

**Environment and Land Tribunals
Ontario**

Conservation Review Board

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ISSUE DATE:

May 6, 2013

IN THE MATTER OF subsection 29(5) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Objector/Owner:	2071430 Ontario Inc.
Subject:	Notice of Intention to Designate (Alexander Johnston House)
Property Address:	24 Mercer Street
Legal Description:	Plan 57, Lot 14 (Mercer Street, north side)
Municipality:	City of Toronto
CRB Case No.:	CRB1203

Peter A.P. Zakarow, Chair
Jerry V. DeMarco, Member
Marc Denhez, Member

APPEARANCES

Counsel for the City of Toronto:
Amanda Hill, Legal Services, City of Toronto

Counsel for the Owner, 2071430 Ontario Inc.:
Dawne Jubb, Glover & Associates

OVERVIEW

This Hearing was convened under s. 29(8) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18, as amended (“Act”), for the purpose of reporting to the Council of the City of Toronto (“City”), whether, in the opinion of the Conservation Review Board (“Review Board”), the property known as 24 Mercer Street (Alexander Johnston House) (“property”) should be protected by by-law under s. 29 of the Act.

The Owner, 2071430 Ontario Inc. (“Owner”) and the City disagree on only one aspect of the proposed designation, namely whether all three storeys of the south (street) elevation façade of the brick building at 24 Mercer Street are elements of cultural heritage value or interest, or just two storeys. The Owner proposes that only the first and second storeys of the façade be included in the description of heritage attributes while the City proposes that all three storeys of the façade be included.

For the reasons set out below, the Review Board recommends that the property be designated for cultural heritage reasons, but that only the first and second storeys of the south (street) façade be included in the description of heritage attributes.

BACKGROUND

At 24 Mercer Street in Toronto, there is an architect-designed 1858 brick building, with two or more additions and other modifications. The City filed a Notice of Intention to Designate the property under the Act. The Owner objected, and that matter was referred to the Review Board.

The Review Board held three pre-hearing conferences on September 27, 2012, December 4, 2012, and January 15, 2013, where dispute settlement was sought in a private, without prejudice discussion with both parties. In due course, the parties made it clear that they were in agreement that:

- (i) the designation of the property itself was uncontested, specifically with reference to the first two storeys of the façade; and
- (ii) there was no significant interest, on the part of either party, in the designation referring to any elements other than the south elevation façade (more specifically, there was agreement that the east elevation should not be included, even though it had been included in the Notice).

The parties were not in agreement on the protection under the Act of the third storey of

the south elevation façade. As a result, the Review Board and the parties agreed that the best way to address the outstanding issue in dispute would be to hold a Hearing with a tightly scoped focus on the inclusion of the third storey of the façade. The parties were instructed to develop an agreed statement of fact and file it with the Review Board along with their case documents during the disclosure period. Upon the commencement of the Hearing, no such agreed statement of fact had been submitted.

Notice of this Hearing was served by the Review Board on the parties and was published in the *Toronto Star* on January 11, 2013, in the manner required under the Act. The Statement of Service was filed as Exhibit 1.

The Hearing took place from 10 a.m. to 4:30 p.m. on Monday, February 4, 2013, at the Environment and Land Tribunals Ontario offices at 655 Bay St., Toronto. Prior to the Hearing, the Review Board panel met with the parties for a site visit at 8:30 a.m. While it is regular practice for the Review Board to set aside time to hear statements from members of the public, no members of the public attended the Hearing.

Lists of the exhibits filed at the Hearing and the witnesses who testified are found at Schedules 1 and 2, respectively.

IDENTIFIED ISSUE

The Hearing focused on whether the third storey, south (street) façade of 24 Mercer Street holds cultural heritage value or interest as prescribed by Ontario Regulation 9/06 under the Act, and thus whether it should be identified in a future designation by-law. More specifically, as acknowledged by the parties, the only issue in dispute was whether the third storey holds contextual value as prescribed by Regulation 9/06.

Regulation 9/06 prescribes the criteria for determining cultural heritage value or interest at the municipal level. It has three categories: design or physical value, historical or associative value, and contextual value. The candidate property must be evaluated according to each category, but only needs to satisfy one criterion to meet the requirement for protection under s. 29 of the Act. In this case, the parties focused solely on the third criterion: contextual value.

CASE FOR THE MUNICIPALITY

The City argued that the third storey of the south (street) elevation façade possesses contextual value as prescribed by Regulation 9/06.

The City filed a Document Book (Exhibit 4), which contains numerous background documents, the Witness Statement of Kathryn H. Anderson (Exhibit 5), and copies of relevant maps (Exhibit 6).

