

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: February 20, 2024

CASE NO(S): OLT-22-004554

PROCEEDING COMMENCED UNDER subsection 29(11) of the *Ontario Heritage Act*, R.S.O. 1990, c. O. 18, as amended

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| Appellant: | Tony Cassone |
| Subject: | Objection to designation By-law No. 2022-348 |
| Property Address: | 501 Cole Avenue |
| Municipality/UT: | City of Ottawa |
| OLT Case No: | OLT-22-004554 |
| OLT Lead Case No: | OLT-22-004554 |
| OLT Case Name: | Cassone v. Ottawa (City) |

Heard: June 6 to 7, 2023 by Video Hearing

APPEARANCES:

Parties

Counsel

Tony Cassone

Jacob Polowin

City of Ottawa

Timothy C. Marc

DECISION DELIVERED BY DANIEL NELSON AND ORDER OF THE TRIBUNAL

[Link to the Order](#)

INTRODUCTION

[1] The City of Ottawa (“City” or “Municipality”) has designated the property located at 501 Cole Avenue (the “Property”) under Part IV of the *Ontario Heritage Act* (“OHA”). Upon

issuing a Notice of Intention to Designate (“NOID”) the Property on July 6, 2022, the owner, Tony Cassone (“Owner” or “Appellant”) filed a letter of objection on August 4, 2022. The City Council passed the designation by-law in respect to the Property on October 5, 2022. Mr. Cassone subsequently filed a notice of appeal with the Ontario Land Tribunal (“Tribunal”).

[2] There were no requests for status. The only Parties to the Video Hearing were the City and the Owner.

[3] The Parties’ Joint Book of Documents was entered into evidence as Exhibit 1 while the Joint Submission of Photos was entered as Exhibit 2, and each was relied on by the Parties.

BACKGROUND

[4] The house, on the Property, is a two- and one-half storey red brick building located in the Westboro or Highland Park neighbourhood of the City. It was built c. 1912 but other dates of 1913 and 1914 were referenced by the witnesses.

[5] Prior to designation, the Property was added to the City’s Heritage Register in 2019 and, the Westboro Community Association requested full designation in October 2021.

[6] The Owner purchased the Property and submitted a notice of intention to demolish the house in May of 2022 and indicated his intention to build two new homes on the land.

[7] City Heritage staff prepared a report recommending against preservation on June 8, 2022. The City’s Built Heritage Subcommittee, notwithstanding the report, voted to designate the property. The NOID was served, and City Council passed the by-law designating the property.

[8] Significantly, immediately adjacent to the Property is the Cobble Cottage, at 420 Kenwood Avenue, which has been designated under the OHA as an important Arts and Crafts style building.

[9] Much was made by counsel for both Parties about the fact that City staff disagreed with the designation. It should be noted that it is City Council that makes the determination of Cultural Heritage Value or Interest (“CHVI”) and designation under the OHA and not staff. While it behooves a municipal council to consider the reports of staff, it is, under the OHA, the responsibility of the council to make that decision and they are certainly not bound by such reports.

ISSUES

[10] The issues before the Tribunal are whether the Property meets any one of three designation criteria from Ontario Regulation No. 9/06 (“O.Reg 9/06”) identified by the City:

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.

[11] There was some discussion that the Property also had contextual value because it was physically, functionally, visually or historically linked to its surroundings. However, there was little to no evidence presented in respect of this criterion and, therefore, it will not be discussed in this Decision.

[12] The Issues List, prepared by the Parties, also identified issues in respect to a study and whether a study is required for designation. This was not discussed at the Hearing and is not relevant to the question of designation itself, in any event, and, therefore, has also not been considered in this Decision.

CASE FOR THE OWNER

[13] The Owner's position is that the Property fails to meet any of the four specified designation criteria from O.Reg 9/06 and the designation by-law was only adopted to prevent redevelopment of the area. Indeed, while not relevant to the determination of the questions before the Tribunal, the Owner's position is that this was an attempt to prevent redevelopment and not a legitimate desire to protect a heritage property.

[14] The Owner called Julie Harris, a well-known heritage planner and she was heard as an expert witness. Her Cultural Heritage Impact Statement ("CHIS") for the Property and the neighbouring property, 420 Kenwood Avenue, which is already designated under the OHA, was in the Joint Book of Documents, along with her expert witness statement. The CHIS investigated whether the demolition of the Property would impact 420 Kenwood Avenue rather than a detailed evaluation of the Subject Property. The CHIS was originally commissioned by the City.

