

Conservation Review Board
Commission des biens culturels



ISSUE DATE: July 24, 2015 **CASE NO.:** CRB1404
(revisions of August 4, 2015 have been incorporated herein)

PROCEEDING COMMENCED UNDER subsection 29(5) of the *Ontario Heritage Act*,
R.S.O. 1990, c.O.18, as amended.

Owner/Objector: St. James No. 1 Inc.
Objectors: Wei Fan, Victor Veri and David Sa
Subject: Notice of Intention to Designate
Property Address: 1 St. James Place
Legal Description: LT 1, PL 686; PT LT 2, PL 686, as in HL183721;
Hamilton
Municipality: City of Hamilton
CRB Case No: CRB1404
CRB Case Name: Fan v. Hamilton (City)

Heard: June 2, 3, and 4, 2015, in Hamilton, Ontario

APPEARANCES:

Parties

Counsel*/Representative

City of Hamilton

Michael Minkowski*

Wei Fan, David Sa, St. James No. 1
Inc. and Victor Veri

Anthony Wellenreiter*

Participants

Janice Brown

Self-represented

Daniel Joyce

Self-represented

Hinda Levine

Self-represented

REPORT OF THE BOARD DELIVERED BY SU MURDOCH AND MARC DENHEZ

SUMMARY OF REVIEW BOARD FINDINGS

[1] The Conservation Review Board (“Review Board”) considered the evidence of the Parties and finds that the City of Hamilton complied with the provisions of the *Ontario Heritage Act* (“Act”) when issuing the Notice of Intention to Designate the property known municipally as 1 St. James Place in the City of Hamilton (the “City”). The Review Board sets out its reasons in this Report.

[2] Given that the Review Board is not persuaded that the procedural requirements of the Act were breached or that there are any other threshold procedural irregularities present, it is unnecessary to make a finding regarding what consequences would flow from a breach of the Act or a finding of procedural irregularity.

[3] The Review Board also finds that the Public Notice of Hearing was issued in compliance with the Act as ten calendar days. This finding was given orally at the start of the Hearing and those reasons are set out in this Report.

[4] For the reasons set out in this Report, the Review Board recommends that the Property at 1 St. James Place in the City of Hamilton be designated under s. 29 of the Ontario Heritage Act.

OVERVIEW

[5] Part A of this Report addresses the Objectors’ allegations of threshold procedural irregularities in this proceeding and the City’s position on these allegations.

[6] Part B of this Report addresses the determination of cultural heritage value or

interest under Ontario Regulation 9/06 and s. 29 of the Act.

[7] The City seeks to protect under s. 29 of the Act the property known municipally as 1 St. James Place in the City (Lot 1 and part Lot 2, Plan 686) (the “Property”) as a property of cultural heritage value or interest as prescribed by Ontario Regulation 9/06: Criteria for Determining Cultural Heritage Value or Interest (“O. Reg. 9/06”).

[8] The Property is a parcel of land at the east terminus, north side, of St. James Place where it meets James Street South. It is within a geographic area known as the ridge terrace, which is the incline of Hamilton Mountain. The rear (north) side of the Property abuts a boundary of the Durand Markland Heritage Conservation District, an area protected by by-law under Part V of the Act.

[9] The Notice of Intention to Designate (“the NOID”) given by the City identifies the two storey dwelling erected in 1935 and the landscaped open space of the front and side yards and view of the dwelling from James Street South as the heritage attributes of the Property. The dwelling is slightly angled towards James Street South and has generous front and side yards.

[10] On June 26, 2014, the Property owner, St. James No. 1 Inc.; two officers of the Corporation, Victor Veri, President, and Wei Fan, Director; and David Sa representing Saco Real Estate Inc. (“the Objectors”) separately objected to the NOID. Each objection notice is prefaced that it is “made under protest with regard to the City of Hamilton’s procedure followed in creating this NOID and with regard to the City of Hamilton’s wrongful intent in creating the NOID.” Each is accompanied by an identical list of reasons challenging the City’s position that the Property holds cultural heritage value or interest. (These cultural heritage value or interest reasons are delineated in Part B of this Report.)

[11] Additionally, an allegation that the Public Notice of Hearing was deficient in the calculation of the ten days requirement of s. 29(9) of the Act was made by the Objectors a few days prior to the start of the Hearing.

[12] At 9 a.m. on June 2, 2015, the Review Board panel members, the City's legal counsel, the Objectors and their legal counsel, and a witness for the City (heritage consultant David Cuming) conducted a site visit of the interior and exterior of the dwelling on the Property and viewed a similarly designed dwelling at 16 Inglewood Drive. The Hearing commenced at 10 a.m. on June 2, 2015, at the Ontario Municipal Board Hearing Room 6, McMaster Learning Centre, 50 Main Street East, Hamilton. The Hearing closed on June 4, 2015.

PART A: THRESHOLD ISSUES ABOUT ALLEGED PROCEDURAL IRREGULARITIES

[13] This proceeding involved debate on four threshold issues about alleged procedural irregularities. These arose in the following order:

1. Whether any action of the City leading to issuing the Notice of Intention to Designate breached the procedural requirements of the *Ontario Heritage Act*, and whether those alleged irregularities cast doubt not only on the NOID, but on the jurisdiction of the Review Board to proceed with a hearing to determine cultural heritage value or interest;
2. Whether other alleged irregularities breached other municipal law and/or the City's own internal rules of procedure for heritage designation, thereby casting doubt on the NOID;
3. Whether the Review Board has jurisdiction to consider arguments pertaining to issues 1 or 2 above, or whether the Review Board is instead confined to "fact finding" strictly on the determination of cultural heritage value or interest;

4. Whether the Public Notice of the Hearing is deficient in the calculation of the ten days requirement of s. 29(9) of the Act.

Background to Part A

[14] To facilitate an understanding of the issues in Part A, the chronology of events leading to the Hearing is summarized as Schedule 1 of this Report.

[15] This proceeding initiated when the corporate owner of the Property, St. James No. 1 Inc.; two of its corporate officers: Mr. Veri, President, and Mr. Fan, Director; and Mr. Sa representing Saco Real Estate Inc. (“the Objectors”), separately objected to the NOID.

[16] St. James No. 1 Inc. (as the corporate owner), Mr. Veri, and Mr. Fan preface their objections with the following:

This objection is made under protest with regard to the City of Hamilton’s procedure followed in creating this Notice of Intention to Designate and with regard to the City of Hamilton’s wrongful intent in creating the Notice of Intention to Designate 1 St. James Place. [Emphasis in original]

[17] In his objection, Mr. Fan adds: “I am very concerned and troubled by the process the City of Hamilton has taken regarding No. 1 St. James Place. . . .”

[18] In his objection, Mr. Sa states:

This objection is made with regard to the City of Hamilton’s procedure followed in creating this Notice of Intention to Designate and with regard to the City of Hamilton’s wrongful intent in creating the Notice of Intention to Designate 1 St. James Place. . . Being the realtor of record who sold this property to the current owners I should know all about this property which is totally and completely different then [*sic*] what it shows in your description in the Notice of Intention to Designate.

[19] Each objection includes an identical delineation of “Objections” and “Some

Facts.” (These relate to the determination of cultural heritage value or interest and are addressed in Part B of this Report.)

[20] At the first prehearing, on October 22, 2014, held under s. 67.1(1) of the Act, Mr. Veri alluded to “issues of law” in how the City conducted its procedures leading to the NOID and that the Property owner would be starting proceedings in the applicable court of law.

[21] In the days prior to May 15, 2015 (the deadline for disclosure for the scheduled June 2, 2015, Hearing), the Objectors turned this position to an argument before the Review Board:

The Objector, being the property owner, has requested a pre-hearing in order to address what it considers to be fundamental procedural errors on behalf of Hamilton’s City Council as well as the question of whether or not the NOID is effective; and therefore, whether the hearing on June 2, 2015 can proceed.

The Objector submits that the procedure in issuance of the NOID violated the Ontario Heritage Act, that Council acted without jurisdiction in issuing the NOID, and that its rights to procedural fairness have also been violated. The Objector is requesting that the Conservation Review Board find that the NOID is of no legal effect and that it does not have jurisdiction to proceed to a hearing.

[22] Submissions on this allegation were received from the Parties. The Review Board requested and received an Agreed Statement of Fact (Exhibit 13) and on the first date available to all, June 1, 2015, a second prehearing was scheduled to hear arguments.

