Conservation Review Board
Commission des biens culturels

ISSUE DATE: November 25, 2020 **CASE NO.:** CRB 1914

PROCEEDING COMMENCED UNDER subsection 31(5) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Objectors:	Rick Ferron, David Vida
Owner:	The Corporation of the City of Niagara Falls
Subject:	Proposed Repeal of Designation By-law No. 2010-90
Property Address:	7565 Lundy's Lane (Former Parks, Recreation & Culture Building)
Legal Description:	PT TWP LT 132 Stamford as in ST51544, ST23564, ST22849 & ST21927 Except RO180983 & PT 1, 59R594
Municipality:	City of Niagara Falls
CRB Case No.:	CRB1914
CRB Case Name:	Ferron v. Niagara Falls (City)

APPEARANCES:

Parties	**Counsel*/Representative**
Rick Ferron, David Vida	Self-represented
City of Niagara Falls	David Neligan*

HEARD: in writing
ADJUDICATOR(S): Daniel Nelson

ORDER

Introduction

[1] A hearing in this matter began on August 31, 2020 in respect to the objections by Rick Ferron and David Vida ("Objectors") to a Notice of Intention to Repeal Designating By-law No. 2010-90 ("By-law No. 2010-90") for the property at 7565 Lundy's Lane in Niagara Falls, Ontario (the "property"). The property is owned by the City of Niagara Falls ("City").

[2] During the hearing, Counsel for the City, Mr. Neligan, raised a question about the nature and scope of evidence that can be heard by the Review Board in cases dealing with a repeal of designation. The Review Board treated this question as an interlocutory motion in writing, notwithstanding the Review Board's *Rules of Practice and Procedure* ("Rules"), and adjourned the matter to allow for the Objectors, acting *pro se*,[1] to consider their position and seek legal counsel if they wished.

[3] The Review Board issued a procedural order setting out the process by which submissions on the motion would be exchanged and provided to the Review Board on September 3, 2020 (the "September 3 Order").

[4] The Review Board received submissions from the City, consisting of a factum and book of authorities in accordance with the September 3 Order. No submissions were received from David Vida. The Review Board received an email from Rick Ferron on September 15, 2020, which the Review Board took to be his submissions on the motion. No further submissions from any party were received either before or after the deadlines set out in the September 3 Order.

[1] A self-represented party.

Background

[5] The property was designated by the City under the *Ontario Heritage Act* ("OHA")[2] on June 28, 2010 by By-law No. 2010-90. After consulting with its Heritage Committee, which recommended maintaining the designation, the City resolved to repeal the designating bylaw and issued the Notice of Intention to Repeal the Designating By-law on July 27, 2019 ("NOIR").

[6] The Objectors, within the timeframe prescribed by the OHA, submitted objections to the NOIR and the matter was referred to the Review Board.

[7] At the hearing, the Review Board, in opening remarks, reminded the parties of its jurisdiction, as is its normal practice. Generally speaking, it has long been the position of the Review Board that its jurisdiction is restricted to independently evaluating a particular property as it relates to the criteria for determining cultural heritage value or interest as set out in O. Reg. 9/06. As a corollary to this, since the OHA is silent, the Review Board, likewise, has long taken the position that, on a repeal of designation, the same evaluation *vis-à-vis* O. Reg 9/06 is performed albeit in reverse.

[8] The City, notwithstanding this position, wished to call evidence unrelated to the evaluation criteria set out in O. Reg 9/06.

Submissions of the City

[9] The City takes the position that the Review Board can hear and consider evidence that does not relate to heritage attributes and the prescribed criteria in O. Reg. 9/06 because:

- The OHA does not prescribe criteria for the Review Board to consider in repeal of designation matters.

[2] RSO 1990, c. O-18.

- That, by imposing the use of O. Reg 9/06 criteria on repeal of designation matters, the Review Board creates absurd results that cannot have be the intention of the Ontario Legislative Assembly.

- The Review Board relies on a comment in the Divisional Court's decision in *Eden Mills*[3] in support of its position, which is *obiter dictum* and therefore not binding.

- That the Review Board's position on restricting the type of evidence that it can hear has been inconsistently applied.

[10] The City seeks, on this motion, to have the hearing rescheduled and the subject evidence admitted for consideration or, in the alternate, that the matter proceed directly to a determination and a report.