Kathryn Anderson provided evidence as an expert in heritage preservation with a specialization in heritage/historical architecture. She is a long-standing preservation officer with Heritage Preservation Services, City of Toronto.

Ms. Anderson reviewed the heritage practices of the City of Toronto, including the 21 Heritage Conservation Districts that have been created in Toronto under Part V of the Act. She provided an overview of the City's practices in the context of the Ministry of Tourism, Culture and Sport's *Ontario Heritage Tool Kit* ("*Tool Kit*") and the City's experience in applying the criteria in Regulation 9/06. Ms. Anderson reviewed the staff report on the subject property and highlighted some of the key information that led to the recommendation to City Council to designate.

The subject property is in the King-Spadina area of the City and within an area currently being assessed as a Heritage Conservation District. There was no dispute that this property has handsome features facing the public realm. The original two-storey, red brick house was designed in 1857-1858 by architect John Tully, for a client named Alexander Johnston. The original structure had a conventional house form, with a roof sloping upward and away from the street.

In 1904, Toronto had a "Great Fire" in its industrial district, prompting substantial relocation of industrial uses into other neighbourhoods, notably King-Spadina. In 1909, the Mercer Street property was purchased by Herbert Shaw, president of the Toronto Hat Block Company, to use as an industrial site to produce forms for hat manufacture. The City said that it was that conversion from residential to industrial use that led to the survival of the house.

In the period 1915-1920, additions were undertaken. According to the City's review of archival documents, these were not only at the rear of the building. The City submitted that a third storey was added by extending the roof at a shallower angle from its crest, thus creating the third storey where the front roof slope of the two storey structure had been. This addition respected the symmetry of the window openings; however, the windows looked different (they were visibly smaller, and instead of prominent stone lintels, there was brickwork above the windows). The third storey was done in mottled brick (like some of the rear additions), instead of uniform red brick. The City inferred that this new shape probably dated from around 1920, and was intended not only to add

industrial space, but give the building a more industrial look.

The City added that the third storey is culturally important as it relates to the building additions that took place on the back portion of the property in 1920. While the City is not seeking to protect these back portions, it wants to capture the significance of the industrial conversion through the preservation of the third storey of the street façade.

Regarding the property as a whole, Ms. Anderson's staff report notes that all three criteria in Regulation 9/06 are applicable. This denotes significant cultural heritage value or interest. Specifically, the design value of the structure, the historical importance of architect John Tully, and its contextual connection to the streetscape as it evolved in the aftermath of the Great Fire of 1904 are emphasized.

Within the narrow scope of inquiry set for this Hearing, focusing only on the third storey façade, the City relied exclusively on the contextual value criteria of Regulation 9/06 to justify the inclusion of the third storey façade in any future heritage by-law. The City asserted that industrial/commercial use buildings define the streetscape of Mercer Street, and the structure at 24 Mercer Street underwent a transformation from residential to industrial. The City argued that, absent the conversion of the building from residential to industrial use, the structure likely would have been replaced by a newer industrial building, as occurred elsewhere in this area.

Ms. Anderson recounted a saying used in the heritage preservation field: "Queen Anne in the front, Plain Jane in behind." She noted that modifications to the industrial buildings in this area were made to improve the streetscape. The third storey and parapet of the subject building enhanced its appearance and presence on the streetscape.

Under cross-examination, Ms. Anderson noted that the City does not seek to preclude development of the site, but rather is seeking to preserve the street façade of the building.

Ms. Anderson concluded that the significance of the early 20th century transformation of the building from residential to industrial is the fundamental reason for including the third storey façade as an element.

In argument, Amanda Hill, Counsel for the City, submitted that this property meets the test of Regulation 9/06 as a candidate for protection under s. 29 of the Act, and that inclusion of the third storey façade meets the test for value or interest even when based exclusively on its contextual value. She stated that there is significant contextual value

in the area, which is why the City is assessing the creation of a Heritage Conservation District for this neighbourhood. Ms. Hill stated that one does not need to understand the complete story of the building as a citizen walking past on the street, but its contextual value should be enough to pique someone's interest and lead him or her to question why that old structure remains in an area dominated by newer buildings.

Ms. Hill noted that Ms. Anderson was the only qualified heritage witness before the Review Board and that her testimony should carry more weight as an expert.

In summary, the City proposed that the property should be protected under by-law with the existing wording found in the Notice of Intention to Designate, minus the reference to the east elevation.

CASE FOR THE OBJECTOR (2071430 ONTARIO INC.)

The Owner argued that the third storey of the façade does not possess contextual value under Regulation 9/06.

The Owner filed its proposed changes to the wording of the description of the property's heritage attributes (Exhibits 3A and 3B), a Document Book (Exhibit 7), and copies of relevant plans (Exhibit 8).

