

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 30, 2015

CASE NO(S): MM140079

PROCEEDING COMMENCED UNDER subsection 41(4) of the *Ontario Heritage Act*,
R.S.O. 1990, c. O. 18, as amended

Appellant:	Larry Favero
Appellant:	Michael Lackowicz,
Appellant:	The Chandler Company Limited
Subject:	By-law (2014)-19821- Heritage Conservation District Area
Municipality:	City of Guelph
OMB Case No.:	MM140079
OMB File No.:	MM140079
OMB Case Name:	Favero v. Guelph (City)

Heard: October 26-28 in Guelph, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Michael Lackowicz

C. Zonneveld

Larry Favero

C. Zonneveld

Chandler Company Limited

M. Lough

City of Guelph

S. Smith*

DECISION DELIVERED BY S. JACOBS AND ORDER OF THE BOARD

INTRODUCTION

[1] The City of Guelph (the “City”) passed By-law No. (2014)-19821 (the “By-law”) to establish a heritage district designation for the Brooklyn and College Hill areas (the “HCD”). The By-law proposes to manage change in the HCD through the adoption of a plan (the “HCD Plan”), which contains policies and guidelines for conservation, protection and enhancement of the character of the proposed HCD. Michael Lackowicz, Larry Favero, and The Chandler Company Limited (the “appellants”) appealed the City’s adoption of the By-law to the Ontario Municipal Board (the “Board”) pursuant to s. 41(4) of the *Ontario Heritage Act*, R.S.O. 1990, c. O. 18, as amended (the “OHA”).

[2] On behalf of the appellants, the Board heard evidence from Mr. Lackowicz, Mark Lough, representative of the Chandler Company Limited, as well as John Clark, a local realtor. Dennis Jamieson appeared as a participant and testified in support of the appellants. Ms. Zonneveld acted as agent for the appellants; however, the Board allowed Mr. Lackowicz to make additional closing submissions on behalf of the appellants as Ms. Zonneveld could not stay the duration of the hearing.

[3] Dan Currie and Stephen Robinson, both qualified to provide opinion evidence in the area of heritage planning, testified in support of the By-law. Bruce Ryan also testified in support of the By-law, on behalf of the Old University Neighbourhood Residents’ Association (the “Association”).

BACKGROUND TO THE BY-LAW

[4] Mr. Robinson provided a detailed background of events leading to the passage of the By-law. He explained that the Brooklyn and College Hill area was first identified as a potential HCD in 2006, as part of the Old University and Centennial Neighbourhoods Community Improvement Plan (the “CIP”). The City hired its first full-time heritage planner in 2009, making it possible for staff to oversee the City’s first HCD designation process. The HCD concept was first introduced at a public open house in January, 2011

and City council initiated an HCD study in March, 2011 (the “HCD Study”). Council directed that a consultant be retained to undertake the HCD designation process and MHBC Planning Limited, in conjunction with George Robb Architect and Meghan Hobson Research, was awarded the contract in June, 2011. The HCD study area provided to the consultants was based on the study boundary recommended by the CIP.

[5] A community working group (“CWG”) was established at the outset of the HCD project to provide strategic input to the consultants and the City; the CWG consisted of two members of the Heritage Guelph Committee, the two ward councilors (*ex officio*), and up to four property owners from within the study area as recommended by the ward councilors, including representation from the Association. In addition, the City formed an internal technical steering committee to provide feedback and strategic input to the consultant’s work.

[6] By all accounts, there were several meetings of the committees described above, as well as Council and other public meetings that took place from the time of the introduction of the HCD concept in May, 2011 to the passage of the By-law in September, 2014 (Exhibit 1, Tab 9A). There were also three HCD Newsletters that were sent by mail to property owners in the HCD study area as well as to those within a 120 metre (“m”) radius. The first newsletter included a questionnaire inviting comments on the HCD concept. While the newsletter and questionnaire were sent to approximately 500 property owners, the City received 17 completed questionnaires.