[15] Ms. Harris acknowledged in the "Research" section of her CHIS that she did not complete in-depth primary research in libraries and archives as that was outside the scope of the project when she was retained.

[16] The Owner also called Leslie Collins, a heritage planner with the City, who appeared at the Hearing under summons as an expert witness. She testified that, in her view, the Property does not have enough significance to qualify for designation under the OHA no matter the individual criterion.

[17] The Owner also called Murray Chown, who is a planner but without expertise in heritage matters and did not appear as an expert witness. He argued that intensification and redevelopment was in keeping with the Provincial Policy Statement ("PPS"), but this is not relevant to an analysis of O.Reg 9/06. He was retained to prepare the application to demolish the existing building and rebuild two new homes in its place.

Design Value or Physical Value

[18] In Ms. Harris' view, the original owner likely built the house, the architect is unknown, and it appears to be a plain house, perhaps out of one of the many pattern books that circulated at the time. In her CHIS, she describes it "...very typical of residences built in the 1910s and 1920s for well-to-do families in new subdivisions of what is now the City of Ottawa...". She also describes it as "...a typical and austere example of Edwardian Neoclassical vernacular residential architecture..."

Historical Value or Associative Value

[19] The area was subdivided and sold by John E. Cole, the owner of the Highland Park Dairy Farm. Ms. Harris' position is that there is really no direct association with the Cole Family, who, while they subdivided and sold the land, were not developers and, as such, did not build the house on the Property. While it was an early home in the area, it was neither the first, nor, in her view, particularly interesting.

[20] The original owner was a William Pert, who appears to have been a messenger and middle manager who did not finish high school, failed the entrance exams for the civil service and held a position with the Bank of Nova Scotia.

[21] The Property was not built as a church manse but was later acquired and served as a manse from 1943-1964 for Highland Park Baptist Church. She found nothing significant about the ministers who served at this time. Ms. Harris was also unconvinced of the importance the City placed on the fact that strawberry socials were held there during the house's time as a church manse.

Character of an Area

[22] Ms. Harris struggled with the Municipality's definition of the area. Highland Park was a name apparently chosen by Mr. Cole. Other people apparently consider themselves to be

part of Westboro. It was her testimony that there was no defining character to the area. Generally speaking, there was no requirement for larger homes. There was no evidence that larger homes were found in Highland Park, as part of a vision of the Coles. There were no covenants on the homes. She acknowledged the mature trees, but this is not particularly surprising in older subdivisions. Nor did she find the generous setbacks significant, which may have been driven by the need for sewers or, if not sewers, then drainage before municipal sewers were installed. She noted that there was a tendency at the time for larger setbacks in order to enjoy the Property and provide breezes for passive cooling.

[23] In her review of the subdivision, consisting of approximately nine City blocks, she found it was entirely residential with one institutional property, an old school and a church. Generally, the buildings were family homes of one- to three- storeys. Her review showed an area of mixed housing, some of which were historical but, in her view, 30-40% of the houses were built since about 1960. No quantitative review of the neighborhood was put before the Tribunal.

[24] The absence of street curbs is also not an indicium. It is not a village, nor does it have a village-like feel. It was called a suburb by Mr. Cole. It did not have a main street, post office or commercial activities. It is, in her view, just a residential area with a church and a school.

[25] She summarized her examination of advertisements of the time for the area as being a nice place to live, with good prices and good neighbours. These advertisements, nor, indeed, a formal quantitative review of these advertisements, were not put before the Tribunal, however.

CASE FOR THE MUNICIPALITY

[26] The Municipality called Mark Thompson Brandt as a senior conservation architect, and expert witness who testified that the Property should be designated under the OHA because of its strong associative and historic value to the community.

[27] He also expressed his concern that the demolition of the Subject Property would have a negative impact on the neighbouring Cobble Cottage, which is protected under the OHA already. It is important to note, however, that impact is not a criterion under O.Reg. 9/06 and is therefore not relevant. His analysis of the Owner's intentions, after demolishing the Property, is also not relevant.

