

**Conservation Review Board**  
Commission des biens culturels



**ISSUE DATE:** November 05, 2019

**CASE NO.:** CRB 1906

**PROCEEDING COMMENCED UNDER** subsection 29(5) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Owner/Objector: WAM Montez C & W Inc.  
Subject: Notice of Intention to Designate (Wellesley Apartments)  
Property Address: 64 Wellesley Street East  
Legal Description: Park Lot 7, Block 2 (part)  
Municipality: City of Toronto  
CRB Case No.: CRB1906  
CRB Case Name: WAM Montez C & W Inc. v. Toronto (City)

**Heard:** October 8, 2019 by telephone conference call and in writing

**APPEARANCES:**

**Parties**

**Counsel**

WAM Montez C & W Inc.

David Bronskill

City of Toronto

Mark Piel and Daniel Elmadany

**ORDER OF THE BOARD DELIVERED BY DANIEL NELSON AND MARCIA VALIANTE**

---

**BACKGROUND**

[1] WAM Montez C & W Inc. is the Owner of 64 Wellesley Street East in the City of Toronto (“subject property”). The subject property contains the Wellesley Apartments, a

five-storey apartment building completed in 1931. On March 18, 2019, the City gave Notice of Intention to Designate (“NOID”) the subject property as a property of cultural heritage value or interest under Part IV, s. 29 of the *Ontario Heritage Act* (“OHA”). On April 17, 2019, the Owner filed a notice of objection pursuant to s. 29(5) of the OHA; as a result, the matter was referred to the Conservation Review Board (“Review Board”).

[2] At the first Pre-hearing Conference (“PHC”) held by telephone conference call on August 22, 2019, David Bronskill, counsel to the Owner, raised a concern regarding the process the City had followed prior to the NOID being given. He argued that the City had not followed the process required under the OHA: specifically, that the City did not properly “consult with” the Toronto Preservation Board (“TPB”) prior to giving notice, contrary to s. 29(2) of the OHA. The Review Board directed the parties to provide written submissions and held a second PHC on October 8, 2019 to hear oral submissions regarding the following issues:

1. What is the scope of the Review Board’s jurisdiction to interpret s. 29(2) of the OHA and determine whether the City has complied with it?
2. If the Review Board has this jurisdiction, how should s. 29(2) of the OHA be interpreted?
3. If the Review Board has this jurisdiction, has the City complied with s. 29(2) of the OHA in accordance with this interpretation?

### **Summary of the Facts**

[3] The Owner submitted applications to the City in 2017 for an Official Plan Amendment and Zoning By-law Amendment to permit redevelopment of the northwest corner of Church Street and Wellesley Street East, which were refused by the City and appealed to the Local Planning Appeal Tribunal (“LPAT”). As part of a revised redevelopment submission for an expanded site, which now included the subject property, the Owner submitted a Heritage Impact Assessment prepared by ERA Architects Inc. (“ERA Report”) to the City in February 2018. The ERA Report included

an assessment of the cultural heritage value or interest of the subject property. The LPAT hearing on the revised submission is scheduled to commence May 4, 2020.

[4] On January 14, 2019, counsel for the Owner discovered a “notice of pending report” respecting the subject property on the agenda for the next meeting of the TPB, scheduled for January 21, 2019. On January 15, 2019, the City’s Heritage Preservation Services Staff wrote a report (“Staff Report”) to the TPB recommending that the subject property be designated under Part IV, s. 29 of the *OHA*. On January 17, 2019, the Owner wrote to the TPB requesting a deferral of the matter to allow for “additional time [that] may enable productive dialogue to occur” with City Staff. The Staff Report was posted on the electronic agenda of the TPB on January 18, 2019.

[5] On January 21, 2019, the TPB held a meeting and heard from counsel for the Owner. The TPB refused to defer the matter and adopted the Staff Report without amendment. The TPB recommended to the Toronto and East York Community Council that the subject property be designated.