ISSUES AND ANALYSIS

[7] The issues as agreed to between the parties can be broadly characterized into two categories:

1. The sufficiency of the process leading to the passing of the By-law; and
2. The appropriateness of the HCD boundary.

[8] The Board must consider these issues within the context of the OHA. Part V of the OHA sets out the requirements a municipality must follow in designating an HCD. The first step is to undertake a study of an area of the municipality for the purpose of designating an HCD, in accordance with s. 40. While the OHA does not require a study to be carried out prior to passing an HCD by-law, this is considered essential for the preparation of the HCD plan that the OHA does require. Section 40 also sets out mandatory components of a HCD study:

Area study

40. (1) The council of a municipality may undertake a study of any area of the municipality for the purpose of designating one or more heritage conservation districts.

Scope of study

(2) A study under subsection (1) shall,

- (a) examine the character and appearance of the area that is the subject of the study, including buildings, structures and other property features of the area, to determine if the area should be preserved as a heritage conservation district;
- (b) examine and make recommendations as to the geographic boundaries of the area to be designated;
- (c) consider and make recommendations as to the objectives of the designation and the content of the heritage conservation district plan required under section 41.1;
- (d) make recommendations as to any changes that will be required to the municipality's official plan and to any municipal by-laws, including any zoning by-laws.

Consultation

(3) If the council of a municipality has established a municipal heritage committee under section 28, the council shall consult with the committee with respect to the study.

The Board accepts Mr. Currie's uncontested evidence that the City complied with s. 40 in all respects regarding the preparation of its HCD Study.

[9] A municipality may designate an HCD, provided that its Official Plan (“OP”) contains policies relating to the establishment of a HCD:

Designation of heritage conservation district

41. (1) Where there is in effect in a municipality an official plan that contains provisions relating to the establishment of heritage conservation districts, the council of the municipality may by by-law designate the municipality or any defined area or areas thereof as a heritage conservation district.

...

Here again, Mr. Currie’s evidence was uncontested. The Board accepts Mr. Currie’s opinion that the City OP contains provisions relating to the establishment of HCDs, in policy 3.5.8, and therefore finds that the By-law complies with s. 41. (1).

[10] In addition, a municipality must adopt a HCD plan that includes the contents set out in s. 41.1(5). The municipality must also meet the public consultation requirements set out in s. 41.1(6) and 41.1(7):

Heritage conservation district plans

41.1 (1) A by-law under section 41 designating one or more heritage conservation districts in a municipality shall adopt a heritage conservation district plan for each district that is designated in the by-law.

Content of plan

- (5) A heritage conservation district plan shall include,
- (a) a statement of the objectives to be achieved in designating the area as a heritage conservation district;
 - (b) a statement explaining the cultural heritage value or interest of the heritage conservation district;
 - (c) a description of the heritage attributes of the heritage conservation district and of properties in the district;
 - (d) policy statements, guidelines and procedures for achieving the stated objectives and managing change in the heritage conservation district; and
 - (e) a description of the alterations or classes of alterations that are minor in nature and that the owner of property in the heritage conservation district may carry out or permit to be carried out on any part of the property, other than the interior of any structure or building on the property, without obtaining a permit under section 42.

Consultation

- (6) Before a by-law adopting a heritage conservation district plan is made by the council of a municipality under subsection 41 (1) or under subsection (2), the council shall ensure that,
- (a) information relating to the proposed heritage conservation district plan, including a copy of the plan, is made available to the public;
 - (b) at least one public meeting is held with respect to the proposed heritage conservation district plan; and
 - (c) if the council of the municipality has established a municipal heritage committee under section 28, the committee is consulted with respect to the proposed heritage conservation district plan.

Notice of public meeting

- (7) The clerk of a municipality shall give notice of a public meeting to discuss a proposed heritage conservation district plan in such manner as the council of the municipality determines is appropriate and to such persons and bodies the council believes may have an interest in the plan.