[23] At this time, the City raised the allegation of whether the Review Board has jurisdiction in any matter predating the referral of an objection to the Review Board under s. 29(7) of the Act.

[24] The Objectors additionally raised an allegation of a deficiency in issuing the Public Notice of Hearing, specifically in defining the ten day requirement for Public Notice as ten business days or ten calendar days. *(The issue being if the calculation is*

the former, then the Public Notice is deficient; if the latter, then the Public Notice is not deficient.)

[25] The Review Board reviewed the written submissions and heard arguments at the June 1 prehearing. At the June 1 prehearing and again at the start of the Hearing on June 2, 2015, the Review Board informed the Parties that it would reserve judgement on the alleged procedural irregularities concerning the NOID and on the matter of the jurisdiction of the Review Board prior to the referral of the file for a hearing. A finding on the validity of the Public Notice of Hearing was issued at the start of the Hearing on June 2, 2015. The Parties were informed that the Review Board findings on all issues would form part of this Report.

THRESHOLD PROCEDURAL ISSUE NO. 1

Whether any action of the City leading to issuing the Notice of Intention to Designate breached the procedural requirements of the Ontario Heritage Act, and whether those alleged irregularities cast doubt not only on the NOID, but on the jurisdiction of the Review Board to proceed with this hearing to determine cultural heritage value or interest.

Background

[26] It was established in evidence that within Hamilton there are properties protected under s. 29 of the Act; properties listed on the municipal Register of Property of Cultural Heritage Value or Interest as prescribed by s. 27(1) of the Act (“the Register”); and properties recorded on the City’s longstanding research tool known as the Inventory of Buildings of Architectural and/or Historical Interest (“the Inventory”). The Inventory predates the 2005 amendment to the Act which added the Register provision.

[27] Prior to May 14, 2014, the property at 1 St. James Place was not an active candidate for protection under the Act and was not listed on the Register, but in 2001 it

was added to the Inventory.

[28] Evidence was heard that about May 2014, some members of City Council were directly informed of concerns held by St. James Place area residents and members of the Durand Neighbourhood Association over tree cutting activity at the Property, a permit issued to demolish the attached side porch and garage, and the general condition and future disposition of the 1935 dwelling and its site. There was alarm that the side yards might be used as an overflow parking area for the nearby Charlton Campus of St. Joseph Hospital. This activity at the Property was public knowledge.

Listing on the Register

[29] On May 2, 2014, the City issued a permit under the *Building Code Act* to demolish the side porch and garage of the dwelling at 1 St. James Place. Permits issued under the *Building Code Act* are outside Review Board jurisdiction.

[30] On May 14, 2014, Council passed a resolution directing the listing of the Property on the Register “following consultation with the Hamilton Municipal Heritage Committee.” The Hamilton Municipal Heritage Committee (“HMHC”) is a committee prescribed by s. 28(1) of the Act and has Council representation. The reference in the resolution to “consultation” is interpreted as a reference to s. 27(1.3) *Consultation* in the Act.

Where the council of a municipality has appointed a municipal heritage committee, the council shall, before including a property that has not been designated under this Part in the register under subsection (1.2) or removing the reference to such a property from the register, consult with its municipal heritage committee.

[31] Protection for a property listed on the Register is limited to the terms of s. 27(3), whereby the property owner must give Council at least 60 days notice in writing of the intention to demolish or remove a building or structure from the property. Section 27(3) only applies if the property is listed on the Register before any application is made for a

permit under the *Building Code Act* to demolish or remove a building or structure, in accordance with s. 27(4). The May 14, 2014, action of listing the Property on the Register, being after the demolition permit was issued on May 2, 2014, did not render that permit void.

[32] Listing on the Register is not a statutory prerequisite for a municipal council to consider a property as a candidate for protection under s. 29 of the Act. The Register listing provision, therefore, is not a matter affecting a proceeding before the Review Board under s. 29 of the Act.

Issuing Notice of Intention to Designate

[33] On May 15, 2014, the day after the Council resolution to list the Property on the Register, the HMHC advised Council through a resolution that it supports the listing and added it has "concerns about the property not being designated" under the Act.

[34] The Review Board finds that this entry in the HMHC Minutes is a statement, for the public record, that the Property should be considered for designation, i.e., protection under s. 29, rather than merely limiting the discussion to listing on the Register.

[35] Slightly less than two weeks later, on May 28, 2014, Council adopted a resolution conditionally issuing the NOID, "provided the Hamilton Municipal Heritage Committee approves." The Review Board finds that this is a reference to s. 29(2) *Consultation*, which reads "the council shall, before giving notice of its intention to designate a property under subsection (1), consult with its municipal heritage committee."

[36] Giving Notice of the Intention to Designate renders all permits, including the May 2, 2014 demolition permit void as per s. 30(1) of the Act.

[37] At 10 a.m. the following day, May 29, 2014 the HMHC voted to "endorse the designation." The NOID was served the same day on the property owner and Ontario

Heritage Trust. The letter of service states:

The Hamilton Municipal Heritage Committee endorsed the designation of the property and the Statement of Cultural Heritage Value or Interest and Description of Heritage Attributes at a Special Meeting held May 29, 2014. The minutes of this meeting will be forwarded once they are available.

[38] Public Notice of the NOID was published on May 30, 2014.

[39] The Objectors contend that Council adopted the NOID resolution on May 28, 2014, before the HMHC had been consulted; and the fact that the resolution was conditional on HMHC approval is reputedly inadequate, as was the consultation itself.

[40] The Review Board would first observe that the wording of s. 29 of the Act specifies that:

- The consultation is to occur before the NOID is “given” by the municipality
- Not before any resolution or motion is adopted.

[41] There is no statutory requirement that the consultation occur before Council considers the subject. The Review Board is unconvinced of the Objectors' procedural challenge on that account.

[42] Furthermore, under s. 64(1) of the *Legislation Act*, statutes like the *Ontario Heritage Act* are to be given a purposive interpretation:

An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[43] On a purposive reading, it is clear that the Legislature wants to ensure that the municipality has the benefit of the municipal heritage committee's input, before the NOID is given.

[44] The Review Board now turns to the wording of Council's NOID resolution of May 28, 2014, which was conditional on HMHC "approval," in place of the word "consult" as prescribed in the Act. Counsel for both sides reference the Divisional Court ruling in *Tremblay v. Lakeshore (Town)* [2003] O. J. No. 4293 ("*Tremblay*"). This case determines that a municipality cannot limit its ability to select candidate properties for protection under s. 29 by imposing a precondition that the property owner consent to designation:

The decision to designate a property under the Ontario Heritage Act is discretionary. However the discretion must be exercised within the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society and the principles of the Canadian Charter of Rights and Freedoms. The immediate case could be determined on traditional administrative law principles. The standard of review of *intra vires* municipal action was one of patent unreasonableness. In requiring the consent of the owner as a pre-condition to designation, the Town imposed a condition contrary to the intent of the Act and placed an unreasonable obstacle on its own discretionary powers thereby fettering its discretion and aborting the process intended by the Act. It was patently unreasonable to impose this condition, and accordingly the application for judicial review should be granted.

[45] In the case of 1 St. James Place, the Objectors argue that Council similarly fettered its discretion by making the NOID conditional on the HMHC's "approval."

[46] The Review Board finds the wording of the May 28, 2014, resolution less than ideal. The question is whether it fetters Council's ability, contrary to the Act, as articulated in the *Tremblay* decision, to select candidate properties for designation. On this, the Review Board is not persuaded.

[47] Unlike the case in *Tremblay*, on a simple reading the May 28, 2014, resolution does not say anything about which properties can be selected as candidates for designation under s. 29 of the Act. The resolution says that the NOID must first be "forwarded to the HMHC for its consideration;" then, "provided the HMHC approves the NOID;" then, "the City Solicitor be directed to take appropriate action to serve NOID." It was possible that, if after its consideration the HMHC withheld its approval, this could have caused a delay in service – but that delay would not be fatal to the issuing of the

NOID. By that interpretation, Council did not limit its own abilities to issue the NOID: all it had done was advise the City Solicitor of Council's intended sequence of events and possibly their timing.

