community.
- c. Prior to passing the By-law, municipal council consulted its Heritage Advisory Committee and provided a Notice of Intention to Designate, as required by the OHA. No Notice of Objection was received.
- d. A Heritage Report written by the Municipal Heritage Committee was attached to the By-law. It describes the cultural and heritage value of the Property and identifies key historical facts as follows:

- i. The Property was originally part of a larger parcel of land owned by local grain and timber merchant George Witherspoon, who was an agent of the Gore Bank and Bank of Upper Canada and the first Reeve of Chatham in 1851;
 - ii. It is believed Helen Witherspoon Charteris, sister to George Witherspoon and wife of his former business partner Alexander Charteris, built the present-day house on the Property and named it after the Witherspoon ancestral home in Haddington, Scotland;
 - iii. The Property was owned by Robert McLaren, a prominent Chatham druggist and Lieutenant-Colonel, 24th Kent Regiment of Infantry, in the early 20th century;
 - iv. The Property was owned by Clarence Bagnall, Police Chief and first president of the Association of Chiefs of Police, from 1950 to the 1990s;
 - v. The brick house is designed in an amalgam of Italianate and Gothic Revival styles and is a well-preserved example of a stylish, upper-middle-class residence.
- e. There have been no substantial changes to the Property since the date of the Heritage Report. Neither the Municipality nor the Owner “have raised a contrary report which suggests that the Property is not of historical value”.
 - f. Neither the Municipality nor the Owner have suggested that the Property is not of historical value.
 - g. On August 21, 2015, the Owner requested repeal of the by-law. In October 2015, the municipal council considered and refused the repeal request. On November 17, 2015, the Owner objected and the matter was referred to the Review Board. The Review Board held a written hearing and issued a report on January 31, 2017 recommending that the by-law not be repealed. On March 20, 2017, Council for the Municipality considered the Review Board report and submissions from the Owner’s representative and passed a motion to repeal the designation.

[9] Both the Objectors and the Municipality made written submissions and the Review Board numbered these as exhibits. A list of exhibits is attached as Appendix 1. The Owner did not make a submission.

[10] The Municipality's submission does not include a copy of the Heritage Report, which forms Schedule A of the By-law. A copy of the By-law, with a copy of the Heritage Report attached as a schedule, was earlier submitted as part of the referral of this file by the Municipality to the Review Board for a Hearing. The Review Board referenced those copies of the By-law and Heritage Report for purposes of this Hearing, and marked them as an exhibit.

ISSUE

[11] The issue is whether the By-law, 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. Of primary concern is whether the property continues to hold cultural heritage value or interest.

RELEVANT LEGISLATION AND REGULATION

[12] *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.

...

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.

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

[13] The Objectors submit that the Property was properly designated in 2012, that the reasons for designation have not changed since that time, and that “nothing has changed” since the Review Board recommended in January 2017 that the By-law not be repealed.

[14] The Objectors assert that the Owner’s concern that the designation negatively impacts the sale prospects of the Property, is “based on unsupported and unsubstantiated information” and that her concern is “speculative, as her property has not been offered for sale”. In support of their position, the Objectors refer to two documents on the economic value of heritage properties:

- a. Dr. Robert Shipley, "Heritage Designation & Property Values: Is There an Effect", *The International Journal of Heritage Studies*, Vol. 6, No. 1, 2000; and
- b. Mark Weisleder, "The Hidden Value in Heritage Properties," *The Toronto Star*, February 10, 2012.

The Objectors attach a reproduction of Dr. Shipley's article to their submission. Mr. Weisleder's article is not included in the submission.

[15] The Objectors submit that the Owner understood the nature of the designation and its impact, as the designation was undertaken at her request, that no objections were filed prior to designation, and that she has benefited from the designation by applying for and receiving municipal heritage property tax relief.

[16] The Objectors further submit that a repeal of this designation on the basis of financial hardship would create a dangerous precedent for future requests coming before the Municipality. The Objectors argue that the prospect of property owners receiving a benefit under the municipal heritage property tax relief program and then requesting a repeal of designation when they wish to sell, alter or demolish the property, is not consistent with the intent of the OHA, the Ontario *Planning Act*, or the Municipality's Municipal Property Tax Relief Program.

CASE FOR THE MUNICIPALITY

[17] The Municipality proposed to repeal the By-Law. It cites the Review Board in *Armstrong v. Goderich (Town)* 2016 CanLII 27018 (ON CONRB) ("*Armstrong*") as follows:

...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.;

and

...Moreover, the very purpose of the Act must be to balance the interests of the public, community and the owner.

