

May 21, 2024

Sent by email

Jacob Polowin
Direct +1 613 786 0134
jacob.polowin@gowlingwlg.com
File no. 02433417

Caitlin Salter-MacDonald
Clerk
City of Ottawa
110 Laurier Avenue West
K1P 1J1

Dear Ms. Salter-MacDonald:

Re: 501 Cole Avenue
Application for repeal of Ontario Heritage Act Part IV designation

We are the lawyers for Tony and Anita Cassone, the owners of the property located at 501 Cole Avenue (the "**Property**"), which is designated under Part IV *Ontario Heritage Act* ("**OHA**") pursuant to by-law 2022-348 (the "**Designation By-law**"). Please accept this letter and enclosures as our clients' application under s. 32(1) of the *OHA* to repeal the Designation By-law in its entirety.

Background

In May 2022, our clients submitted a notice of intention to demolish the building existing on the Property. At the time, the Property was listed on the City's non-designated heritage register. The Ward Councillor then requested a report from City heritage staff regarding the designation of the Property under Part IV of the *OHA* be brought forward to the City's Built Heritage Subcommittee ("**BHSC**") and Council. On June 8, 2022, City of Ottawa heritage staff submitted a report (the "**Staff Report**") that evaluated the Property under the criteria prescribed in the *OHA* and recommended that Council not designate the Property under Part IV of the *OHA*. Staff's recommendation was based on their conclusion that:

As the house at 501 Cole Avenue **demonstrates limited historic or architectural value**, staff are of the opinion that **the property's designation under Part IV of the Ontario Heritage Act would not contribute meaningfully to the City's designation program** nor address any gaps in regard to associative or community histories not yet represented through heritage designation [*emphasis added*].

Notwithstanding Staff's recommendation, on June 20, 2022, BHSC unanimously approved a motion that ignored staff's opinion regarding the design value of the Property and reversed staff's recommendation, instead recommending that Council designate the Property under Part IV of the *OHA*. The motion was brought without notice to our clients, and without the ability to properly respond. The motion did not identify any study or other evidentiary basis for reversing staff's recommendation and its opinion regarding design value and had no basis beyond the request of the Westboro Community Association. Planning Committee and Council adopted BHSC's recommendation without debate or further study.

On July 7, 2022, our client received Notice of the City's intention to designate the Property. On August 4, we submitted, on our client's behalf, an objection to the Notice of Intention to Designate, based on the grounds set out in this letter. On October 3, 2022, BHSC refused to withdraw the Notice of Intention to Designate, notwithstanding the utter of lack of evidence justifying designation. Instead, BHSC voted to recommend that Council proceed with designation, and on October 5, 2022, Council passed the Designation By-law.

The Designation By-law stated that the Property meets three of the nine designation criteria listed in Ontario Regulation ("**O. Reg 9/06**):

1. The property has design value or physical value because it is a rare, unique, representative or early example of a style, type, expression, material or construction method.
4. The property has historical value or associative value because it has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community.
7. The property has contextual value because it is important in defining, maintaining or supporting the character of an area.

At the time of the passage of the Designation By-law, the City was empowered to designate a property under Part IV if it met one of the criteria listed in O. Reg 9/06. Our client appealed the adoption of the Designation By-law on October 19, 2022.

The appeal was heard by the Ontario Land Tribunal ("**OLT**") on June 6 and 7, 2023. At the hearing, the OLT heard from witnesses including the City's heritage planner Leslie Collins, who "testified that, in her view, the Property does not have enough significance to qualify for designation under the OHA no matter the individual criterion."¹

The OLT rendered its decision on February 20, 2024, finding that the Property only satisfies criterion 4 (historical or associative value), and does not satisfy criteria 1 or 7. The OLT directed the City to amend the Designation By-law accordingly. The Tribunal maintained the designation of the Property on the basis that at the time of the hearing, designation only required that the Property at least one of the nine criteria set out in O. Reg 9/06.