Submissions of Mr. Ferron

[11] As the submissions of Mr. Ferron are brief, the Review Board will quote the key paragraphs verbatim:

> In short, if I understand this correctly, the property owner has stated that there is no dispute that the cultural, heritage, and architectural merits of the historical designation still exist. Rather, they have instead made a motion before the CRB to create an entirely new legal precedent, whereby the CRB would have to also consider other factors such as plans the property owner may have for the property, logistical concerns related to preservation, and restoration costs. If successful, such a move would basically render hollow the entire process of heritage designation in Ontario, as it would allow municipalities (and by extension property owners) numerous loopholes to have designation rescinded, including damage caused by neglect. I certainly do not have the resources to offer any formal legal counter to this reinterpretation.
>
> The purpose of entrusting municipalities with the power of heritage designation is to ensure that our heritage withstands the fleeting whims of property owners and term elected councils. This motion is an attempt to

[3] *Friends of Eden Mills Inc.* v. *Eramosa (Township),* 1998 CanLII 17742 (ON SCDC) (hereafter "*Eden Mills*")

> change all of that. I will have to trust that the [Review] Board will make a ruling that is in keeping with the intent and spirit of the legislation.

Analysis

[12] The City agrees, in its submissions, that the property continues to have cultural heritage value or interest and does not appear to claim that it has lost any of its heritage attributes. Thus, the matter of cultural heritage value or interest and the heritage attributes protected thereby are not at issue in this motion and, presumably, subject to the submissions of the City, would not be when a hearing in this matter is eventually reconvened.

Role and Jurisdiction

[13] Before the Review Board turns specifically to the City's four arguments in support of its motion, it is of fundamental importance that the nature and scope of the Review Board's role and jurisdiction be understood. Much turns on the City Counsel's statement in paragraph 31 of the City's factum:

> "The [Review] Board is established under section 24 to review municipal and ministerial decisions made under the Act [OHA]. If the Board cannot consider the same evidence as the municipality who made the decision, it cannot fully and adequately perform its function to review that decision."

[14] Counsel for the City, in this paragraph, makes a fundamental error, from which the rest of the City's arguments flow and, as fruit of a poisoned tree, are, therefore, also flawed, unfortunately.

[15] Put bluntly, the Review Board does not review municipal or ministerial decisions: "It is not a form of quasi-judicial review."[4] Nor is it a body to hear appeals from a municipality's decision. If parties wish to seek such a review, they must avail themselves of the superior and appellate courts' judicial review power.

[4] *Trothen v. Sarnia (City),* 2016 CanLII 29998 (ON CONRB) at para. 44. (hereafter "*Trothen*")

[16] Rather, “[i]t 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.”[5] The Review Board makes an independent assessment of the evidence of the parties in order to make its recommendations as to whether a subject property is one of cultural heritage value or interest or not within the parameters of the OHA. It is a subject matter expert in cultural heritage value or interest. It is not an expert in broader public policy issues that may shape a municipality’s final decision.

[17] This, of course begs the question: if the Review Board is not an appellate body, then what is it? While there are important differences, in some respects, the Review Board, in its role, is closer in function to a royal commission or public inquiry, which likewise independently receives and evaluates evidence and renders a report to the applicable decisionmakers who established the commission. With respect to the OHA, the municipality, as decisionmaker, is legally obligated to consider a Review Board’s report before making its final decision but is not bound by it.[6]

[18] There are, on the other hand, very few constraints on municipalities. As a democratic decision-making body, municipal councils are only constrained, in this area, by the OHA, the applicable common law decisions which interpret it, and, presumably, by subsequent evaluation by electors at the ballot box. The Divisional Court’s decision in *Tremblay* identifies the purpose of the OHA and, by doing so, identifies the way in which a municipality must act in carrying out such responsibilities:

> The purpose of the Act is to provide for the conservation, protection and preservation of the heritage of Ontario. In order to protect the heritage of Ontario, municipalities have been given the power to designate the properties of their choice and thus to suspend certain private property rights.

[5] *Ibid*., at para. 45.
[6] OHA, s.29(14).

> **Those provisions of the Act must be applied in such a way as to ensure the attainment of the legislature's objectives** [emphasis added].[7]

[19] The question every municipality must grapple with is whether or not, in making decisions pursuant to the OHA, they are ensuring the attainment of the legislature's objectives, which is a positive obligation imposed on municipalities by the province. Again, to quote *Tremblay*:

> The decision to designate a property is clearly discretionary. However, there are limits on the exercise of discretion where fundamental constitutional and societal interests are at stake. That discretion must be exercised 'with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter'.[8]

[20] To further complicate such questions, the City, in this case, is both the owner of this heritage property and a regulator of it. Therefore, the City finds itself, in effect, requesting repeal of designation from itself. Self-dealing, while absolutely permitted in situations such as this by the OHA, should give rise to natural caution. As such, it may be useful for any municipality to reflect on prior Review Board cases where owners have requested a repeal of designation. Specifically, the Review Board, in *Armstrong* noted:

> 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…[9]

[21] To be clear, however, it is not the role of the Review Board to investigate such quandaries and whether a municipality is meeting its objectives under the OHA. Again – that is the role of the courts.