[18] The Municipality submits that the Review Board's comments in *Armstrong* mean that evidence as to whether a property no longer holds cultural heritage value is not the only consideration, and that other evidence may also be relevant to the Review Board's consideration.

[19] The Municipality further submits that the Review Board's comment that interests must be balanced means that "Heritage value is not a trump, it is one of the considerations for the Council to consider in balancing competing interests."

[20] The Municipality states that at the municipal council meeting of March 20, 2017, when Council considered the previous recommendation of the Review Board not to repeal the designation, the representative for the Owner informed Council that the Owner did not understand several aspects of the legal process which resulted in the designation of her property. This issue was one of the factors considered by Council in balancing the public and private interests involved in the heritage designation.

[21] The Municipality submits that under the OHA: "Council is afforded discretion in determining whether to designate a property, or in this case, remove the designation." The Municipality submits that it used that discretion appropriately in this case.

[22] The Municipality further submits that the Review Board should consider the issues advanced by the Owner's representative, and should defer to Council's balancing of public and private interests in this matter.

CASE FOR THE OWNER

[23] The Owner did not directly make any submissions or file any evidence. In the Agreed Statement submitted by all parties, a section titled "Disputed Facts" notes that:

1. Ms. Campbell has stated that the Designation of the property negatively impacts the sale prospects of her property. The Objectors disagree with this assertion and point to a study which has reviewed the impacts of such designations across Ontario and concludes that such designations can have positive impacts on property sales.

2. The Objectors state that Ms. Campbell requested the designation of the Property. Ms. Campbell does not entirely agree with this and states that she did not understand the nature of the designation or the associated impacts that such a designation would have.

ANALYSIS

[24] Under s. 29(12) of the OHA (which deals with designations rather than repeals), the Review Board's role is to "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". Section 29(12) is incorporated by reference into cases concerning proposed repeals of designation by-laws (see: 32(18)). For repeal cases, therefore, the Review Board's role is to make a report on whether a designation should be repealed, including findings of fact, recommendations and any information or knowledge that was used.

[25] In interpreting s. 31(6) of the OHA, which has the same effect as s. 32(18), the Divisional Court stated in *Friends of Eden Mills Inc. v. Eramosa (Township)* (1998), 111 O.A.C. 81 ("*Friends of Eden Mills*"), that the Review Board's "findings of fact should be restricted to the heritage merits of the property and as to which it may make its recommendation".

[26] The issue in the present case is the same as that in *Campbell*: whether the Review Board should recommend the repeal of designation the By-law. In this case, the "heritage merits of the property" are not at issue (see paragraphs (e) and (f) of the Agreed Statement summarized above). In the present proceeding, the parties agree that the Property continues to hold cultural heritage value or interest under O. Reg. 9/06. Since the Review Board's fact-finding and recommendations should be restricted to the "heritage merits", the other concerns addressed by the parties, which do not relate to heritage, are not relevant. Nevertheless, the Review Board will briefly address those matters below so that there is a record of what matters were raised before the Review Board in the written hearing.

[27] In *Campbell*, the preceding case regarding this Property, the Review Board considered the appropriate scope of inquiry for the Review Board cases involving a proposed repeal of a designating by-law on an owner's initiative under s. 32 of the OHA, a provision which does not itself set out any criteria to be followed. Citing CRB1305 (February 26, 2014) 1105 Front Street South, Amherstburg and *Armstrong* the Review Board concluded in *Campbell*, at paragraph 20, that "the inquiry under s. 32 focuses on the determination of whether or not a property designated under s. 29 continues to hold cultural heritage value or interest as prescribed by O. Reg. 9/06"; and, "other relevant factors may also be considered".

[28] Because the parties in *Campbell* agreed that the Property continues to hold cultural heritage value or interest, the Review Board went on to consider whether there were any "other relevant factors". At the time, the Review Board considered the Owner's claims that: she did not receive the Notice of Intention to Designate, that she was not informed that the designation by-law would be added to the parcel register for the Property, that she was misinformed by municipal staff in 2012 that repeal would be automatically granted on request, and that the value of the Heritage Property Tax Relief Program had diminished over the years. The Review Board concluded in *Campbell* that none of these were relevant factors and recommended against repeal of the By-law.

[29] As it did in *Campbell*, the Review Board acknowledges that there may be "other relevant factors" that can be considered by the Review Board in a by-law repeal matter under s. 31 or s. 32 in addition to the criteria in O. Reg. 9/06. For example, for a proposed repeal of a by-law for a property that was designated prior to the passage of O. Reg. 9/06, the Review Board may consider what criteria and evidence were used in the original designation process. However, it follows from *Friends of Eden Mills* that any other relevant factors to be validly considered by the Review Board must relate to the "heritage merits" of the Property. Under the OHA, the Review Board is not tasked with weighing all other non-heritage related matters in arriving at its recommendation. For example, the property resale value issue raised in this proceeding does not relate to the "heritage merits" and is thus beyond the scope of the Review Board's considerations. As well, the Review Board notes that the evidence from the parties was too limited for

the Review Board to reach any findings of fact with respect to the potential effect of the designation By-law on the resale value of the Property.