The Owner is involved in a proposal to build a highrise project on the property. It is zoned for 12 storeys; one proposal currently under discussion is for 21 storeys. The Review Board was advised that the overall project is the subject of an appeal filed with another tribunal at Environment and Land Tribunals Ontario (ELTO), namely the Ontario Municipal Board (OMB).

Ashley Wilson, a long practicing professional architect, was admitted as a witness for the Owner providing evidence on architecture and the history of the building. Given his association with the Owner (which has a financial stake in this proceeding), the Review Board did not admit Mr. Wilson as an expert witness. Mr. Wilson is an employee of Scott Morris Architects Inc., as thus works for Debra Scott who is also an owner of 2071430 Ontario Inc. There was no separate retainer for his participation in this case. In addition, Mr. Wilson has limited experience in heritage issues and noted that he did not write his own witness statement, though he was involved in its development with Ms. Scott.

Mr. Wilson focused almost exclusively on reading historical architectural drawings for

the subject building, to assert that the third storey may have been added much later than 1920. More particularly, Mr. Wilson called attention to the depiction of the roofline and third storey windows on various plans to conclude that the changes to the third storey façade did not necessarily occur in the early 20th century.

The Owner questioned whether the third storey addition:

- (a) was in fact ever put to industrial use (suggesting that this portion of the building might have been in residential use), and
- (b) was in fact built at that time of the rear additions, which facilitated industrial use (suggesting it might have been built decades later).

In argument, Dawne Jubb, Counsel for the Owner, outlined how the Owner is very supportive of designation of this property, but without including the third storey façade. She referenced the *Tool Kit* discussion of the “integrity” of property to refute the City’s emphasis on the importance of the third storey in capturing the context of historical significance. Specifically, the *Tool Kit* notes that “cultural heritage value or interest may be intertwined with location or an association with another structure or environment. If these have been removed, the integrity of the property may be seriously diminished.”

Ms. Jubb asserted that there is no conclusive evidence as to exactly when the third storey was built and when the use of the building transformed. She pointed to Mr. Wilson’s testimony that there is no architectural significance to the windows. She also submitted that there is no remaining contextual value relative to other buildings on the street. In the context of the City’s case, Ms. Jubb submitted that someone walking by the building would not identify the significance of the third storey with respect to industrial conversion, nor is there a clear connection to the context of nearby buildings. The subject property now abuts a modern hotel and a new condominium on either side.

The Owner concluded that the third storey façade should not be included and that the Owner’s revised wording submitted as Exhibit 3B should be used.

ANALYSIS

Section 29 of the Act protects real property. A by-law under s. 29(6)(a)(ii) of the Act requires “a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property” (“Statement”).

The heritage attribute identified for the subject property is the existing, three storey, brick structure. In describing this heritage attribute, the City is proposing to include only

the first, second, and third storey facades of the south (street) elevation of this structure. The owner agrees to this except for inclusion of the third storey façade. The task for the Review Board was to assess whether the third storey façade should be identified in the Statement.

The arguments heard with regard to the third storey facade specifically relied on the category of contextual value as prescribed under s. 1(2)3 of Regulation 9/06:

3. The property has contextual value because it,
 - i. is important in defining, maintaining or supporting the character of an area,
 - ii. is physically, functionally, visually or historically linked to its surroundings, or
 - iii. is a landmark.

Although no agreed statement of fact was submitted, both parties are supportive of protection (designation) of the property under s. 29 of the Act. The Review Board agrees that a general application of the Regulation 9/06 criteria supports designation, for many of the reasons outlined in the City of Toronto's staff report. The building on the property is an example of a mid 19th century, urban house that was modified for industrial purposes. The property as a whole, including the rear additions, reflects the historical development and evolution of the neighbourhood.

With respect to the third storey, south façade, the City is justifying its inclusion based on an alleged historical link to the 1915 through 1920 construction activity on the property that transformed its use from residential to industrial. It is clear from the documentary evidence that a three storey factory was constructed on the rear of the property in two stages. The City of Toronto's staff report points out that tax rolls show a substantial increase in assessed property value in the 1915/1916 time period as a single storey factory was added to the rear of the house form building. The City provided evidence in support of the proposition that, in 1920, two storeys were added to the rear factory.

At some point, modifications were made to the south (streetscape) façade of the original building. The City submits that these modifications were likely part of the early 20th century attempt to tie the look of the formerly residential building to the new reality of industrial use on the property and in the neighbourhood generally. This was likely important as other buildings on Mercer Street at that time had more of an industrial/commercial appearance, consistent with their use. This is the essence of the City's "historical link" argument regarding the third storey façade and the way in which the streetscape appearance was changed to better associate with other buildings in the area.