[28] Similar to the restrictive research undertaken by Ms. Harris, Mr. Brandt acknowledged that his testimony was based on a review of the materials prepared by the City and the Owner only. It does not appear that Mr. Brandt conducted any independent research.

[29] Much of Mr. Brandt's testimony is based on a differing interpretation of the limited materials put before the Tribunal. In effect, where Ms. Harris finds the evidence of little significance, Mr. Brandt finds great significance.

Design Value or Physical Value

[30] Mr. Brandt does not really discuss this criterion either in his testimony or in his witness statement. He argued that the Property was a modest representative example of its kind. It is solid and well-built and is an example of a vernacular interpretation of a functional domestic building.

Historical Value or Associative Value

[31] Relying on Ms. Harris' information, Mr. Brandt argued that the Cole Family were of significance. They were an important early family involved in farming and business. The advertisements referenced by Ms. Harris show, in Brandt's view that they were well-known. He suggests that the marketing came from a vision and the selling of a dream. This Property is an example of that vision.

[32] In particular, he places great emphasis on the house's history as a manse as a center for community events. The manse is tied to Highland Park Baptist Church, which was the first church in Highland Park. He discusses some of the ministers and discussed, at length, the fact that the building was the host of an annual strawberry social, which are, apparently still talked about.

[33] These two points, added together, demonstrate, in his view, the importance of associative value of the Property.

Character of an Area

[34] Mr. Brandt had no difficulty in determining the character of the area. It developed as a 19th century suburb. It is a fully residential area and he makes the important note that one should not be "hung up" on exact boundaries. It is, as an area, an early example of Ottawa's suburb development.

[35] It is important because of the rapid redevelopment of the area. The nine blocks of Highland Park have, in his view, largely survived intact. This rareness does matter in his view. He also notes a cluster of OHA designated or listed properties in the area. While Ms. Harris' testimony suggests a quantitative evaluation of the area; Mr. Brandt's appears to be qualitative although this is not necessarily clear from his testimony and witness statement.

ANALYSIS

[36] The purpose of the OHA, fundamentally, is to preserve Ontario's built heritage. It does this by empowering municipalities to identify and protect real property (i.e., land) that has CHVI as determined by the designation criteria set out in O.Reg 9/06.

[37] Of course, if there is a disagreement on such designation, an owner can appeal to the Tribunal. Sometimes the determination of CHVI is straightforward and even obvious. In

other cases, it is less clear, and it is vital that the Parties bring evidence before the Tribunal to aid it in determining a Property's CHVI.

[38] This matter is one such case where the determination of CHVI is less than clear and where the evidence placed before the Tribunal was less than fulsome. As a largely historical evaluation, primary and secondary materials are vital for the Tribunal to consider in making a determination. This is why the Tribunal, in heritage matters, proffers its *Guidance to Parties on Expert Reports and Other Disclosure Materials*.

[39] Here, we have two competing expert witnesses arguing over the significance of historical data without having placed that historical data before the Tribunal. We have a CHIS prepared without historical or archival research. We have witness statements made without any direct reference to primary or secondary sources. Instead, the Tribunal must evaluate the *viva voce* testimony of the experts referring to heritage resources not before it.

[40] Despite this marked lacuna, the Tribunal has no choice but to evaluate the Property based on the materials before it.

Design Value or Physical Value

The Property has design value or physical value because it is a rare, unique, representative or early example of a style, expression, material or construction method. (O.Reg. 9/06 (2)(1))

[41] The evaluative process for this criterion is set out in *Baker v Port Hope*:

To be representative of a style or type, the Review Board considers that the proponent should first describe the benchmark characteristics of a recognized style or type within the context of architectural history, and then provide evidence as to how the present example meets or is typical of that benchmark. Several classically inspired revival styles were prevalent in the first few decades of the 20th century, including the Beaux-Arts style, the Edwardian Classical style, the Modern Classical style and the Georgian Revival style. Each had their own characteristics and approach to using classical elements, varying in form, scale, decorative program, surface treatment and materials. Classical styles were also employed during the early 19th century in Canada: Palladian, Neoclassical, and Italianate... What are the characteristics that distinguish that style from others? In what ways

are the buildings in their current condition, typical of the style? All of these components are necessary in order to determine the extent to which each building conforms to the expected elements of the style.¹

[42] Neither Party undertook such an analysis. No benchmark characteristics of vernacular Edwardian Classicism were established and as used in this modest form before the Tribunal. It was not made clear how the Property, in its current condition, was of the style or not, which is the first step in an analysis of this criterion.