[6] On February 13, 2019, the Owner wrote to Community Council requesting that the matter be referred back to the TPB on the grounds that it had received no notice that the TPB would consider designation of the subject property, that there was insufficient time for it to review the Staff Report and prepare a meaningful presentation to the TPB, and that there was inadequate time for the TPB to review the Staff Report, posted on a Friday, prior to its meeting the following Monday. Community Council considered the matter at its meeting on February 14, 2019 and adopted the TPB recommendation in favour of designation without amendment. City Council adopted the item on February 26, 2019 without amendment and without debate.

**Issue 1: What is the scope of the Review Board’s jurisdiction to interpret s. 29(2) of the *OHA* and determine whether the City has complied with it?**

### *Submissions*

[7] The Owner submits that the Review Board has jurisdiction to interpret s. 29(2) of the *OHA* and assess and determine whether the City complied with the requirement that it “consult with” the TPB prior to issuing the NOID.

[8] The Owner argues that the City did not meet the requirement in s. 29(2) because the meaning of the term “consult with” required a meaningful dialogue between the Owner and the City and adequate time for the TPB to consider the Staff Report, the ERA Report and the Owner’s input before providing its advice to Community Council. The Owner requests that the Review Board adjourn this proceeding so that the City can carry out that meaningful consultation process.

[9] The Owner argues that, as an administrative tribunal, the Review Board has authority to interpret its home statute, the *OHA*. Further, the Owner submits that the Review Board has used this authority to review the process followed by a municipality prior to giving notice under the *OHA*, citing the decision in *Fan v. Hamilton (City)*, 2015 CanLII 47123 (ON CONRB) (“*Fan*”). The Owner further argues that, by virtue of s. 24(8) of the *OHA*, certain provisions of the *Statutory Powers Procedure Act* (“*SPPA*”) apply to the Review Board, in particular, s. 21, s. 23 and s. 25.0.1, which permit the Review Board to adjourn proceedings and generally to control its process.

[10] The City submits that the *OHA* sets out the jurisdiction of the Review Board in s. 29(8) and 29(12). The City submits that this grant of authority is limited and does not extend to the Review Board performing a quasi-judicial review of the City’s decision-making process leading up to the issuance of a notice of intention to designate. It cites the Divisional Court decision in *Friends of Eden Mills v. Eramosa (Township)*, 1998 CanLII 17742 (ON SCDC) (“*Friends of Eden Mills*”), and decisions of the Review Board in *Trothen v. Sarnia (City)*, 2016 CanLII 29998 (ON CONRB) (“*Trothen*”), and *Benson v. Chatham-Kent (Municipality)*, (2018 CanLII 5667 (ON CONRB), in support of its position.

### *Analysis and Findings*

[11] Section 29(2) of the *OHA* provides:

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.

[12] There is no dispute that the TPB is a “municipal heritage committee” and therefore City Council was required to consult with the TPB before giving the NOID for the subject property. The heart of the first issue is whether the Review Board has jurisdiction to evaluate how a municipality carried out this consultation and determine whether this obligation was met.

[13] The Review Board agrees with the parties that it has authority to interpret relevant provisions of the *OHA* in the course of carrying out the role assigned to it by the Legislature. But the Review Board agrees with the City that its role under Part IV of the *OHA* is limited. The role of the Review Board is to hold a hearing to inquire into whether a property that a municipality intends to designate has cultural heritage value or interest and to report its findings and recommendations in that regard to the municipality, which must consider the report before it makes a final decision on designation.

[14] In practice, the Review Board does consider whether the pre-conditions to its exercise of jurisdiction have been met. But this consideration is limited to asking whether there is a technical defect in the commencement of a proceeding. For example, the Review Board queries whether notice of intention to designate was published in a local newspaper and served on an owner and the Ontario Heritage Trust, whether the notice of objection was filed within the statutory limitation period, and so on. This practice is a simple binary, “yes” / “no” exercise, and does not delve into an assessment of the relative quality of a municipality’s approach to satisfying a pre-condition.

[15] Accepting the Owner's position would turn an administrative exercise, which asks simply whether there is a technical defect, into a qualitative assessment of a municipality's process, necessitating the hearing of evidence and a determination in the nature of quasi-judicial review. There is nothing in the *OHA* that contemplates that role for the Review Board.