On the question of precisely when the two storey, residential structure was modified to

its present three storey form, the evidence provided by the parties is not conclusive. It is possible that the modifications date to 1920. It is also possible that the modifications are more recent. All that can be concluded is that changes were made to the house at some point, and that the changes included the replacement of the gable roof with a parapet to create the third storey. Based on the limited evidence, it appears unlikely that these changes were made at the same time as the rear factory addition in 1915/1916. It is more likely that the changes were made either around the time of the second addition at the rear (possibly 1920) or at an even later date.

The third storey was a significant departure from, and lacks continuity with, the original residential architecture of this building. There have been alterations and additions to the original structure that, on the one hand, diminish the value of the property as an intact example of an early urban house (though the remaining portion is of cultural heritage value), but on the other hand, represent the transformation in use that actually contributed to the preservation of the building, albeit in a modified form. Without the industrial modification, the Review Board agrees that the original house likely would have been completely replaced by an industrial building.

The City submits that the Great Fire of 1904 led to the transformation of the King-Spadina area from residential to industrial (which is not in dispute) and that the third storey modifications assist in telling that story of neighbourhood transformation. If, as the City argues, the third storey was added even as early as around 1920, this is still long after the neighbourhood transformation that followed the Great Fire of 1904. The evidence is clearer that the first of the rear industrial additions occurred about 1915, closer in time to 1904. The same may be true for the second round of rear additions. Yet, these additions are not included in the proposed Statement.

Given the City's approach to seek protection of only the street façade of the building, omitting the seemingly important industrial, three storey factory in the rear, the Review Board agrees with the Owner that the integrity and meaning of the third storey façade, in isolation, is significantly diminished. The Review Board is of the opinion that the City could have supported the historical significance of the transformation of the neighbourhood from residential to industrial, by reference to the more directly associated changes at the rear of the property, rather than relying solely on how the transformation may be reflected through contextual elements of the street façade.

In the application of Regulation 9/06, the Review Board finds that the third storey, south façade, viewed in isolation, does not meet the test of Regulation 9/06 (recalling that this is the only issue in dispute between the parties). While it is possible that the third storey modifications date back to around 1920, the Review Board finds that without the factory

additions to the rear of the structure, whose origins from that time period are much clearer from the evidence, the cultural heritage value of the third storey façade on its own is greatly diminished.

Based on the evidence heard and in consideration of the criteria of Regulation 9/06, the Review Board concludes that the third storey, south (street) façade lacks significance commensurate with the original two storeys, which are a rare surviving example of an urban house designed by Toronto architect John Tully. The Review Board does not agree that the third storey, south (street) façade should be included in the description of the heritage attribute of this property.

RECOMMENDATION

Based on the evidence heard, the Review Board supports the joint position of the parties as it pertains to the designation of this property, and thus recommends that the property be protected under s. 29 of the Act for its cultural heritage value or interest. However, in light of the position of the City with regard to the exclusion of the rear additions (whose historical significance is more evident than the third storey façade), the Review Board recommends the adoption of the revised wording outlined in Exhibits 3A/3B, which expressly excludes the third storey, south (street) façade in any description of the heritage attribute of the property known municipally as 24 Mercer Street in the City of Toronto.

“Peter A.P. Zakarow”

Peter A.P. Zakarow, Chair
May 6, 2013

“Jerry V. DeMarco”

Jerry V. DeMarco, Member
May 6, 2013

“Marc Denhez”

Marc Denhez, Member
May 6, 2013

SCHEDULE 1

EXHIBITS LIST

- Exhibit 1: Affidavit of Notice of Hearing being served, as required under the *Ontario Heritage Act*, 4 pages, tabled by the Conservation Review Board.
- Exhibit 2: Placeholder for the Agreed Statement of Fact, when submitted by the parties (as of decision writing, still not received by the Review Board).
- Exhibit 3A: One page of amended wording by Owner of proposed heritage elements for a NOITD and/or by-law (in track changes)
- Exhibit 3B: One page of amended wording by Owner of proposed heritage elements for a NOITD and/or by-law (in final form)
- Exhibit 4: Document Book of the City of Toronto
- Exhibit 5: Witness Statement for Kathryn Anderson
- Exhibit 6: Colour prints of various atlas maps of the area.
- Exhibit 7: Document Book of 2071430 Ontario Inc. (Owner)
- Exhibit 8: Enlargements of original design plans for building

SCHEDULE 2

LIST OF WITNESSES IN ORDER OF APPEARANCE

Kathryn H. Anderson, Preservation Officer, Heritage Preservation Services, City of Toronto

Ashley A. Wilson, Project Architect, Scott Morris Architects Inc.