[43] The experts, in their testimony, simply assumed it was Edwardian Classicism (although, it is likely to be of that style) and, restricted their analysis, apparently, to whether it had design or physical value, generally, as a representative of the style. There was no discussion in respect to it being rare or unique, or early, nor about the materials used or the construction method being of importance. There was no discussion about it being representative either.

[44] Therefore, on the basis of the evidence before the Tribunal, such as it is, this Property does not meet this criterion and cannot be designated under such criterion.

Historical Value or Associative Value

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. (O.Reg. 9/06 (2)(4))

[45] For the Property in question to have historical value or associative value, a party must demonstrate that it has *direct associations* [emphasis added]. In this case, the

¹ *Baker v Port Hope (Municipality)*, 2019 CanLII 20795 (ON CONRB) at para 70. Note, however, that the determination of a style is not algebraic. As was noted in *Faghani v Toronto (City)*, 2018 CanLII 37799 (ON CONRB) at 59: "Some architectural styles (including the Georgian style), and the buildings that reflect them, are easily understandable and, therefore, easily categorized. Some designs are less obvious and pull together a variety of design elements, making it difficult to taxonomize them. Such difficulty does not vitiate the cultural heritage value or interest of such a design. There is a very good reason for that: architecture is both an art and a science."

evidence establishes that there are associations with the Cole Family, with the Highland Park Baptist Church as a manse, and with its connections as a hub for community events. Thus, the associations are linked to people, activities, and an organisation.

[46] In *Black v. Niagara-on-the-Lake*², the Tribunal noted:

Rather, in the view of the [Tribunal], to be “linked” within the context of this regulation necessarily means there must be some substantial or important connection between the property and its surroundings that “ensure[s] the attainment of the legislature’s objectives.” In other words, this important connection must establish CHVI.

[47] This quote is in reference to criterion 8 of O.Reg 9/06 but is a useful commentary on how to understand and analyze the criterion under consideration here. In order to attain the legislature’s objectives, are these associations direct enough, and significant enough to establish CHVI?

[48] There are, perhaps, some connection to the Cole Family but, in evaluating the evidence before it, these are not directly associated with the Property. They may have prepared the lots and sold them. They may well have advertised the sale of these lots but, once the lot was sold, the association ends. The connection, such as it is, does not give rise to CHVI in respect of the Property. Indeed, if this was significant enough, the City must designate every property subdivided and sold by Mr. Cole as having CHVI. Thus, to conclude that there is significance just because the lot was sold by Mr. Cole would lead to an absurd result.

[49] There are much more direct associations with the Highland Park Baptist Church and its role as a hub for community events and, in particular, the ‘famous’ strawberry socials held at the home. As has been noted in previous cases, the idea of “community” is a fluid

² *Black v. Niagara-on-the-Lake (Town)*, 2021 CanLII 44083 (ON CONRB) at 45.

one and “can be expanded, contracted, or specialized depending on the circumstances.”³ The idea of Highland Park as a community, or even the Church, as a community, can be easily established in this case, but what remains unclear is whether such associations were significant to either community. All that is before the Tribunal is that, in the view of Mr. Brandt, these strawberry socials are still talked about. Talked about by whom? This obvious question remained unanswered.

[50] If this place was so significant to the community, as a community hub, why did the church sell the manse? Was the sale driven by economic decisions, in which case the events may have been significant but were forced to end because of this necessity? Or was the sale driven by other reasons and could those reasons illuminate the significance of these events? Did the strawberry socials continue elsewhere after the manse was sold? Again, these questions remained, sadly, unanswered.

[51] Indeed, so many questions remain unanswered. It is impossible to determine whether or not these events were significant and, therefore, the Tribunal is unable to determine whether the Property meets this criterion and, therefore, the Property cannot be designated under this criterion.

Character of an Area

The property has contextual value because it is important in defining, maintaining or supporting the character of an area. (O.Reg. 9/06 (2)(7))

[52] The final question before the Tribunal is whether the Property has contextual value because it is important in defining, maintaining, or supporting the character of the area in question.