[16] The Owner suggests that recognizing the jurisdiction of the Review Board to inquire into and qualitatively assess the City's process leading up to the giving of notice would further the administrative law goal of diverting such matters away from the courts to a specialized agency or tribunal. Yet, there is no indication in the *OHA* that the Legislature intended the Review Board to exercise a general authority to police a municipality's compliance with the provisions of the *OHA*, or to interpret the provisions of the *OHA* "at large", unrelated to its assigned task of making findings of fact and recommendations on whether a property has cultural heritage value or interest. The *OHA* is structured such that a municipality must comply with the pre-conditions to giving notice in every case when it intends to designate, but not every case will come before the Review Board.

[17] A proceeding before the Review Board under s. 29 is only triggered when a municipality gives notice of intention to designate *and* an objector to that notice files a notice of objection. If no notice of objection is filed, the Review Board has no authority at all over a matter. Thus, in cases not yet before the Review Board, such as at a time prior to the giving of notice of intention and the filing of a notice of objection, or cases that will not come before it because of the absence of a notice of objection, the Review Board would have no authority to consider the issue and evaluate the quality of the municipality's process if a person believes that a municipality's process is defective.

[18] The *OHA* is silent on the point, but it is presumed that any challenge to a municipality's process in those cases would have to be advanced in court. Moreover, even in a case that comes before it, the Review Board is not given any remedial power

to order a municipality to carry out any particular action. The Legislature could have given such power to the Review Board, but it did not do so.

[19] The role of the Review Board has been addressed in some previous cases, including those cited by the parties. In *Friends of Eden Mills*, the Divisional Court addressed the requirement for consultation by a municipality with its heritage committee prior to repealing a designating by-law. In addition to commenting on the meaning of the term “consult”, the Court held that the role of the Review Board is not to evaluate whether consultation had been adequate but is limited to evaluating the heritage merits of a property. The Court stated, at para. 15:

Lastly, it would seem that the finding of the CRB that there had not been adequate consultation by the Council with the [committee] would not be the subject matter of a CRB hearing. The OH Act appears to confer upon the CRB the function of determining whether a property should be designated (s. 29(a)) and by implication pursuant to s. 31(6) as to whether a property should be de-designated. Logically its findings of fact should be restricted to the heritage merits of the property and as to which it may make its recommendation (which the Council must consider but need not necessarily follow...).

[20] The Owner seeks to distinguish this case by arguing that the Court’s finding (that the issue of municipal consultation is not the proper matter of a Review Board hearing) does not apply to a Review Board pre-hearing. This submission posits an artificial distinction between a pre-hearing and a hearing and ignores the fact that a proceeding before the Review Board may involve a number of hearing events, but that all of those hearing events are subject to the same statutory limits and Rules of Practice regardless of the term applied to the event.

[21] In *Trothen*, the parties criticized the municipality’s process in considering the repeal of a designating by-law and the Review Board held that its role is not to investigate a municipality’s process or methods of exercising its powers. It stated, at para. 44:

The City, in defending its 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 municipalities exercise the discretion given to them under the *OHA*. It is not a form of quasi-judicial review.

[22] *Fan* is the only case cited by the Owner to support its position. In *Fan*, the objectors argued that the City of Hamilton failed to consult with its heritage committee prior to issuance of the notice, as is required by the *OHA*, thereby challenging the validity of the notice and the jurisdiction of the Review Board. The City Council there had passed a resolution conditionally issuing a notice of intention to designate a property, “provided the [heritage committee] approves.” The objectors argued that City Council had failed to follow its internal procedures and had failed to consult with the heritage committee before adopting the resolution. The Review Board found that City Council, by making the notice conditional on the approval of the committee after it adopted the resolution, had satisfied the requirement of the *OHA* that it consult with the committee before the giving of notice. The Review Board found that it had authority to determine whether there was a “procedural irregularity” under the *OHA*, its home statute, which would affect its jurisdiction but not authority to determine whether internal municipal procedures had been followed.