[48] A simple reading has its limitations, particularly in defining what Council's underlying intent may have been. There was a scarcity of conclusive evidence on that point. An observer might suppose that there was an error in the choice of semantics in the drafting of the motion (approve vs. consult), rather than any purposeful intent of Council to require pre-approval of its municipal heritage committee. In either event, the Review Board is not persuaded on the evidence that the approach taken in *Tremblay* points to a fatal flaw in this NOID resolution.

Finding of the Review Board on Threshold Issue No. 1

[49] The Review Board finds that Council did not fetter its authority in the issuing of the NOID.

[50] The Review Board also finds that consultation between Council and its municipal heritage committee occurred. In this regard, it is known that since 2001, the Property has been an item on the City's Inventory of Buildings of Architectural and/or Historical Interest. In the normal course, the Inventory is a working document and the properties included would be familiar to a municipal heritage committee and municipal heritage staff.

[51] As reflected in its recorded Minutes of May 15, 2014, it was the HMHC itself that endorsed Council's resolution to list the Property on the Register, and went further by querying why it was "not being designated," thereby suggesting to Council that it warrants designation under the Act. Of note is that the HMHC has a Council appointed representative.

[52] On May 28, 2014, Council *acted* on that suggestion for designation in issuing the

NOID. Council called for the HMHC to be canvassed yet again; but there was little objective doubt about the Committee's stated position given the May 15 Minutes.

[53] During the morning of May 29, 2014, the HMHC endorsed Council's resolution to issue the NOID. The resolution appears in the HMHC Minutes under the heading: *1. 1 St. James Place – Consultation respecting Intent to Designate (Item 8.1)*. The letter of service sent the same day to the Property owner and to the Ontario Heritage Trust makes reference to this endorsement.

[54] The Review Board finds that there was no failure to comply with the statute. The Review Board does not accept the supposition that when a municipality *accepts* a committee's recommendation – and acts on it – the committee has not therein been "consulted." That supposition is clearly at variance with common parlance. It is also at variance with a purposive reading of the Act.

[55] The Review Board finds that there are no irregularities under the Act related to issuance of the NOID. It is, therefore, unnecessary to make a finding regarding what consequences would flow from a finding of such irregularities.

[56] On the evidence, the Review Board was not persuaded that the Act's procedural requirements for the NOID had been breached.

THRESHOLD PROCEDURAL ISSUE NO. 2

Whether other alleged irregularities breached other municipal law and/or the City's own internal rules of procedure for heritage designation, thereby casting doubt on the NOID.

[57] Over City objections, but in light of the debate among the Parties about the jurisdiction of the Review Board in a proceeding such as this, the Review Board heard evidence regarding the City's internal rules of procedure for heritage designation (Exhibits 9 and 12). Some of that evidence came from the City's own witness, Mr.

Cuming, a former Hamilton heritage staff member.

[58] Counsel for the City stated that the application of this type of internal protocol is discretionary. Evidence was heard that there have been instances in Hamilton, such as in 2012, when extenuating circumstances made it necessary to set the approved designation protocol aside. It was suggested that the extenuating or “threatened” circumstance of 1 St. James Place was such an instance when the internal process for designation was set aside.

[59] The May 14, 2014 resolution of Council to list the Property on the Register directs Planning Staff to evaluate the property “in accordance with the Council approved Designation Process and report back to Planning Committee and Council for direction and prioritization of any further research and evaluation.” This direction was then revoked by Council’s May 28, 2014 resolution to issue the NOID.

[60] The Review Board acknowledges that internal or in-house rules of procedure can facilitate municipal cultural heritage management, but their existence is not prescribed by the Act. The evaluation for cultural heritage value or interest and the issuing of the NOID are not reliant on the existence and/or implementation by the municipality of internal rules for procedure. The application of a municipal procedure, where such exists, is not a matter for Review Board consideration.

Finding of the Review Board on Threshold Issue No. 2

[61] For the reasons given and as outlined in Issue No. 3 next, the finding of the Review Board is that its mandate does not extend to consideration of extraneous matters (such as the *Municipal Act*, the City's own internal rules of procedure, or its Code of Ethics) unrelated to the Act or to the functions of administrative tribunals generally.

- First, those matters are outside the Review Board’s governing legislation.

- Second, at law, there is no presumption of procedural irregularity, let alone of bad faith.
- Third, the Review Board notes that the Objectors have already filed an Application for Judicial Review pertaining to these allegations in the applicable forum, the Divisional Court.

[62] The Review Board finds that consideration of internal municipal processes, extraneous to the Act, is outside the normal mandate of the Review Board.

THRESHOLD PROCEDURAL ISSUE NO. 3

Whether the Review Board has jurisdiction to consider arguments pertaining to Questions 1 or 2, or whether the Board is instead confined to "fact finding" strictly on the determination of cultural heritage value or interest.

[63] The Objectors allege that the City breached various rules of process, under both the Act and its own internal City procedures, thereby tainting the NOID that could lead to the designation of the Property under s. 29 of the Act. The City's response is that there has been no breach and, additionally, that the Review Board had no jurisdiction to entertain such procedural arguments.

[64] According to the City, the Review Board has statutory jurisdiction to make a non-binding recommendation to Council, based on evidence, as to whether the cultural heritage value or interest of the Property meets the criteria of O. Reg. 9/06 sufficient to warrant designation under s. 29 of the Act – and essentially nothing else. The City contends that the jurisdiction of the Review Board only begins with the referral of an objection to the Review Board under s. 29(7) of the Act. Its jurisdiction does not reach back to any "analysis of the process that occurred before you received the objection."

[65] The Objectors' counsel, for his part, delivered an impassioned plea that there has been "a total abandonment of the rights of citizens" and that the Review Board is "a critical fact-finding body":

You do make decisions. You do take evidence under oath. You do have a quasi-judicial function. The City's (required) procedure is not garbage. You have a duty to do right. We operate by rules! You are the instrument by which right is to be preserved. [The designation process] is going to cut their [the Objectors'] knees off. Look, you cannot do this this way. It is better that right is done.

[66] In response to those opposed positions, the Review Board reiterates that, on consideration;

- its finding is that there are no fatal procedural irregularities in the NOID, under the Act; and
- that alleged irregularities under other legislation (such as the Municipal Act, the City's own internal rules of procedure, or its Code of Ethics) are outside the Review Board's jurisdiction.

[67] By the Objectors' reasoning, the Review Board should have made findings on both. By the City's reasoning, it should have made findings on neither, and left those matters to the Courts.

[68] To explain how, under its mandate, it addresses one and not the other, the Review Board draws a key distinction between three classes of process requirements:

1. Those arising from its own Act and its Regulations;
2. Those arising from law applicable generically to all such tribunals; and
3. Those arising elsewhere.

[69] In the first category, the Review Board has the power to consider the processes of its own Act. Indeed, the *Ontario Heritage Act* confirms that this tribunal has legal authority even to dismiss a proceeding without a hearing, if the Act's requirements for

same have not been met.

[70] Second, this tribunal is bound by the requirements applicable to all equivalent tribunals generically, whether emanating from statutes or jurisprudence.

[71] As for the third category, neither the Act nor the jurisprudence specifies that the Review Board is conferred any legal mandate to consider those matters. Functionally, consideration of matters arising under other statutes would call for analyses and assessments outside the recognized expertise of the Review Board, and outside the duties assigned to it by statute and the Courts. On a purposive reading, the Review Board discerns nothing in its enabling legislation to suggest that such a scenario was ever intended.

[72] In that light, the Review Board addresses the threshold procedural irregularities issues. The Objectors allege a number of process issues in this proceeding. Two contentions are about provisions of the Act: that the NOID was given without the requisite consultation with the municipal heritage committee and that the Public Notice of Hearing does not meet the ten day requirement of s. 29(9). These two threshold matters are governed directly by the Act and directly related legislation, notably the *Legislation Act*, and are therefore addressed by the Review Board elsewhere in this Report.

[73] There is also an argument by the Objectors that Council improperly fettered its own discretion under the Act, by making its instructions for the NOID conditional on HMHC approval. This contention is again tied directly to the Act, and therefore is addressed by the Review Board elsewhere in this Report.

[74] The Objectors have also raised the issue that the City did not follow its own internal procedures for the designation process. That contention, in the third category, is outside of the jurisdiction of the Review Board, as stated elsewhere in this Report.

Finding of the Review Board on Threshold Issue No. 3

[75] The Review Board finds that its procedural mandate is found in the *Ontario Heritage Act* as its enabling statute, and in legal provisions generically binding on every such tribunal, but it has no mandate arising elsewhere.