---

[7] *Tremblay v. Lakeshore (Town)*, 2003 CanLII 6354 (ON SCDC) at para. 15. (hereafter "*Tremblay*")
[8] *Ibid*., at para. 18, citing *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC).
[9] *Armstrong v. Goderich (Town),* 2016 CanLII 27018 (ON CONRB) at para. 60. (hereafter "*Armstrong*")

No Prescribed Criteria

[22] This brings us to the first argument raised by the City: that the OHA does not set out the requirements to be considered by the Review Board (or a municipality for that matter) in repeal of designation matters.

[23] This question was dealt with conclusively in *Trothen*:

> 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.[10]

[24] After reviewing a number of Review Board cases that had previously dealt with this issue, the decision goes on to state:

> …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.[11]

[25] The Review Board considers the decision in *Trothen*, (amongst other decisions) to be a full answer to the question of appropriate criteria for consideration of repeal of designation matters, whether under s. 31 or s. 32 of the OHA. After all, if the Ontario Legislative Assembly enacted criteria for designation, it is logical, in the absence of any other statutory direction, to come to such a conclusion, *a priori.* Counsel for the City appears to be making a common bootstrapping error of assuming that a tribunal can create authority out of statutory silence; it cannot.

---

[10] *Trothen* at para. 48.
[11] *Ibid*., at para. 53.

Absurd Result

[26] The City argues that, by artificially constraining its jurisdiction, and thereby restricting its ability to hear evidence, in repeal of designation hearings, the Review Board creates absurd results because it cannot hear the City's non-heritage-related evidence that led the City to make its decision to repeal.

[27] This could well be true but only if one assumes that the role of the Review Board is to review municipal decisions while, at the same time, deciding that a lack of specified criteria in repeal of designation cases is a lacuna. Regrettably, for the City, and as previously discussed, this is not the case.

[28] As an independent evaluator of the evidence of cultural heritage value or interest, the Review Board can still hold a hearing on a repeal of designation case where a municipality concedes that such value remains. It may not be a long and complicated hearing if the identified heritage attributes giving rise to cultural heritage value or interest have not been lost, but that does not diminish the importance of that hearing, as a public process, the public report that is written therefrom, and the municipality's mandated public re-evaluation of the decision after considering that report, which it must do in accordance with the OHA.

[29] The Review Board also notes that such an argument was specifically rejected in *Armstrong*, which Counsel for the City fails to note in his factum despite quoting the case elsewhere: "…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."[12]

[30] The Ontario Legislative Assembly decided that there would be an opportunity for members of a community to challenge a municipality's determination to repeal designation of a property notwithstanding cultural heritage value or interest, which then

[12] *Armstrong*, at para. 60.

triggers a public hearing and a public process of re-evaluation and required consideration of the Review Board's report. To suggest that this important process is absurd is both unfair to concerned Ontarians and a misunderstanding of the Review Board's important role as an independent evaluator of cultural heritage value or interest.

Relying on Obiter Dicta

[31] The Review Board's long-held conclusion that O. Reg 9/06 also applies to any analysis of a repeal of designation, discussed above, was, no doubt, grounded in a certain comment of the Divisional Court's decision in *Eden Mills*, *viz*.: "Logically [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 recommendations (which the Council must consider but need not necessarily follow - as Council did here)."[13]

[32] In this regard, Counsel for the City is correct. The Divisional Court's comment, above, was likely *obiter dictum*.[14] But the significance of such a conclusion, on the City's part remains unclear. The Review Board does not consider it binding but it is highly persuasive and serves only to reinforce the *a priori* conclusion, discussed above, that the Review Board's jurisdiction is limited to an independent evaluation of a property *vis-à-vis* O. Reg. 9/06 (whether it relates to designation or the repeal of designation).

[33] The City, in paragraph 42 of its factum states: "Despite the seemingly inconsequential nature of Court's statement, this [Review] Board has heavily relied on *Friends* [*Eden Mills*] to nullify any non-heritage evidence by municipalities or private property owners seeking to repeal a designating by-law." The City, in paragraph 43 went on to state: "The Act [OHA] is completely silent on the intended scope of the Board's inquiry under section 31. It is the Divisional Court's lone statement in *Friends* [*Eden Mills*] which has placed a limitation on the Board's jurisdiction that is not provided

[13] *Eden Mills,* at para. 15.
[14] Latin for "something said in passing". In this sense, it refers to comments made incidentally by the judge and not directly tied to the reported key facts and law of the case and the judge's conclusions flowing from and is, therefore, non-binding. For a singular comment, the term is "obiter dictum" while "obiter dicta" is the plural form.

for at law and which weakens the ability of the Board to appropriately review lawful municipal decisions."