[23] The Review Board’s approach in *Fan* did not extend to a qualitative assessment of the nature and extent of the City’s consultation process but only considered whether the minimum statutory pre-condition had been met. It found that the heritage committee’s approval of a resolution to give notice of intention to designate a property met the pre-condition and was not a procedural irregularity. It stated, at para. 54:

“The Review Board does not accept the supposition that when a municipality accepts a committee’s recommendation – and acts on it – the committee has not therein been ‘consulted’.” Thus, the Review Board does not read *Fan* in the expansive way suggested by the Owner, which would recognize a broad authority to inquire into and rule on the relative quality of municipal procedures respecting consultation.

[24] In summary, the Review Board finds that, while it has jurisdiction to consider whether the pre-conditions to the commencement of a proceeding have been met, that

exercise does not extend to an investigation into, or a qualitative assessment of, the process followed by the City in meeting those pre-conditions.

### **The Remaining Issues**

[25] The Owner argues that s. 29(2) should be interpreted so as to require a municipality to consult with its heritage committee in a way that allows for meaningful dialogue with an owner and sufficient time for the committee to consider in depth not just a staff report but any report or information available regarding the cultural heritage value or interest of a property prior to the committee providing advice to the municipal council. The Owner cites some cases that have discussed consultation and, while conceding that it is not legally binding, looks to the guides that form the Ontario Heritage Tool Kit, published by the Ministry of Culture, for guidance on the proper approach to consultation.

[26] Given the Review Board's finding on the first issue, these issues will not be addressed in any depth, but a few comments are appropriate in light of the submissions of the parties.

[27] First, the *OHA* speaks only to consultation by a municipal council with its heritage committee as a pre-condition to giving notice. Although the Ontario Heritage Tool Kit recommends that a municipality discuss designation with an owner "as early as possible in the process", and regardless of whether or not that is a wise approach, there is no statutory requirement that staff, a heritage committee or a council consult with an owner as a pre-condition to giving notice, and there is no statutory requirement that an owner consent to designation.

[28] Second, while the Ontario Heritage Tool Kit contains a number of suggestions for making heritage committee operations effective, the *OHA* and the regulations do not establish any specific process a municipality must follow. This leaves the choice of an appropriate consultation process up to each municipality. The nature and extent of the

consultation process adopted by each municipality will vary depending on a number of factors, such as resources.

[29] Third, when the s. 29 designation process is considered as a whole, it seems evident that, when an owner objects to a proposed designation, the detailed and independent evaluation of whether a property has cultural heritage value or interest, including a full opportunity to lead evidence and cross-examine witnesses and have an independent review of expert reports, is intended to occur in the course of a proceeding before the Review Board. The heritage merits of the subject property will be the subject of the Review Board's findings of fact and recommendations to City Council, which must consider them before making a final decision on designation.

## **CONCLUSION**

[30] This process began when the Owner claimed a procedural defect in the referral of this matter to the Review Board and, as a result of such a claim, with the three questions posited by the Review Board, as set out in paragraph 2 above. After considering the written and oral submissions of the parties, the Review Board answers these questions as follows:

1. As discussed above, the Review Board does have jurisdiction to interpret s. 29(2) and determine whether the City has complied with the requirements of the section but that such an interpretation and review is necessarily constrained by a plain reading of the *OHA*. Such a review, undertaken by the Review Board, is necessarily restricted to a binary question of compliance: was the procedural step met or not? No qualitative review is possible or proper.
2. Section 29(2) of the *OHA* should be interpreted on the basis of a plain reading of the words of the section. In this case, the evidence indicates

that a consultation took place between the City and its municipal heritage committee and, therefore, there was no procedural defect.

3. Finally, the Review Board answers question 3 in the affirmative. The City has complied with the requirements of s. 29(2) of the *OHA*.

[31] Therefore, the Review Board is satisfied that there was no procedural defect in the referral of the matter to it and, as a result, the proceedings may continue in the ordinary course.

[32] In light of this, the case coordinator is directed to schedule a Pre-hearing conference as soon as practicable to canvas the parties on settlement, simplification of issues, agreed statements of issues/facts, and whether the parties are ready to set the matter down for a hearing and the procedural matters arising therefrom.

*“Daniel Nelson”*

DANIEL NELSON  
MEMBER

*“Marcia Valiante”*

MARCIA VALIANTE  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Conservation Review Board**

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