THRESHOLD PROCEDURAL ISSUE NO. 4

Whether the Public Notice of the Hearing is deficient in the calculation of the ten days requirement of s. 29(9) the Act.

[76] The Review Board directed the City in writing to publish the Public Notice of Hearing, as prescribed by s. 29(9) of the Act, “at least 10 days before the start of the hearing” (Exhibit 3). The City’s Affidavit of Service filed at the Hearing confirms that it published the Public Notice in the May 21, 2015 issue of the *Hamilton Spectator Community Wrap*, the May 22 issue of the *Hamilton Spectator*, and on May 22 it was posted on the City’s website.

[77] There was no dispute that the City had given Public Notice of this hearing at least ten *calendar* days in advance, but fewer than ten *business* days.

[78] The Objectors cited the Review Board *Rules of Practice and Procedure* (“Review Board Rules”), where the definition of “day” (in Rule 3) is “a business day and does not include a holiday.” Under that approach, the Public Notice is deficient in providing notice “at least 10 days before the start of the hearing” as required by the Act.

[79] The Objectors infer that if the Review Board issues a timeline for its own procedures in business days, then the same must apply to timelines specified in the Act. Counsel for the Objectors surmised that the timeline in the Act is “ten days as the Board sees it.”

[80] The Act itself does not specify whether its own timelines are measured in

calendar days or business days. What does have clear authority to define the terms of the Act is the *Legislation Act*. At s. 88-89 of the *Legislation Act*, statutory timelines are measured in calendar days, not business days.

[81] Review Board Rule 3 is prefaced with the qualifier "In these Rules" and although the Review Board has jurisdiction to control its *own* timelines, it has no jurisdiction whatever to control *statutory* ones or to redefine the terms of the Act.

[82] The Review Board is compelled to find that the statutory timeline is not "ten days as the Review Board sees it," but rather ten days as the statute defines it. At law, and as a matter of strict statutory compliance, the Public Notice of the Hearing issued in this case does not digress from the timeline of the Act, as defined in the *Legislation Act*.

[83] This finding was given orally by the Review Board at the start of the Hearing on June 2, 2015. After consultation with their legal counsel, the Objectors agreed to proceed with the proviso that the record indicate they do so "under protest." Counsel added that the above "failure to follow process" would compromise his "ability to cross-examine." The City objected to Counsel's objection. The Hearing proceeded.

Finding of the Review Board on Threshold Issue No. 4

[84] The Review Board concludes that the Public Notice of Hearing complied with the applicable statutes.

PART B: DETERMINATION OF CULTURAL HERITAGE VALUE OR INTEREST

[85] Having reserved judgement on the issues of the alleged NOID procedural irregularities and on the jurisdiction of the Review Board, and orally given its finding of no deficiency in issuing Public Notice, the Review Board proceeded with the Hearing under s. 29(8) of the Act. The scope of inquiry was to hear evidence sufficient to report to the Council of the City of Hamilton, whether in the opinion of the Review Board, the

Property should be designated under s. 29 of the Act for cultural heritage value or interest reasons as prescribed by O. Reg. 9/06.

[86] A site visit of the Property and vicinity was conducted on June 2, 2015, and immediately followed by the Hearing. The City called one witness, the Objectors called four witnesses, and three members of the public each gave a statement. The Hearing closed on June 4, 2015.

[87] A list of the exhibits filed at the Hearing is Schedule 3 of this Report.

RELEVANT LEGISLATION

[88] *Ontario Heritage Act*, Designation of Properties by Municipalities

Definitions

1. In this Act,

“heritage attributes” means, in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest:

Designation by municipal by-law

29.(1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

- (a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
- (b) the designation is made in accordance with the process set out in this section.

29.(14) After considering the report under subsection (12), the council, without a further hearing,

- (a) shall,
 - (i) pass a by-law designating the property,
 - (ii) cause a copy of the by-law, together with a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the

property,

- (A) to be served on the owner of the property and on the Trust, and
- (B) to be registered against the property affected in the proper land registry office, and

(iii) publish notice of the by-law in a newspaper having general circulation in the municipality; or

(b) shall withdraw the notice of intention to designate the property by causing a notice of withdrawal,

- (i) to be served on the owner of the property and on the Trust, and
- (ii) to be published in a newspaper having general circulation in the municipality.

DETERMINATION OF CULTURAL HERITAGE VALUE OR INTEREST

[89] When a property is a candidate for protection under s. 29 of the Act, it must meet the “test” of Ontario Regulation 9/06: Criteria for Determining Cultural Heritage Value or Interest (“O. Reg. 9/06”) as prescribed by s. 29(1)(a). A property may be designated if it meets one or more of the criteria for determining whether it is of cultural heritage value or interest.

[90] The scope of inquiry under s. 29 is to hear evidence within the three evaluation categories prescribed in O. Reg. 9/06.

- Design or Physical Value or Interest under 1(2)1 (i) (ii) (iii)
- Historical or Associative Value or Interest under 1(2)2 (i) (ii) (iii)
- Contextual Value or Interest under 1(2)3 (i) (ii) (iii)

[91] Based on the evidence, the Review Board will make a determination as to whether:

- The property meets one or more of the criteria of O. Reg. 9/06; and, if so,
- That the statement of cultural heritage value or interest and description of heritage attributes (collectively “the Heritage Value Statement”) required by s. 29(14)(a)(ii) of the Act is accurate and sufficient.

WITNESSES

[92] In order of appearance:

1. **David J. Cuming, for the City of Hamilton:** The sole witness for the City, Mr. Cuming, was admitted as an expert in “cultural heritage resource planning, design, conservation and management.” He holds professional memberships with the Canadian Institute of Planners and the Royal Town Planning Institute. He is a Registered Professional Planner in Ontario and a member of the Canadian Association of Heritage Professionals. From 2001 to 2011, Mr. Cuming served the City of Hamilton as the Senior Heritage Planner, Senior Project Manager (Heritage and Urban Design), Acting Manager of the Heritage and Urban Design Section, and Acting Manager of the Community Planning and Design Section. He was retained by the City on October 15, 2014, to peer review the Heritage Value Statement for 1 St. James Place. He reviewed the City’s research and undertook additional research and evaluation. The Review Board reminded Mr. Cuming that by signing the Acknowledgement of the Duty of an Expert Witness he is agreeing to give evidence that is “fair, objective, and non-partisan.”
2. **William Rosart, for the Objectors:** In his Witness Statement of May 14, 2015, Mr. Rosart states “I have been a member of the Hamilton Municipal Heritage Committee since 2011 and currently am a member Based upon my experience over the four years as a member of the HMHC improper procedure was followed inconsistent with the legislation and inconsistent with

the procedures that are outlined by the City of Hamilton and by the Committee proper.” The scope of Mr. Rosart’s testimony was to elaborate on his May 14, 2015 statement. His testimony was considered by the Review Board when deliberating on the Objectors’ allegations of threshold procedural irregularities in issuing the NOID.

3. **Victor Veri, Objector:** Mr. Veri is president of St. James No. 1 Inc., which owns 1 St. James Place. Much of his June 26, 2014 letter of objection, his Witness Statement of May 26, 2015, and part of his testimony challenges the process undertaken by the City in issuing the NOID. Mr. Veri’s testimony was considered as the Review Board deliberated on this allegation of procedural irregularities. Mr. Veri also gave extensive evidence related to the determination of the cultural heritage value or interest of the Property.
4. **Joseph B. Coleman, for the Objectors:** Mr. Coleman has been a professional journalist since 2007 and is the owner of The Public Record.ca which livestreams online “unedited public meetings.” The scope of his testimony was to establish the provenance of his broadcast of the May 29, 2014 meeting of the Hamilton Municipal Heritage Committee, which the Objectors submitted as evidence (as an online link to the live broadcast and as a transcript) in their allegation of procedural irregularities. The Review Board acknowledged this provenance.
5. **Kenneth Schroeder, Dipl. Tech, B.A. Sc., P. Eng. for the Objectors:** Mr. Schroeder was admitted as an expert in civil engineering. It was established that residential structures of the type and 1930s vintage at 1 St. James Place are not his primary scope of work, but he has applicable knowledge and expertise. He gave evidence related to the determination of the cultural heritage value or interest of the Property. The Review Board reminded Mr. Schroeder that by signing the Acknowledgement of the Duty of an Expert Witness, he is agreeing to give evidence that is “fair, objective, and non-

partisan.”

