

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



22-258-OLT-01 Schedule 1

ISSUE DATE: July 11, 2023
EFFECTIVE DATE: June 21, 2023

CASE NO(S): OLT-23-000115

PROCEEDING COMMENCED UNDER subsection 40.1(4) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18, as amended

Appellants: Doug Chapple & Jenny Fellman
Subject: Objection to by-law designating a Heritage
Conservation District Study Area
Municipal Reference Number: By-law No. 22-258
Location: Melville Street from Sydenham Street to Wellington
Street North
Municipality: City of Hamilton
OLT Lead Case No.: OLT-23-000115
OLT Case No.: OLT-23-000115
OLT Case Name: Chapple v. Hamilton (City)

Heard: June 21, 2023 by Video Hearing

APPEARANCES:

Parties

Counsel*/Representative

D.Chapple
J. Fellman

Self-represented

City of Hamilton

P. MacDonald*

**MEMORANDUM OF ORAL DECISION DELIVERED BY BRYAN W. TUCKEY ON
JUNE 21, 2023 AND ORDER OF THE TRIBUNAL**

[Link to Final Order](#)

[1] The Tribunal convened a settlement hearing with respect to a proposed settlement for the above noted matter. Douglas Chapple and Jenny Fellman (“Appellants”) have filed an appeal against the City of Hamilton (“City”) in respect of the passing of By-law No. 22-258 (“By-law”) designating a heritage conservation study area pursuant to s. 40.1(4) of the *Ontario Heritage Act* (“Act”). The property is known municipally as 208 Melville St. in the City (“subject property”). The subject property is in the former municipality of Dundas.

[2] The effect of the appeal is to allow the demolition of the existing structures (detached dwelling and garage) on the subject property and replacing these structures with a new detached dwelling.

[3] The Affidavit of Service, sworn on May 9, 2023, is found to be appropriate and is marked as Exhibit 1 to these proceedings.

[4] There are no additional Party requests to these proceedings. There is one request for Participant Status from Margret Stowe. Ms. Stowe is not a resident of the Melville Street Heritage Conservation District Study Area (“study area”) but is a local historian who has a significant interest in the former municipality of Dundas. The Parties did have some reservation as to the granting of Participant Status (as did the Tribunal) but her knowledge of the history of the area and the subject property could have some significance in the matter. Therefore, the Tribunal granted participant status to Ms. Stowe. She is also called as a witness for the Tribunal to read her participant statement that provided a brief non-expert testimony in respect of the history of the subject lands. Her testimony is described later in this decision.

MINUTES OF SETTLEMENT

[5] The Tribunal is presented with Minutes of Settlement (“MOS”) between the Appellants and the City and they are marked as Exhibit 2 to these proceedings. The

MOS outline the agreed upon changes to both the By-law and the Appellants building permit application which has the effect of implementing the proposed settlement. The MOS includes design renderings for the proposed new detached dwelling.

CITY COUNSEL SUBMISSIONS

[6] Mr. MacDonald, Counsel for the City, at the outset (and during the course) of the settlement hearing requested that the Tribunal make an oral decision on this matter. The reason for this request relates to when the proposed By-law would come into force. The Appellant's have been caught in a challenging series of circumstances that are not of their making. In Mr. MacDonald's justification of this request, he first noted s. 40.1(5) of the Act which reads:

(5) Subsections 41(6) to (9) apply with the necessary modifications to an appeal under subsection (4)...

[7] Secondly Mr. MacDonald made reference to the nature of the request being made of the Tribunal at these proceedings as found in s. 41(7)(ii) of the Act 'Powers of Tribunal' that reads:

(7) After holding a hearing, the Tribunal shall,
(b) allow the appeal in whole or in part and,
(ii) amend the by-law in such a way as the Tribunal may determine,

[8] Lastly Mr. MacDonald makes specific reference to s. 41(10)(b) 'Coming into force' of the Act which reads:

(10) If one or more notices of appeal are given to the clerk with the time period specified in subsection (4).
(b) if the by-law is amended by the Tribunal under subclause (7) (b) (ii), the by-law, as amended by the tribunal, comes into force on the day it is so amended;

[9] It is Mr. MacDonald's submission that the best way to remedy this appeal is to have the Tribunal give an oral Order with the date the By-law comes into force being June 21, 2023, when a Tribunal oral Order is made.