[11] In addition to the statutory requirements of the OHA, the Ontario Heritage Toolkit includes several guides to assist in explaining the heritage conservation process in Ontario. The “Heritage Conservation Districts: A Guide to District Designation Under the Ontario Heritage Act” (the “HCD Guide”) establishes guidelines for delineating an HCD boundary, which is discussed in detail below, and also sets out, on page 16, four key ingredients for a successful HCD:

1. A sound examination of, and rationale for, district designation, particularly for the delineation of district boundaries;
2. Active public participation in the designation process;
3. A clear and complete designation by-law; and
4. Clear and well-advertised policies for controlling development in a designated district to protect and enhance the very character which was the basis for designation.

i) Process Leading to the Passing of the By-law

[12] With respect to the process leading to the passing of the HCD By-law, the Board’s role is to determine whether this process meets the requirements of the OHA, in particular s. 41.1. The Board was presented with no evidence to indicate that the City

did not meet its statutory obligations with respect to the passage of its HCD By-law. Both Mr. Robinson and Mr. Currie are of the opinion that the City went beyond the statutory consultation requirements by hosting several public meetings and making other attempts to engage the public through mailed newsletters and a questionnaire. In addition, the HCD Plan was available on the City's website and hard copies were available for public viewing in the City planning department.

[13] Both Mr. Lackowicz, in his evidence, and Ms. Zonneveld, in her submissions, acknowledged the many meetings held by the City, as well as the City's attempts to keep property owners informed through newsletters and circulation of a questionnaire. The issue, from the standpoint of the appellants, is the sufficiency of these attempts. In their opinion, the low response rate to the questionnaire and small numbers of attendees at public meetings indicate a flawed public consultation process. They believe that a HCD should go forward based on majority support of the residents in a HCD area. The Board notes that there is no statutory requirement for a majority of residents to be in favour of a HCD, nor was there evidence at the hearing to demonstrate whether there is or is not a majority in support of the Brooklyn and College Hill HCD. Conversely, Mr. Ryan, on behalf of the Association, indicated that not only did there appear to be widespread support for the HCD within the Association, but that the Association actually requested a HCD through its involvement in the CIP.

[14] Mr. Robinson and Mr. Currie agreed that more public interest and participation in the HCD process would be ideal, bearing in mind the HCD Guide's inclusion of "active public participation" as a key ingredient for a successful HCD. However, they pointed out that the City can merely offer opportunities for participation, and that it is up to individuals to determine whether they wish to participate. The Board agrees that the many and varied opportunities offered by the City for public engagement go far beyond the requirements of s. 41.1(6) of the OHA, which merely required the City to make information about the plan available to the public and to hold one public meeting.

[15] The Board understands the concern articulated by the appellants that perhaps the City's method of communicating with residents, that is, by regular mail and newspaper notices, may not be the most effective method of communication for all residents. Here, the Board notes s. 41.1(7) of the OHA, which provides that it is within the discretion of council to determine how best to provide notice of a public meeting relating to a HCD. This is therefore a matter for residents to discuss with the municipality and is not for the Board to determine.

[16] Similarly, the appellants raised concerns about a potential conflict of interest of a ward councilor who resides in the HCD area and supported the HCD. Again, this is not properly a consideration for the Board in determining whether the City complied with the OHA in passing the By-law.

[17] The appellants also raised a concern relating to the City's selection of the Brooklyn and College Hill area for the HCD, namely that there may be other areas in Guelph with perhaps more heritage resources and more public support for a HCD. While the OHA does not set out a process or requirements for selection of a HCD area, the Board notes that this particular HCD area was identified in the 2006 CIP and has undergone an extensive period of study. As Mr. Currie explained, it is common for a HCD designation process to originate from a CIP.

[18] The appellants also question whether economic impact is a consideration when establishing an HCD, and, if so, whether the City considered such impact before passing the By-law. Mr. Clark testified in support of the appellants by providing anecdotal evidence of two sales of residential dwellings that, in his opinion, were made difficult due to the heritage attributes of the properties. The appellants' concern is one that is often articulated before this Board; that is, that heritage designation increases costs of renovations, upkeep, insurance, and makes resale difficult. The Board concurs with the submissions of the City that economic impact is not a consideration in designating a HCD under the OHA, and, regardless, also agrees that the appellants did

not provide evidence to demonstrate any potential economic impact of the proposed HCD.