[30] Another factor raised by the Municipality relates to the possibility that the Owner did not understand some aspects of the legal process of designation. However, neither the Municipality nor the Owner brought forward evidence on this point in the current proceeding. Further, the parties agreed in the Agreed Statement that the requirements of the OHA were met at the time of designation. In any event, the Divisional Court in *Tremblay v. Lakeshore (Town)*, 2003 CanLII 6354 (ON SCDC) ("*Tremblay*") at para. 23 made it clear that an owner's consent is not required for a designation to proceed: "Requiring the consent of the owner is not consistent with an overall reading of the Act or its purpose." The Court also noted, at paragraph 26, that: "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." Regarding the potential impact of designations on property rights, see also *St. Peter's Evangelical Lutheran Church v. Ottawa*, [1982] 2 SCR 616 and *Re Toronto College Street Centre Ltd. and City of Toronto et al.*, 1986 CanLII 2472 (ON CA) ("*Toronto College Street*").

[31] In *Armstrong*, the Review Board concluded that a decision to repeal a designation should not be based solely on the owner's wishes, as this would contradict the intention of the OHA and would be inconsistent with the Divisional Court's reasoning in *Tremblay*:

[54] ...Both the Owners' perception of the [property'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 *Tremblay*].

[60] ...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 ... 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.

[32] The Review Board does not consider the Owner's understanding of the legal process or her lack of consent to the continued designation of the property to be relevant factors. They do not relate to the "heritage merits" of the Property, which is the Review Board's focus in this proceeding as per *Friends of Eden Mills*.

[33] The Municipality submits that Council is entitled to balance public and private interests in making its decision and that the Review Board "should defer to Council's balancing of public and private interests in this matter" in making its recommendation to Council. However, the Review Board's role is to engage in fact-finding and to make recommendations on the "heritage merits" of the property. It is not engaged in, nor does it defer to, the balancing exercise referred to by the Municipality in this proceeding.

[34] As noted in *Toronto College Street* with respect to the OHA: "To achieve its aims the Act must interfere with private property rights. To counterbalance such interference numerous procedural safeguards are enacted for the benefit of the property owner". The OHA sets out the procedural safeguards that the Legislature considered necessary and sufficient to protect the interests of owners from undue interference in their private property interests, including the referral of matters to the Review Board for its consideration and recommendation. As the Review Board noted in *Trothen v. Sarnia (City)*, 2016 CanLII 29998 (ON CONRB) ("*Trothen*") at paragraph [43]: "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." At the Review Board proceeding stage, the OHA's procedural safeguards include the opportunity for an owner to challenge any evidence regarding the heritage merits of the property and to bring evidence demonstrating a lack of heritage value or interest. The procedural safeguards do not rise to the point where an owner can veto a designation on the basis of lack of consent to the designation, lack of understanding of the consequences of the original designation, or concerns over property value.

[35] In this case, the Agreed Statement acknowledges the continued presence of cultural heritage value or interest. The Municipality and the Owner have failed to bring evidence demonstrating a lack of cultural heritage value or interest or raised any other factor that is relevant to the heritage merits of the Property. Based on the Agreed Statement, the Review Board finds as a fact that the Property continues to hold cultural heritage value or interest. Keeping in mind that the Review Board is to focus on the “heritage merits” of the Property, the Review Board concludes that no relevant heritage-related reasons have been raised that would justify repealing the By-Law.

SUMMARY AND RECOMMENDATION

[36] Having considered the evidence and submissions before it, and for the reasons set out above, the Review Board recommends that Designation By-law No. 130-2012 not be repealed.

“Daniel Nelson”

DANIEL NELSON
MEMBER

“Laurie Smith”

LAURIE SMITH
VICE-CHAIR

Appendix 1 – Exhibits List

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

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Appendix 1**Exhibits List**

Exhibit #	Nature of Exhibit and Description
1	Statement of Service (noting that Notice of Hearing was served on the parties and directed public notice according to the Rules and the Act)
2	Agreed Statement of Facts, Agreed Issues List, and Approved Timeline submitted August 10, 2017.
3	Submission of the Objectors dated October 2, 2017
4	Submission of the Municipality dated October 19, 2017
5	By-law 130-2012, with Schedules A (Heritage Report) and B (property description), as contained in Tab 6, Case CRB1510 referral materials