MEMBERS OF THE PUBLIC

[93] In order of appearance:

1. **Daniel Joyce:** The position of Mr. Joyce is that the NOID was “wrongly done as a planning process” in that it is how Council chose to respond to residents opposed to the possible use of the Property for overflow parking purposes. Council’s action was not motivated by heritage concerns. Mr. Veri had shared his research on the historic development of the property with Mr. Joyce, who then undertook additional research.
2. **Janice Brown:** As an area resident since 1972 and the president of the Durand Neighbourhood Association, Ms. Brown is concerned for the quality and heritage of the area and does not want any more “destruction.” She was integral to the campaign to have Council consider designation of the property under the Act.
3. **Hinda Levine:** As a resident of St. James Place since 1992, Ms. Levine finds that the Property “contributes to the richness of the area and beauty of the street.” She felt such a “terrible time pressure at hearing of the demolition permit,” that she and her spouse initiated the injunction to have that permit revoked.

CASE FOR THE MUNICIPALITY AND FOR THE OBJECTORS

[94] Item No. 1 of the June 14, 2014 letters of objection states: “The property does not meet any one of the criteria for determining whether it is of cultural heritage value or interest.” Contrary to this initial position by the Objectors, and as acknowledged in the final summations for the Objectors and for the City, there is “no fundamental dispute on

the merits of designating the Property.” Their combined evidence corroborates that “one or more” of the criteria of O. Reg. 9/06 are met.

[95] It remained for the Review Board to analyse where there is agreement among the Parties, where refinement in the wording is appropriate, and where there is disagreement on the content of the Heritage Value Statement.

[96] Much of Mr. Cuming’s Witness Statement (Exhibit 4, Tab 1) is an analysis of the City’s research and evaluation of the Property, plus supplementary research undertaken by Mr. Cuming. Using his findings, Mr. Cuming again applied the criteria of O. Reg. 9/06 to the Property, with the result being a Revised Heritage Value Statement. At the start of the Hearing, all agreed that for purposes of the Hearing, Mr. Cuming’s Revised Heritage Value Statement (Exhibit 8 or Schedule 2 of this Report) be substituted for the original Heritage Value Statement in the NOID.

O. REG. 9/06: DESIGN OR PHYSICAL VALUE

Does the property meet the test of O. Reg. 9/06: Criteria for Determining Cultural Heritage Value or Interest for Design or Physical Value?

- [97] 1. The property has design value or physical value because it,
- i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
 - ii. displays a high degree of craftsmanship or artistic merit, or
 - iii. demonstrates a high degree of technical or scientific achievement.

[98] Item No. 2 in the June 26, 2014 letters of objection states in reference to the original Heritage Value Statement in the NOID: “The structure is not a representative example of the Art Moderne architecture.” On this point, Mr. Cuming concurs with the Objectors. In the Revised Heritage Value Statement, all references to Art Moderne

(including the missed reference under the heading Description of Heritage Attributes) are substituted with the following:

The property has design value as a rare example of a classically proportioned residence with a symmetrical arrangement of façade and wings influenced by the Art Moderne use of smooth stucco and the delicate use of Art Deco decorative motifs within the City of Hamilton.

[99] Mr. Cuming was not given permission to enter the dwelling prior to the site visit of June 2, 2015, but viewed an online real estate video of the interior. His conclusion about the construction type relies on archival documentation, notably extracts of *Canadian Homes and Gardens*: the January-February 1936 issue article: “A Steel-Built House” and March 1936 advertisements: “Unfettered by Precedent – A New Era Begins in Pigott-Built Homes”; “New Development in House Construction.”

[100] Based on his research findings, Mr. Cuming removed, from the original Statement of Value, the wording “and the use of a steel structure in residential construction.” He then substituted with the following in the Revised Heritage Value Statement:

The property has physical value as a rare combination of the use of residential building construction materials of structural steel, concrete floor slabs and insulating cork and demonstrates a high degree of technical achievement. Technical achievement is demonstrated in the comprehensive steel framing of the entire residential structure, the use of three inches of insulating cork, a zinc roof, and the use of a pressurised air conditioning system and insulating, double glazing.

[101] Item No. 6 in the letters of objection states in reference to the original Heritage Value Statement in the NOID: “The materials used in the construction were not unique at the time of construction: structural steel skeletons were already in use in the 1890s.” Subsequent to their initial “not unique” objection, the Objectors shifted to an explanation that the construction method of the dwelling is not “structural steel.”

[102] In his Witness Statement, Mr. Schroeder of Schroeder Engineering Consultants Ltd. references the conclusion in his “Engineering Review: Existing Porch and Garage

Removal, Residential Building, No. 1 St. James Place, Hamilton, Ontario”:

We have reviewed our files regarding our work at the above referenced site. This residential building is not a steel structure house.

[103] In his testimony, Mr. Schroeder explained that he visited the site and examined the construction of the dwelling and garage through holes cut by Mr. Veri into the inside walls of the dwelling and the side garage. He determined that the dwelling is a composition of “plaster, wood, cork, concrete, and steel.” The garage abutting the exterior wall of the dwelling is differently constructed of “tile masonry.”

[104] Mr. Schroeder differentiated between the terms “structural steel” and “steel framing.” Structural steel is steel formed into shapes and sizes during its production. The components are then assembled as the skeleton of the building structure. Steel framing is a network of columns and beams of different sizes, each smaller in dimension and lighter in weight than structural steel. The steel framing members are used to form a panel which constitutes the main framing.

[105] In the dwelling at 1 St. James Place, steel framing is used in combination with wood, concrete, and cork, making it a composite, not “structural steel,” structure. The floor is a light gauge, sheet steel used to shape a pan into which concrete was poured. Under this is a series of small dimension steel rod bars serving as joists for reinforcement.

[106] Mr. Schroeder summarized that the “house is of composite construction using typical materials wood, concrete, steel, and cork, but it is not “structural steel.” With this explanation, he added “wood” to the list of construction materials in Mr. Cuming’s Revised Heritage Value Statement.

[107] On cross-examination, Mr. Schroeder stated that he had “never experienced another building with this combination of materials.” He agrees that the construction is “consistent” with the section drawing (Exhibit 4, Tab M, p. 139). He expressed his

admiration for the kinds of innovations and experimentation being conducted by those in the engineering profession in the 1930s. “This house is a high tech application of materials.” He considers Joseph Pigott to be a “very special” “kind of builder” and among the “experimenters.” This 1930s example of innovation “inspires” Mr. Schroeder “as an engineer to strive for new innovation.”

[108] The evidence by Mr. Cuming and Mr. Schroeder suggests that the 1 St. James Place dwelling was constructed in 1935 using experimental technology. The proof of this was submitted by Mr. Veri as Exhibit 17. This is Canadian Patent (11) CA 355247, Canadian Patent Classification 72/25 issued to Inventors: Percy Merrihew Smith and Franklin Sturgeon Milligan, and Owner: The Pigott Construction Company Limited. Issue date 1936-01-07. The illustration attached to the patent document was drawn at Hamilton on August 22, 1935. In summary, the Patent reads:

Our invention relates to improvements in Building Construction and more particularly to the construction of houses, and the object of the invention is to devise a construction which will be more perfectly insulated against temperature variations than is at present the case, thereby affecting an appreciable saving in the fuel consumption to heat the house over that usual for an orthodox house of the equivalent cubic capacity. . . .

A further object is to devise a construction which will enable a unit construction to be employed in which in different sizes and designs of houses it is only necessary to vary the number of units to achieve the desired result . . .

A still further object is to devise a construction of frame for the house in which the units may be pre-fabricated, necessitating only comparatively unskilled labour for their erections.

Yet another object is to evolve a construction which will be strong, durable, comparatively insusceptible to the action of the elements and which can be easily and quickly erected at a cost not greatly in excess of the cost of a brick house of equivalent size.

Another object is to devise a construction in which the heating, electrical, gas and water conduits may be carried in the wall of the structure.

Yet another object is to provide means for securing the insulating material and/or the exterior wall surface to a medium which is itself of insulating materials and which is attached to the frame.

Another and one of the main objects of our invention is to devise a construction which will be essentially fire resisting, being fabricated substantially of non-inflammable materials.