WITNESS OF THE TRIBUNAL

[10] Ms. Stowe is not a resident of the study area nor qualified to give opinion evidence related to matters related to heritage matters. She is an interested community resident who studies the history of the former municipality of Dundas. Ms. Stowe is given the opportunity to read her participant statement to the Tribunal since it is not yet on the record.

[11] From assessment records (that were not presented to the Tribunal) Ms. Stowe provided interesting background to what appears to be the history of the existing structures on the subject property. She became aware at the hearing that the subject property is not designated under the Act and therefore the City has limited ability to prevent demolition or alteration of existing structures.

[12] Albeit Ms. Stowe's historical review is interesting, it has little if any relevance to the matter before the Tribunal in this proceeding. The Tribunal does thank Ms. Stowe for her interest and attendance at this settlement hearing.

THE WITNESS

[13] Opinion evidence is heard from one witness. Alissa Golden is qualified to give expert opinion evidence in the disciplines of land use and heritage planning. She has significant background in and tenure with the City in matters related to cultural heritage.

BACKGROUND

[14] In September 2022, the City passed a By-law to designate a portion of Melville Street In the City as a study area. The By-law establishes limitations on the types of alterations, demolitions and new construction that are permitted in the study area for one year from the passing of the By-law. The By-law does provide exemptions for certain permitted actions and for specified building permits issued before the date of its passage.

[15] In November 2022, the Appellants appealed the By-law to the Tribunal. The Tribunal is advised that the subject property is not designated under Part IV or Part V of the Act, nor is it listed as a non-designated property of heritage value or interest in the City's municipal heritage register. Ms. Golden noted that the subject property is

not included in the City's Inventory of Heritage Properties, which includes properties that have being previously surveyed or flagged as having potential cultural heritage value or interest but may not yet have been evaluated to determine if they warrant listing on the register or potential designation

under the Act.

[16] The Appellants submitted a building permit application for new construction on the subject property in April 2022 and a building permit application to demolish the existing detached dwelling in July 2022. Both applications were deemed complete as of September 28, 2022. A building permit was also issued in June 2022 for the demolition of the detached accessory structure (garage).

[17] City Council adopted the By-law on September 28, 2022.

THE PROPOSED SETTLEMENT

[18] Ms. Golden advised the Tribunal that the fundamental elements of the proposed settlement are:

- a. Amending the By-law to include an additional exemption for any property which a complete building permit application which had been made prior to the date of the By-law passing. Ms. Golden noted that to her knowledge the subject property is the only application that meets the conditions of this exception.
- b. The Appellants will make changes to their building permit application for the new detached dwelling. Changes include the design of the front facade of the home, agreed upon materials for use on this facade, modified landscaping and the maintenance of the City tree located on the west side frontage of the subject lands. A revised building permit in keeping with these changes has been submitted to the City by the Appellants.

[19] Ms. Golden stated that the subject property has no status under the Act at the time when the building permit application for demolition and new construction were submitted to the City. Therefore, in her opinion, no approvals are required under sections 33 or 34 of the Act.

[20] Ms. Golden advised the Tribunal that, if it was not for the passing of the bylaw, the Appellants would have received the necessary building permits for demolition and new construction with no applicable law impediments related to provisions of the Act.

[21] The study area is currently under review as a potential heritage conservation district. Ms. Golden in her oral evidence, advised the Tribunal that the City has received a draft report from the consultant in respect of their observations and conclusions in respect of the study area. Although this study is not before the Tribunal, the member is advised that the subject property is considered a non-contributing property in the study area draft conclusions. Ms. Golden opined that nothing in this draft study area report has changed her opinion in respect of the matter before the Tribunal. Council could at

some future date choose to designate a new district in accordance with Part V of the Act.

[22] Ms. Golden is of the opinion that the modified design of the new detached dwelling on the subject property is consistent with what City heritage staff would typically recommend when commenting on new construction subject to *Planning Act* applications within an historic neighborhood. That being said, the Appellants proposed construction requires no *Planning Act* approvals.

[23] Ms. Golden opined that the proposed changes ensure that the design of the new structure is sympathetic and complementary to the existing character of the neighborhood, including building setbacks, massing, height, roof lines and cladding materials. Changes secured through the MOS ensure the new detached dwelling is more sympathetic to the existing character of the neighborhood than what was originally proposed by the Appellants in their initial building permit application.