[34] Regrettably, this is yet more fruit from the poisoned tree. It is, for the reasons discussed above, not the job of the Review Board to review municipal decisions. The claims of the City are only relevant if one accepts its erroneous conclusions about the scope and jurisdiction of the Review Board. Since those conclusions are wrong, then these arguments, which flow therefrom must also be summarily rejected.

[35] In addition, the City asserts, as cited above, that the Divisional Court's comment was "insignificant", but the Review Board rejects such a characterisation. There is a dearth of appellate court decisions dealing with the OHA due, no doubt, to the nature and jurisdiction of the Review Board. As this comment, from the Divisional Court, is the only judicial comment that addresses the question of what can and cannot be heard by the Review Board then it is, *ipso facto*, significant albeit nonbinding.

Inconsistent Application

[36] With respect to the final argument of the City, Counsel for the City begins with the following proposition at para. 44 of the City's factum:

> While it has been consistently clear that the Board's focus is on the heritage merits of a property, but [sic] it has not consistently stated that it will only hear evidence directly related to heritage attributes and tied to the prescribed criteria.

[37] Further down, in its factum, at paragraph 56, Counsel for the City goes on to say, in part, after citing several cases:

> In each of these cases, however, the [Review] Board heard the evidence of the owner or municipality seeking to repeal the by-law before determining if it was relevant or sufficient to outweigh whether the [p]roperty continues to hold cultural heritage value or interest. The City in this matter, submits that it deserves to have its evidence heard, scrutinized and considered before the [Review] Board makes a determination and issues its recommendations back

> to Council. If the [Review] Board does not find in favour of that evidence, that is its prerogative, but the evidence should still be heard.

[38] The City is correct insofar that the Review Board may choose to hear evidence or not but, for the reasons stated above, non-heritage evidence is irrelevant, unless, of course, the City can show that it somehow directly connected to the criteria set out in O. Reg. 9/06. Individual members of the Review Board may give more time or less to such arguments but those individual decisions on latitude given to a party does not change the fundamental nature of the Review Board and its jurisdiction.

[39] In any event, while the doctrine of *stare decisis*[15] is of fundamental importance to the administration of justice, the Review Board is not, strictly speaking, bound by the doctrine, and even if there were a few cases that did not consistently apply the principle (an argument not accepted by the Review Board) that does not diminish the overwhelming number of cases that do.

[40] Ultimately, the argument is irrelevant as it is built on the previously discussed erroneous conclusions about the role of the Review Board and, in any event, appears to rely too heavily on a strenuous overreading of selective quotes from previous Review Board decisions.

Alternative Relief

[41] If the City's primary request that the Review Board admit the subject evidence is not granted, the City requests, in the alternative, at paragraph 61 of its factum, that the matter proceed directly to a determination and report by the Review Board.

[42] Such an alternate request cannot be entertained. No discretion is given to the Review Board by the OHA. Once an objection to the issuance of a NOIR is forwarded

[15] A legal doctrine that judges are bound by the relevant and applicable decisions that came before.

by a municipality to the Review Board, it "**shall** hold a hearing open to the public…" [emphasis added].[16]

[43] In this case, the hearing was quickly adjourned, as a result of the City's motion, before the Review Board could "determine whether the property in question should be [de-] designated…"[17] and it heard no submissions or evidence with respect to such repeal of designation. To proceed directly to a report, without hearing from the parties, would be contrary to spirit, if not the letter, of the law and, would in particular, be very unfair to the Objectors. While it is possible for the hearing to be continued in writing, for example, rather than *viva voce*, the Review Board received no submissions on this.

[44] Thus, the request for such alternate relief, as sought by the City is, at best, premature.

Conclusion

[45] The City's arguments, in this motion, have either previously been conclusively considered by the Review Board in ways unfavourable to the City's position, were otherwise unpersuasive or premature, or were grounded in erroneous conclusions about the Review Board's jurisdiction and role.

[46] Therefore, for the reasons set forth above, the City's motion is denied in its entirety.

[47] The Review Board's case coordinator is, therefore, directed to:

- Schedule a pre-hearing conference ("PHC") as soon as practicable, pursuant to the September 3 Order, to consider any procedural matters a party may

[16] OHA, s. 29(8), which applies to repeal of designation matters by operation of s. 31(6).
[17] *Ibid*.

wish to bring to the Review Board in advance of the resumption of the hearing;

- Subject to any further direction of the Review Board arising from the PHC, schedule dates for the resumption of the hearing as soon as practicable thereafter.

"Daniel Nelson"

DANIEL NELSON
MEMBER