[109] Exhibit 18 is a photograph of 1 St. James Place with the heading “Another ‘First’ for Hamilton!” The caption calls the structure “the first fabricated house. . . .” “The dwelling is proof against heat and cold and is composed of steel, tile and insulating materials. It is the first of the ultra-modern dwellings to be erected in Canada.”

[110] Based on the evidence heard and with the clarifications made by Mr. Schroeder regarding the corrected use of the term “structural steel” and the addition of “wood” to the list of materials, the Review Board agrees that the Property satisfies the criteria of Design or Physical Value.

O. Reg. 9/06: Historical or Associative Value

Does the property meet the test of O. Reg. 9/06: Criteria for Determining Cultural Heritage Value or Interest for Historical or Associative Value?

- [111] 2. The property has historical value or associative value because it,
- i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,
 - ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
 - iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

[112] The Revised Heritage Value Statement states:

The development of the property and its cul-de-sac setting is directly associated with the theme of early to mid-twentieth century suburban development located outside Hamilton Downtown and immediately below the Escarpment base. The residence demonstrates the work of the well-known, Hamilton based architectural firm of Hutton and Souter as well as the work and ideas of the Pigott Construction Company Limited in the use of modern construction materials and innovative building practices.

[113] The surveyed plan for St. James Court (now St. James Place) was registered on July 24, 1929, as Plan 686. Mr. Cuming considers this plan of subdivision to be part of a second phase of “suburban” residential development (c.1929-1960) outside of the traditional downtown core and immediately below the Niagara Escarpment. No evidence to the contrary was presented by the Objectors.

[114] Biographical information (Exhibit 4, Tab J) establishes that Gordon Johnston Hutton (1881-1942) apprenticed as an architect in the Hamilton firm of Charles Mills, joining the firm as a partner in 1905. In 1921, Mr. Hutton formed a partnership, Hutton and Souter, Architects and Engineers, with Mills’ former apprentice William Russell Souter (1893-1971). The firm had several important commissions for commercial, industrial and ecclesiastical work.

[115] Biographical information (Exhibit 4, Tabs G,H,I) establishes that Joseph M. Pigott (1885-1969) was head of the Hamilton based Pigott Construction Company Ltd. By the mid 20th century, this was Canada’s largest privately owned construction company. Joseph M. Pigott was a “remarkable administrator, patriot, and urban visionary” with a long list of achievements and accolades in business, social movements, and philanthropy. A “great city builder,” he was inducted into the City of Hamilton Hall of Fame in 1997.

[116] Item No. 3 in the letters of objection states in reference to the original Heritage Value Statement in the NOID: “This structure is not a unique work of the architects Hutton & Souter. It does not compare to a legacy work of these architects in Hamilton such as the Basilica of Christ the King.”

[117] Item No. 4 in the letters of objection states in reference to the original Heritage Value Statement in the NOID: “The structure is not a unique work of the builder Pigott. It does not compare to a legacy work of the builder such as the Pigott Building.”

[118] In his Witness Statement of May 26, 2015, Mr. Veri states: “There is no reliable

evidence proffered in the said report which identifies the architects as Hutton & Souter. They [the City] have simply made an assumption based on the initials “H.S.” being on the original blue prints.”

[119] In response, Mr. Cuming again referenced the January-February 1936 issue of *Canadian Homes and Gardens* in which the article “A Steel-Built House” is subtitled “Hutton and Souter, Architects” and a photograph of the dwelling is captioned “The Pigott-built house, Hamilton, Ont., first product of an important experiment in modern Canadian housing.”

[120] The collection of architectural drawings held by the City for the dwelling (Exhibit 4, Tab M) was examined by both Mr. Cuming and Mr. Veri. Neither could identify and/or decipher any architect’s title block, stamp, or signature with which to verify the attribution to Hutton and Souter. (Of note, is that the locations of the side porch and garage on the drawings are reversed to *as built*).

[121] Mr. Veri contends that all architects identify their work out of a sense of creative pride. He draws from this the conclusion that if not signed by Houter and Souter, it is not their work. Based on his research, he theorizes that the design, and therefore the drawings, were done by the patent inventors Percy Smith and Franklin Milligan, with the latter taking the lead. These two may have been employees of Pigott Construction Co. Ltd.

[122] Mr. Cuming pondered if the City holds a *complete* collection of the drawings and/or if the title block may simply be missing on this copy. He referred to the dwelling at 1 Markland Street, abutting the rear of 1 St. James Place. This was built in 1911 for Harry L. Frost using “a design by Mr. Hutton of the prominent local firm of Mills and Hutton (and later of Hutton and Souter)” Mr. Cuming describes the Markland Street example as a Classical design in traditional materials and the St. James Place example as a Classical design in modern materials. In addition, the patent inventors would need an architect to create a design to “host the technology.” Mr. Cuming

believes the common denominator is the designer Gordon Hutton and the firm Hutton and Souter.

[123] Mr. Veri and Mr. Cuming agree that Hutton and Souter are the project architects for the 1936 dwelling at 16 Inglewood Drive, erected for Vernon Hale and the second experimental house involving Pigott and others. The Review Board observed during the June 2, 2015 site visit, that there is an undeniable similarity in design, architectural elements, finishing, and materials between 16 Inglewood and 1 St. James Place.

[124] On the question of whether it is correct to attribute the construction of the dwelling to Pigott Construction Company Ltd., Mr. Cuming and Mr. Veri investigated the personal journals of Joseph M. Pigott held by the William Ready Division of Archives and Research Collection, McMaster University, 1910-1968. Mr. Cuming read 1935 to 1936; Mr. Veri continued to 1940.

[125] These journals chronicle Pigott's personal involvement with the "St. James Court house" project. On May 23, 1935, he wrote: "Told Parker to offer \$3000 for lot at corner of St. James Place and James St. S. [the Property location]." The Property land records Title indicates that it was bought by Pigott Construction Co. On May 29, he appears to be negotiating with "[Fred] Dolley, Hamilton, [Allan] Parker, and [Frank] Milligan re Housing company." On June 18, "We agreed to put up \$5000.00 each to [start?] experimenting with the houses."

[126] The journals verify the activity and determination of Pigott to take the experimental housing project to fruition. He manages issues such as noted on July 8: "The Building Code does not cover houses of this type. The revised code is not yet law here" He visits the construction site frequently and tracks activity such as on August 23, "delivering the steel panels for the 7 room house also the fabricated steel joists."

[127] The Parties agree that Joseph M. Pigott was personally involved with the St.

James housing project and that his corporation, Piggott Construction Company Ltd., held ownership of the lot. Where they differ is whether the statement “built by the Piggott Construction Company” included in the revised Heritage Value Statement is correct.

[128] Mr. Veri’s position is that a separate housing company was founded in 1935 by Piggott, Dolley, Hamilton, Parker, and Milligan, and that this initiative was independent of Piggott Construction Company Ltd. Citing the 1936 *Canadian Homes and Gardens* issues, he suggests that the company was called “Pigott-Built Homes.” Exhibit 19 is a booklet found in the 1937 Piggott journal that lays out the benefits of “insulated steel frame construction.” It reads:

The design and fabrication of the steel frame panels illustrated in this booklet, and the method of attaching the insulation thereon, are patented features of Pigott-Built Homes, Pigott Building, Hamilton, Ontario. This company is prepared to undertake construction contracts which involve their use. . . .”

[129] Mr. Cuming noted that the March 1936 *Canadian Homes and Gardens* advertisements do not identify the project architect but include a photograph captioned “Pigott-Built Home at St. James Court, Hamilton, Ontario. For further details and information write Pigott Construction Co. Limited., Pigott Building, Hamilton, Ontario.” With this and in the absence of any references in Piggott’s journals to a separate business entity, selection of company name, minutes of corporate meetings, etc. Mr. Cuming concludes that there was a financial arrangement between Piggott, Dolley, Hamilton, Parker, and Milligan, but there is no corporate acknowledgement of a separate company framework. Mr. Veri disagrees.

[130] Given that none of the Parties searched company registration records, which presumably could resolve the matter, this discussion was closed.

[131] In the absence of any definitive proof, the wording of the final Heritage Value Statement should *suggest*, but not confirm, the attribution of the design of the 1935 dwelling to Hutton and Souter.

[132] The wording of the final Heritage Value Statement should confirm that Joseph M. Pigott, President of Pigott Construction Company Ltd., was personally involved in this experimental housing project. In the absence of any definitive proof, the attribution to “the work and ideas of the Pigott Construction Company Limited” should be omitted.