[19] The Board agrees with Mr. Robinson and Mr. Currie that the City met, and, in fact, exceeded the requirements for public consultation under the OHA, and that the process leading to the City's passing of the By-law complied in all other respects with the OHA.

ii) HCD Boundary

[20] While the OHA does not contain requirements for determining a HCD boundary, the HCD Guide, on page 24, provides guidelines for determining HCD boundaries:

The boundary of the district could be determined using the following criteria:

- **Historic factors** such as the boundary of an original settlement or an early planned community, concentrations of early buildings and sites;
- **Visual factors** determined by an architectural survey or changes in the visual character or topography of an area;
- **Physical features** such as man-made transportation corridors (railways and roadways), major open spaces, natural features (rivers, treelines and marshland), existing boundaries (walls, fences, and embankments), gateways, entrances and vistas to and from a potential district;
- **Legal or planning factors** which include less visible elements such as property or lot lines, land use designations in Official Plans or boundaries for particular uses or densities in the zoning bylaw, may also influence the delineation of the boundary, especially as they may affect its eventual legal description in the by-law. [Emphasis in original]

[21] Mr. Currie explained that the HCD Study concluded that the area contains a majority of properties of cultural heritage value and that there is a rationale for designation of the area as a HCD. This rationale is based on the fact that the area contains a number of distinctive heritage features and attributes that are related to a long history of human activity and modification of the landscape, including milling

activities along the river (with associated commercial and residential development) and the development of the historical transportation route of the Gordon Street corridor.

[22] Both Mr. Currie and Mr. Robinson noted that the HCD Plan boundary is slightly smaller than that included in the HCD Study, and is based on an option chosen by council from three alternatives that were recommended by staff. They share the opinion that the boundary, as original proposed in the HCD Study, and as modified in the HCD Plan (and now before the Board), is appropriate when considering the HCD Guide guidelines. In particular, it is their opinion that the HCD contains:

- A concentration of heritage resources, including heritage buildings and structures predominately dating from an early period in the City's history, the historic waterways and banks of the Speed and Eramosa Rivers, landscape features including the designed landscape of Royal City Park, the historic Dundas Road (now Gordon Street) and its crossing point at the Speed River.
- A framework of structuring elements, particularly the Speed and Eramosa Rivers at the north edge of the district, the historic Gordon Street transportation corridor from its crossing point of the Speed River and then heading south to College Hill, and the grid pattern of streets in the historic Brooklyn neighbourhood.
- A considerable degree of visual coherence through human activities and designs on the landscape over time, including the design and public use of the rivers and associated valley lands and the low-profile residential forms and grid transportation patterns developed from 1850s to the 1950s.
- A distinct character that separates it from surrounding areas, such as the commercial downtown core to the north, the golf course and mid-century residential dwellings to the east, the University of Guelph campus to the north, and the mid-century residential neighbourhoods to the west.

[23] Several of the appellants concerns arise from skepticism due to the boundary change from the time of the HCD Study to the HCD Plan. They question why certain properties were ultimately removed from the HCD and sought to rely on letters to City staff from a consultant who appeared to be retained by landowners who sought removal of their properties from the HCD boundary. The Board explained that, while it would accept these documents, it could not accord much weight to them, given that this consultant did not appear as a witness at the hearing and therefore could not be examined on his written statements.

[24] Rather, the Board must rely on the evidence presented at the hearing with respect to the appropriateness of the HCD boundary. The Board accepts the shared opinion of Mr. Currie and Mr. Robinson that the HCD boundary before the Board is appropriate in light of the guidance provided by the HCD Guide, and that the formerly proposed HCD boundary, while not before the Board, also met the criteria of the HCD Guide. The delineation of a HCD boundary is clearly not a precise exercise and allows for a certain degree of subjectivity while applying the criteria suggested by the HCD Guide.

[25] The appellants questioned why the HCD includes three distinct areas, namely Brooklyn, College Hill and the riverscape. In their opinion, the boundary would be more appropriate if contained to a distinctive area, for example, one HCD for the Brooklyn neighbourhood. Mr. Lackowicz argued that because the riverscapes extend across the City and are not contained within the proposed HCD, it is not appropriate to contain a portion of them within the HCD. In other words, the riverscape is not unique to Brooklyn and College Hill. He also noted the differences in housing in Brooklyn and College Hill, where the former was developed as a working-class neighbourhood, and the latter contains more elaborate residences associated with the development of the Ontario Agriculture College (now the University of Guelph). Finally, with respect to Gordon Street, the appellants noted that this corridor is the main route into downtown Guelph and, similar to the riverscape, is not unique to this particular area.