[24] The only change to the By-law is to include an additional exemption for properties for which a complete building permit application was with the City prior to the passage of the By-law by City Council on September 28, 2022. In Ms. Golden's opinion, the proposed change to the By-law is similar to the existing exemption provided for by Council for properties that had active and issued building permits within the study area.

TRIBUNAL FINDINGS

[25] The Tribunal accepts the uncontested evidence of Ms. Golden in its entirety, that the proposed changes to the By-law are appropriate and in keeping with the Act. The changes, as defined and implemented in the MOS, ensure that the design of the new detached dwelling is sympathetic and complementary to the existing character of the neighborhood.

[26] The Tribunal finds that the City has an extremely well established planning and cultural policy as it relates to the subject property and surrounding area and has followed a careful, complete, and comprehensive review of the proposed settlement and the terms of the MOS.

[27] The Tribunal notes that, although not before it, nothing in the draft study area consultant's report provides any reason or rationalization to change the context on which the existing structures on the subject property are evaluated nor in the witness's opinion their heritage value.

[28] The Tribunal finds, through the submissions and evidence of City staff at the hearing, that the original building permit met a number of regulations that must be satisfied and met relevant applicable law. The building permit was deemed complete prior to the By-law being enacted which is the only reason this permit was not granted. The relatively minor change to the By-law serves to rectify the impediments to the building permit being issued.

[29] The Tribunal finds, in keeping with s. 41(10), the amended By-law No 22-258 of the City of Hamilton comes into full force and effect on the date of this oral decision of the Tribunal, being June 21, 2023.

ORDER

[30] Accordingly, **THE TRIBUNAL ORDERS THAT** the appeals filed on behalf of Douglas Chapple and Jenny Feldman for the lands known municipally as 208 Melville St. in the City of Hamilton in Ontario Land Tribunal File No. OLT-23-000115 are allowed, in part, in accordance with subsections 40.1(5) and 41(7)(b)(ii) of the *Ontario Heritage Act*. The Tribunal Orders that City of Hamilton By-law No. 22-258 is amended as set out in Schedule 1 to this Order.

“Bryan W. Tuckey”

BRYAN W. TUCKEY
MEMBER

Ontario Land Tribunal

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The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.

Schedule 1

Schedule 1

CITY OF HAMILTON

BY-LAW NO. 22-258

To Designate a Portion of Melville Street in Dundas, from Sydenham Street to Wellington Street North, as a Heritage Conservation District Study Area

WHEREAS Melville Street is an historic streetscape in the community of Dundas, located in the City of Hamilton, consisting of a significant concentration of buildings of cultural heritage value or interest;

AND WHEREAS the eastern portion of Melville Street, from Sydenham Street to Cross Street, was designated as part of the Cross-Melville Heritage Conservation District in 1990 by former Town of Dundas By-law No. 3899-90;

AND WHEREAS the portion of Melville Street from Sydenham Street to Wellington Street North, identified in Schedule "A" attached to this By-law, consists of a collection of pre-1950 buildings of potential heritage value or interest, including three properties individually designated under Part IV of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18, that may collectively be considered a cultural heritage landscape;

AND WHEREAS the purpose of a heritage conservation district study, as provided for under section 40 of the *Ontario Heritage Act*, is to examine the character and appearance of an area to determine if the area should be preserved as a heritage conservation district and to consider and make recommendations with regard to the establishment of a district plan to guide changes to properties located within the district;

AND WHEREAS section 40.1(1) of the *Ontario Heritage Act* provides that, if the council of a municipality undertakes a study of a heritage conservation district, the council may, by by-law, designate the area specified in the by-law as a heritage conservation study area for a period of up to one year;

AND WHEREAS section 40.1(2) of the *Ontario Heritage Act* provides that a heritage conservation district study area by-law may prohibit or set limitations with respect to the alteration of property and the erection, demolition or removal of buildings or structures, or classes of buildings or structures within the heritage conservation district study area;

To Designate a Portion Melville Street in Dundas, from Sydenham Street to Wellington Street North, as a Heritage Conservation District Study Area

NOW THEREFORE the Council of the City of Hamilton enacts as follows:

1. The area identified in Schedule "A" attached hereto (the Melville Street Heritage Conservation District Study Area) is designated as a heritage conservation district study area for a period of one year from the date of enactment of this By-law.
2. The City shall undertake a heritage conservation district study of the Melville Street Heritage Conservation District Study Area in accordance with the requirements of section 40(2) of the *Ontario Heritage Act*, for the purpose of examining the character and appearance of the area to determine if the area, or any part of the area should be preserved as a heritage conservation district and to make recommendations with respect to the content of a heritage conservation district plan.
3. The alteration of property and the erection, demolition or removal of buildings or structures within the heritage conservation study area is prohibited with the exception of the following permitted actions:
 - a. an expansion of such legally existing buildings or structures, to a maximum of 25% of the existing gross floor area;
 - b. a change to the interior of such legally existing buildings or structures;
 - c. a change to the façade of such legally existing buildings or structures where that façade does not address a public street or highway;
 - d. *the reconstruction or replacement of such legally existing buildings or structures which are totally or partially destroyed by fire, accident or natural disaster, provided the building or structure is reconstructed on its original site and the floor area and dimensions are not increased; and,*
 - e. the erection of a new accessory building or structure.
4. This By-law shall be in effect for a period of one year from the date of passage of this By-law.
5. The alteration of property and the erection, demolition or removal of buildings or structures is permitted within the study area and shall be exempt from this By-law:
 - a. under building permits issued before the passage of this By-law and located within the study area at 56 Melville Street, 136 Melville Street, 138 Melville Street, 172 Melville Street, 183 Melville Street, and 188 Melville Street shall be exempt from this By-law; and
 - b. where an application for a building permit was completed prior to September 28, 2022.

To Designate a Portion Melville Street in Dundas, from Sydenham Street to Wellington Street North, as a Heritage Conservation District Study Area

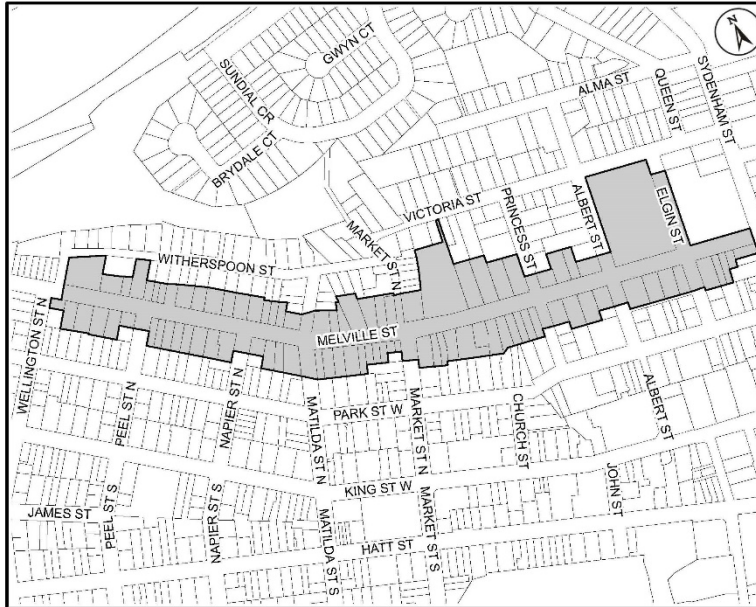
6. The City Clerk is hereby authorized and directed,
- a. to cause a copy of this By-law to be served upon the owners of all of the properties within the Melville Street Heritage Conservation District Study Area and upon the Ontario Heritage Trust within 30 days of the passage of this By-law, by a method permitted by the *Ontario Heritage Act*; and,
 - b. to publish a notice of passing of this By-law in a newspaper having general circulation in the City of Hamilton.

PASSED and ENACTED this 28th day of September, 2022.

To Designate a Portion Melville Street in Dundas, from Sydenham Street to Wellington Street
North, as a Heritage Conservation District Study Area

Schedule "A"
To
By-law No. 22-258

Melville Street Heritage Conservation District Study Area



<p>This is Schedule "A" to By-law No. 22-</p> <p>Passed the day of, 2022</p>	<p>-----</p> <p align="center">Mayor</p> <p>-----</p> <p align="center">Clerk</p>		
<p>Schedule "A"</p> <p>Map forming Part of</p> <p>By-law No. 22-_____</p>	<p>Subject Property</p> <p> Melville Street Heritage Conservation District Study Area (Dundas)</p>		
<p>Scale: N.T.S.</p>	<p>File Name/Number: Dundas HCD Study</p>	<p>Date: September 23, 2022</p>	<p>Planner/Technician: AG/AL</p>
<p>PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT</p>			

To Designate a Portion Melville Street in Dundas, from Sydenham Street to Wellington Street North, as a Heritage Conservation District Study Area