[133] The Review Board finds that the Property satisfies the criteria of Historical or Associative Value.

O. Reg. 9/06: Contextual Value

Does each property meet the test of O. Reg. 9/06: Criteria for Determining Cultural Heritage Value or Interest, in the category of Contextual Value?

- [134] 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.

[135] The Revised Heritage Value Statement does not seem to ascribe any Contextual Value to the Property.

[136] The zoning of the Property is “Urban Protected Residential.” Exhibit 4, Tab C, maps the “Immediate Locale” of 1 St. James Place. It colour codes the locations of numerous properties on the Inventory, including six on St. James Place; several properties protected under s. 29 of the Act; and the boundary of the Durand-Markland Heritage Conservation District protected under Part V of the Act. It is evident from this mapping that there is a predominance of properties in the area that hold cultural

heritage significance. No evidence to the contrary was presented.

[137] In his Witness Statement and testimony, Mr. Cuming concludes that the Property maintains and supports the “varied residential character of this diverse area” of St. James Place. It is physically, functionally, visually, and historically linked to the area “as a residential house in a residential area,” clearly visible, and within a residential plan of subdivision.

[138] The Review Board finds that the Property satisfies the criteria of Contextual Value. Some reference to the contextual importance of the Property in maintaining and supporting the character of the area and the linkages with its surrounding should be included in the Heritage Value Statement.

HERITAGE VALUE STATEMENT

Is the statement of cultural heritage value or interest and description of heritage attributes accurate and sufficient?

Heritage Integrity and Authenticity

[139] In Item No. 5 of the June 26, 2014 letters of objection, the Objectors raise the issue of the heritage integrity and authenticity of the Property and its 1935 dwelling:

The current structure has maintained very few of its original construction materials and practices. If the structure had cultural heritage value at one time, this has been totally eroded by its modernization. There has been no attempt by previous owners to maintain the characteristics of the original materials. The structure no longer represents the construction materials and practices of the 1930s.

[140] The objection continues with Facts 7 through 14 itemizing that the flooring on the first and second floor “is not original;” the ceramic floor, countertop, and cabinetry of the kitchen are “not original;” the landscaping and open space are “not unique;” the roof is asphalt shingle; the window sash are a replacement vinyl type; and the interior has

been modernized. These changes are reiterated in Mr. Veri's Witness Statement.

[141] Based on the site visit and the evidence heard, the Review Board is not convinced by the Objectors' characterization that the dwelling is so "modernized" and changed that the heritage integrity and authenticity of the Property has been negated.

Revised Heritage Value Statement

[142] The Revised Heritage Value Statement is divided into the statement of cultural heritage value or interest and the description of heritage attributes, as required by the Act.

[143] The statement of cultural heritage value or interest proposed by the City is as follows:

Statement of Cultural Heritage Value or Interest

The two-storey house located at 1 St. James Place was constructed in the mid- 1930s. The house was designed by Hutton and Souter architects and built by the Pigott Construction Company as a classically proportioned residence with a symmetrical arrangement of façade and wings influenced by the Art Moderne use of smooth stucco and the delicate use of Art Deco decorative motifs.

The property is located at the corner of St. James Place and James Street South and sited so that it is slightly angled towards James Street South and has generous front and side yards.

As reported in Canadian Homes and Gardens in 1936, the house was built of a structural steel skeleton with stucco cladding and cork insulation. The front façade is symmetrically arranged with three bays on the main façade and a projecting volume on each end – a single bay garage at the east end and a porch at the west end. The façade is adorned by reliefs in the stucco above and around the windows and entrances, over the garage door, and along the top of the porch openings, as well as by metal railings around the porch and in front of the ground floor windows. The shallow hip roof disappears behind a parapet and there is a chimney at each end of the roof.

The original steel casement windows have mostly been replaced with vinyl casement windows, although at least two sets of steel windows remain on the east side façade of the garage. The roof was originally clad with zinc and now has asphalt roofing.

The property has design value as a rare example of a classically proportioned residence with a symmetrical arrangement of façade and wings influenced by the Art Moderne use of smooth stucco and the delicate use of Art Deco decorative motifs within the City of Hamilton. The property has physical value as a rare combination of the use of residential building construction materials of structural steel, concrete floor slabs and insulating cork and demonstrates a high degree of technical achievement. Technical achievement is demonstrated in the comprehensive steel framing of the entire residential structure, the use of three inches of insulating cork, a zinc roof, and the use of a pressurised air conditioning system and insulating, double glazing.

The development of the property and its cul-de-sac setting is directly associated with the theme of early to mid-twentieth century suburban development located outside Hamilton Downtown and immediately below the Escarpment base. The residence demonstrates the work of the well-known, Hamilton based architectural firm of Hutton and Souter as well as the work and ideas of the Pigott Construction Company Limited in the use of modern construction materials and innovative building practices.

[144] Based on the evidence heard, the following revisions to the statement of cultural heritage value or interest are recommended:

1. “Constructed in the mid-1930s” could be narrowed to 1935.
2. Unless subsequent research can confirm the attribution of the design to Hutton and Souter, all references should be modified to a likely attribution.
3. Unless subsequent research can confirm the attribution of the construction work to Pigott Construction Company Ltd., all references should be modified to a statement of the personal involvement of Joseph M. Pigott, President of Pigott Construction Company Ltd., in the experimental housing project.
4. The term “structural steel” should be substituted in all instances with wording to the effect that this was an innovative composite technology using wood, cork insulation, concrete floor slabs, and steel framing, with a stucco cladding.
5. The “pressurised air conditioning system and insulating, double glazing” should be specified as existing or removed.

6. At the June 2, 2015 site visit, Mr. Cuming determined that the interior staircase including its terrazzo steps and metal handrail are original elements. These could be added to the statement of cultural heritage value or interest and/or the description of heritage attributes.
7. Some reference to the contextual importance of the Property in maintaining and supporting the character of the area and the linkages held with its surrounding are advised.

[145] The description of heritage attributes proposed by the City is as follows:

Description of Heritage Attributes

The heritage attributes of the two storey building are derived from the property's built heritage value as an example of the Art Moderne style of architecture, as designed by Hutton and Souter and built by the Pigott Construction Company. The heritage attributes include, but are not limited to:

- All exterior features of 1 St. James Place including all building facades of the existing house, the cross-hip roof and existing chimneys, including the projecting end volumes, and all associated construction materials and techniques;
- All interior structural steel, concrete floor slabs and insulating cork; and;
- The landscaped open space of the front and side yards and view of the house from James Street South.

[146] Based on the evidence heard, the following revisions to the description of heritage attributes are recommended:

1. The reference to "Art Moderne" as the style of architecture should be deleted.
2. Unless subsequent research can confirm the attribution of the design to Hutton and Souter, all references should be modified to a likely attribution.

3. Unless subsequent research can confirm the attribution of the construction work to Pigott Construction Company Ltd., all references should be modified to a statement of the personal involvement of Joseph M. Pigott, President of Pigott Construction Company Ltd. in the experimental housing project.
4. The term “structural steel” should be substituted in all instances with wording to the effect that this was an innovative composite technology using wood, cork insulation, concrete floor slabs, and steel framing, with a stucco cladding. For clarification, the word “interior” in “all interior structural steel...” and in the revised wording should be omitted.
5. For clarification, “All building facades of the existing house” should be broadened to “of the existing house, including the side porch and side garage.”
6. At the June 2, 2015 site visit, Mr. Cuming determined that the interior staircase including its terrazzo steps and metal handrail are original elements. These could be added to the statement of cultural heritage value or interest and/or the description of heritage attributes.
7. Regarding the open space, as several mature trees were recently removed from the property, the City will need to decide if retaining the word “landscaped” is appropriate.

SUMMARY

[147] In Part A of this Report, the Review Board concludes that no procedural requirements of the Act were breached and there are no other threshold procedural irregularities of relevance to the Review Board.

[148] In Part B of this Report, the Review Board concludes that cultural heritage value

or interest as prescribed by all categories of O. Reg. 9/06 is found in the candidate property at 1 St. James Place. With additional research, it may be possible to confirm the attribution of the design of the 1935 dwelling to architects Hutton and Souter and its construction to Pigott Construction Company Ltd. Whether or not further research is pursued, the Review Board considers the existing evidence to be sufficient to proceed with designation of the Property under s. 29 of the Act.