³ *Faghani, supra*, at para. 70.

[53] The test for this criterion is set out in *Zhang v Amherstburg*:

To determine whether a property has contextual value because it is important in defining, maintaining, or supporting the character of an area, it is first necessary to ask the following questions:

- a) What is the area in question?
- b) What is the character of the area today?
- c) Does the property define, support, or maintain the character of that area?
- d) Is it desirable to maintain the character of the area as it is today?"⁴

[54] The expert witnesses spent a great deal of time arguing over the nature of the area. Indeed, Ms. Harris places great emphasis on the uncertainty of the area and whether it was Highland Park or Westboro or something else. However, as *Zhang* discusses, the determination of the character of an area is not a mathematical or geographical formula. Rather, it is a general quantitative 'sense of place.' Put another way, would the reasonable person, walking down the street be able to detect this sense of place or *mise-en-scène*?

[55] Ultimately, the Tribunal is satisfied, based on the evidence before it, that this area is known, generally, as Highland Park, as named by Mr. Cole, and in relation to the dairy that once operated there, and that this area is roughly nine blocks in size. This is established by the testimony of both expert witnesses. But, ultimately, as discussed in *Zhang*, the precise definition is not hugely relevant. Boundaries of areas, in respect to this criterion, will always be necessarily fuzzy. There will be transitional spaces between areas. There is no hard line to an area in applying this criterion.

[56] However, no matter how the area is defined, and as discussed, a precise definition is not required, this is still one of the oldest suburbs in the Municipality, consisting of modest residential properties, most being of one-and-half to two-storeys tall, with mature trees, and

⁴ *Zhang v Amherstburg (Township)*, 2021 CanLII 83338 (ON LT) at para. 28.

generous setbacks.⁵ Even Ms. Harris noted these general characteristics. A reasonable person, walking down these streets would certainly be able to get a qualitative sense of this place.

[57] There are, almost certainly, properties that are not part of this sense of place. They may be larger or newer, or built closer to the road. Trees are living things; they grow and decay. But, as *Zhang* also notes, a streetscape cannot be frozen in time in order to meet this criterion. It cannot be immutable. To demand such would mean that the criterion could never be applied outside of a heritage conservation district and as discussed in *Zhang*, that cannot have been the Ontario Legislature's intention in adopting this criterion.

[58] In this matter, we have a two-storey home, relatively modest in form and massing, and built early in the history of the area. A look at the photos provided by the Parties makes it clear that this Property is almost archetypal of this sense of place. It is an early 20th century home set in this early suburb, together with many other such residential homes. Thus, it clearly maintains and supports the character of the area. Furthermore, as a property built early in the history of the area, it may well have helped establish or define the character of the area. It is clearly a part of the sense of this place as defined by *Zhang*.

[59] Finally, the Tribunal must determine whether or not this definable character should be maintained. The Owner's position is that this Property should be torn down and replaced with two modern homes in support of the laudable goal of urban densification. The Municipality argues, on the other hand, that the loss of this Property will further weaken this sense of place.

⁵ For a discussion of setbacks as a heritage attribute, see *Black, supra*, at paras 50-58.

[60] We have an area with a definable sense of place. There are many listed and designated properties in and around the area and, indeed, an important designated home immediately beside the Property. The Property is practically archetypal of this sense of place. As such, the loss of the Property would have a detrimental effect on the area and its character and, therefore, it must be preserved.

ORDER

[61] Having considered the evidence before it, and the submissions of the Parties at the hearing, and for the reasons set forth above, the Tribunal orders that the Appeal against designation is denied in part and allowed in part.

[62] In respect to Ontario Regulation No. 9/06 (“O.Reg 9/06”), criterion 1, the Appeal is allowed. The Property does not meet this criterion.

[63] In respect to O.Reg. 9/06, criterion 4, the Appeal is allowed. The Property does not meet this criterion.

[64] In respect to O.Reg. 9/06, criterion 7, the Appeal is denied. The Property does meet this criterion. It has contextual value as it helps define, support, and maintain the character of the area in question.

[65] The City of Ottawa is ordered to amend By-law No. 2022-348 in accordance with this Decision.

“Daniel Nelson”

DANIEL NELSON
MEMBER

Ontario Land Tribunal

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