[26] While the Board understands the natural tendency to group 'like with like' in a district, and perhaps to delineate precise boundaries to encapsulate a particular neighbourhood, there is no such requirement under the OHA nor in the HCD Guide. In fact, the HCD Guide , on page 5, acknowledges the potential lack of uniformity within a district:

A HCD may comprise an area with a group or complex of buildings, or a larger area with many buildings and properties. It may also comprise an entire municipality with a concentration of heritage resources with special character or historical association that distinguishes it from its surroundings.

Potential districts can be found in urban and rural environments. They may include residential, commercial and industrial areas, rural landscapes or entire villages or hamlets with features or land patterns that contribute to a **cohesive sense of time or place**.

...

The significance of a HCD often extends beyond its built heritage, structures, streets, landscape and other physical and spatial elements, to include important vistas and views between and towards buildings and spaces within the district. The quality and interest of a district may also depend on the diversity of the lifestyle and the traditions of the people who live and work there. [Emphasis added].

Similarly, on page 24:

Some study areas have an obvious character and a clear set of boundaries. Others are more difficult to define. They may include both cultural and natural features. They may cross political boundaries. They may have evolved over time.

[27] Mr. Robinson and Mr. Currie explained that while the proposed HCD contains three essential character areas (the riverscape, the Brooklyn neighbourhood, and residences at the top of College Hill), the development of these areas is tied to milling and industrial activities along the Speed and Eramosa rivers and the associated development of Gordon Street. As they explained in their evidence, and as is explained in great detail in the HCD Study, these areas developed within the same time period, from the late 1800s through the end of the Second World War, and are indicative of a cohesive sense of time and place. While Mr. Lackowicz pointed out that architectural styles and street patterns vary between the distinct areas in the HCD, the Board

accepts Mr. Currie and Mr. Robinson's shared opinion that the styles are consistent with the areas' shared period of development.

[28] Mr. Currie and Mr. Robinson also referred the Board to examples of HCDs in other municipalities that, similar to this proposed HCD, contain distinct areas, including a riverscape, such as the Kleinburg-Nashville HCD in the City of Vaughan (Exhibit 2, Tab 5, p. 45). The appellants, however, referred the Board to one of its former decisions, *Coburg (Town) By-law 27-90 (Re)*, [1992] O.M.B.D. No. 636, to stand for the proposition that it is appropriate for the Board to order splitting of one proposed HCD into separate HCDs. Having reviewed the decision and the submissions of the parties, the Board sees no discussion and certainly no direction in the Cobourg case relating to the splitting of a HCD. While the decision does approve an HCD By-law that appears to contain three separate HCDs, there is no indication that such direction came from or was even considered by the Board.

[29] The Board sees no rationale for splitting the proposed HCD as suggested by the appellants. Rather, the Board accepts the shared opinion of Mr. Currie and Mr. Robinson that the HCD boundary is appropriate when considered against the criteria set out in the HCD Guide, and finds that their evidence demonstrates that the areas in the HCD are physically, historically and functionally linked.

CONCLUSION

[30] The Board finds, based on the evidence at the hearing and a thorough review of the documentary evidence, including the HCD Study and HCD Plan, that the City complied in all respects with the requirements of the OHA, and that the HCD boundary is appropriate given the criteria set out in the HCD Guide. While the Board understands the frustration expressed by the appellants and by Mr. Jamieson about the sufficiency of OHA requirements as they relate to public consultation, the Board refers to its earlier finding that this is a matter that is within the City's discretion in how it chooses to

provide notice of its public meetings under the OHA, and is not for the Board's determination.

[31] The Board commends all parties and participants for their organization and efficiency in the presentation of evidence and in submissions.

ORDER

[32] The Board orders that the appeals are dismissed.

"S. Jacobs"

S. JACOBS
MEMBER

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Ontario Municipal Board

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