Since the time of the hearing, the statutory standard for designation has been made more stringent, such that the Property no longer qualifies for designation. As such, the Designation By-law should be repealed in its entirety.

¹ *Cassone v. Ottawa*, para 16.

Grounds for repeal of the Designation By-law

1) Designation now requires two criteria rather than one

A property may only be designated under Part IV of the *OHA* if it meets the criteria prescribed in O. Reg 9/06. At the time of the passage of the Designation By-law (and of the hearing of our clients' appeal), s. 1(2) of O. Reg 9/06 provided that a property may be designated if it "meets one or more" of the criteria.

On January 1, 2023, O. Reg 9/06 was amended such that s. 2(3) now provides that the property may only be designated if it "meets two or more" of the criteria. In light of the OLT's ruling in *Cassone v. Ottawa*, it is clear that the Property would not qualify for designation today.

2) A repeal application must be evaluated under the current regulations

The case law demonstrates that a repeal application under s. 32 must be considered under the statute and regulations as they exist at the time of application, and not at they existed at the time of designation.

In *Tremblay v. Lakeshore (Town)*, the Ontario Divisional Court emphasized that the purpose of the *OHA* is to balance the rights of landowners with the community interest in preserving heritage, and that the Act must be applied in a way to ensure the attainment of the legislature's objectives.²

In *Trothen v. Sarnia*, the former Conservation Review Board relied on *Tremblay* in developing the test for evaluation of a repeal designation.³ In that case, the City of Sarnia brought an application to repeal the designation of a property that the City had designated in 1986, prior to the enactment of O. Reg 9/06. Critically, the Board found that in considering an appeal of the repeal, it was bound by O. Reg 9/06, even though the regulation had not been in force at the time of designation:

the appropriate test for [*the Board*] 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.** "*[emphasis added]*".⁴

In developing this test, the Board emphasized that the balancing of interests required by the *Tremblay* decision is accomplished by complying with the *OHA*:

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." **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.**⁵

² *Tremblay v. Lakeshore (Town)* 2003 CanLII 6354 (Ont Div Ct).

³ *Trothen v. Sarnia (City)* 2016 CanLII 29998 (On CRB).

⁴ *Ibid* at para 53.

⁵ *Ibid* at para 43.

Trothen remains the leading case on the test for consideration of a repeal application.⁶ Based on this case, in evaluating our clients' application for repeal of the Designation By-law, the City must consider whether the Property retains cultural heritage value **within the meaning of O. Reg 9/06 as it currently reads**.

The OLT's decision in *Cassone v. Ottawa* makes it clear that the Property does not meet the regulation's current requirement that two of the prescribed criteria must be satisfied. Indeed, in light of the OLT's order to amend the Designation By-law, the by-law itself no longer meets the requirement for designation.

3) Consideration of the repeal application only considers the criterion listed in the Designation By-law

In considering our clients' application to repeal to the Designation By-law, the City (and ultimately the OLT, if necessary) will only consider the criteria listed in the Designation By-law itself. The City may not raise new criteria without amending the Designation By-law. In light of the OLT's decision in *Cassone v. Ottawa*, the Designation By-law only contains one criterion. For the reasons set out above, satisfaction of one criterion is not a sufficient basis for the City to refuse to repeal the Designation By-law.

In short, if this matter proceeds to the OLT, there is no circumstance in which the OLT will be able to find that the Property satisfies any of the criteria beyond criterion 7.

Conclusion

The repeal application is based on the above-noted reasons, as well as any additional reasons that may be raised by the applicant through the course of the application and potential appeal. Please find enclosed with this letter a report from Julie Harris.

Please direct any questions or notices regarding this matter to the undersigned.

Sincerely,



Jacob Polowin
Partner

JP

⁶ See, eg. *Chisholm v. South Stormont (Township)* 2022 CarswellOnt 5648 at paras 22-23.