RECOMMENDATION

[149] The Conservation Review Board recommends that:

The Revised Statement of Cultural Heritage Value or Interest and Description of Heritage Attributes be revised as recommended in this Report, and;

The City of Hamilton then proceed with the designation of the property at 1 St. James Place, under the provision of s. 29(14) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended.

“Su Murdoch”

SU MURDOCH
VICE-CHAIR

“Marc Denhez”

MARC DENHEZ
MEMBER

Schedule 1: Chronology relevant to this case

Schedule 2: (Exhibit 8): Revised Statement of Cultural Heritage Value and Description of Heritage Attributes

Schedule 3: Exhibits List

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Conservation Review Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

SCHEDULE 1**CHRONOLOGY RELEVANT TO THIS CASE****April 1, 2014**

The Property is acquired by St. James No. 1 Inc.

April 17, 2014

Property Owner applies to the City under the *Building Code Act* for a permit to demolish a “side garage and side porch.”

May 2, 2014

Property Owner is issued a Building Permit by the City under the authority of the *Building Code Act* to “demolish existing attach garage and attached porch at the existing single family dwelling.” The Review Board can confirm that no demolition of the garage and porch had transpired by June 2, 2015.

May 14, 2014

City Council Meeting of May 14, 2015, at 5 p.m. Minutes 14-010, includes:

8.3 Inclusion of 1 St. James Place, Hamilton in the Register of Property of Cultural Heritage Value or Interest

Whereas, 1 St. James Place Hamilton (Ward 2), is believed to be of cultural heritage value or interest and may be worthy of designation under part IV of the *Ontario Heritage Act*.

Therefore Be it Resolved:

(a) That, following consultation with the Hamilton Municipal Heritage Committee, 1 St. James Place, Hamilton be included as a non-designated property in the Register of Property of Cultural Heritage Value or Interest and,

(b) That Planning staff be directed to prepare a staff report including a Preliminary Evaluation of 1 St. James Place, Hamilton in accordance with the Council-approved Designation Process and report back to Planning Committee and Council for direction and prioritization of any further research and evaluation.

(Farr/Morrow)

That the Rules be waived to allow the introduction of a motion respecting inclusion of 1 St. James Place, Hamilton in the Register of the Cultural Heritage Value or Interests Carried

May 15, 2014

Hamilton Municipal Heritage Committee Meeting of May 15, 2014, at 12 p.m.
Report 14-005, includes:

(g) Discussion Items

(vii) Inclusion of 1 St. James Place, Hamilton, in the Register of Property of Cultural Heritage Value or Interest (Item 8.9)

Councillor McHattie advised the Ward Councillor is working on this matter.

The Committee expressed concerns about the property not being designated.

The Hamilton Municipal Heritage committee supported the motion respecting the Inclusion of 1 St. James Place, Hamilton, in the Register of Property of Cultural

Heritage Value of Interest, moved by Councillor Farr at Council on May 14, 2014.

May 21, 2014

Hamilton Superior Court of Justice Notice of Application regarding an appeal brought pursuant to s. 25(1) of the *Building Code Act* seeking to revoke the demolition permit. The NOID renders the permit void under s. 30(1) of the Act.

May 28, 2014

City Council Meeting May 28, 2014, at 5 p.m. Minutes 14-011, includes a resolution, 8.4(a):

Whereas City Council has included 1 St. James Place, Hamilton in the Register of Property of Cultural Heritage Value or Interest as a non-designated property;

And Whereas a Building Permit for the demolition of the attached garage and porch has been issued and remains in effect;

And Whereas subsection 29 (1) of the *Ontario Heritage Act* enables the Council of a municipality to designate by by-law property that is of cultural heritage value or interest if such property satisfies the prescribed criteria in Ontario Regulation 9/06;

And Whereas subsection 33 (1) and subsection 34 (1) of the *Ontario Heritage Act* provide for a process to manage alterations to property and demolition or removal of buildings or structures designated under the *Ontario Heritage Act*,

And Whereas the property located at 1 St. James Place, Hamilton, meets the criteria specified in Ontario Regulation 9/06 including, but not limited to:

- The property's design value as a representative example of the Art Moderne style within the City of Hamilton and as an example of the use of a steel structure in residential construction.
- The property's historical associations with Hutton and Souter, architects, and the Pigott Construction Company, as well as associations with the theme of the development of modern construction materials, practices and conveniences.

Therefore be it resolved:

(a) That the Notice of Intention to Designate 1 St. James Place, Hamilton attached as Appendix "A", be approved by Council;

(b) That the Notice of Intention to Designate 1 St. James Place, Hamilton be forwarded to the Hamilton Municipal Heritage Committee for its consideration;

(c) That, provided the Hamilton Municipal Heritage Committee approves the Notice of Intention to Designate 1 St. James Place, the City Solicitor be directed to take appropriate action to serve Notice of Intention to Designate 1 St. James Place, Hamilton, under Part IV of the *Ontario Heritage Act* on the owner of the property and on the Ontario Heritage Trust, and to publish the Notice of Intention to Designate in a newspaper having general circulation in the municipality; and,

(d) That the resolution approved by Council on May 14, 2014 which directed staff to prepare a staff report including a Preliminary evaluation of 1 St. James Place, Hamilton and report back to Planning Committee and Council for direction and prioritization of any further research and evaluation, be rescinded.

May 29, 2014

Hamilton Municipal Heritage Committee Meeting of May 29, 2014, at 10 a.m.
Report 14-006, includes:

1. 1 St. James Place – Consultation respecting Intent to Designate (Item 8.1)

That the Hamilton Municipal Heritage Committee endorse the designation of the property at 1 St. James Place, Hamilton as approved by Council on May 29, [sic] 2014, including the Statement of Cultural Heritage Value or Interest and Description of Heritage Attributes contained in the Notice of Intention to Designate.

The Minutes record “correspondence from Hamilton residents respecting 1 St. James Place, Hamilton (Item 5.1).” (Exhibit 15 contains this correspondence.) Victor Veri “spoke before the Committee and expressed his dissatisfaction with Council’s intent to Designate 1 St. James Place.”

May 29, 2014

The Property Owner and the Ontario Heritage Trust are served the NOID by the City.

May 30, 2014

Public Notice of the NOID is published by the City.

June 3, 2014

Planning Committee Minutes 14-009, June 3, 2014 include:

HMHC Report 14-006 (Item 8.2)

That City Council be advised that the Hamilton Municipal Heritage Committee endorse the designation of the property at 1 St. James Place, Hamilton as approved by Council on May 29 [sic], 2014, including the Statement of Cultural Heritage Value or Interest and Description of Heritage Attributes contained in the Notice of Intention to Designate.

June 26, 2014

Objections to the NOID are filed by the Objectors.

July 18, 2014

The Objections are referred to the Review Board for a hearing.

October 22, 2014

A prehearing is conducted by a Review Board panel of Su Murdoch and Marc Denhez and attended by counsel for the City; the Property Owner represented by Victor Veri and Wei Fan as officers of the Corporation; David Sa representing Saco Real Estate Inc., and a member of the public. The Objectors are self represented. A hearing date of February 24, 25, 26, 2015, is set. The Objectors subsequently request and were granted an adjournment to June 2.

May 4, 2015

Written Notice of Hearing is served on the Parties by the Review Board.

May 21 and 22, 2015

The City publishes the Public Notice of Hearing.

June 1, 2015

A second prehearing under s. 67(1) was conducted by a Review Board panel of Su Murdoch and Marc Denhez and attended by counsel for the City and counsel for the Objectors.

SCHEDULE 2**EXHIBIT 8: REVISED STATEMENT OF CULTURAL HERITAGE VALUE AND DESCRIPTION OF HERITAGE ATTRIBUTES****CITY OF HAMILTON****NOTICE OF INTENTION TO DESIGNATE****1 St. James Place, Hamilton**

IN THE MATTER OF THE ONTARIO HERITAGE ACT and the property in the City of Hamilton known municipally as 1 St. James Place, Hamilton.

NOTICE IS HEREBY GIVEN that the City of Hamilton intends to designate this property as being a property of cultural heritage value.

Statement of Cultural Heritage Value or Interest

The two-storey house located at 1 St. James Place was constructed in the mid- 1930s. The house was designed by Hutton and Souter architects and built by the Pigott Construction Company ~~in the Art Moderne style~~ as a classically proportioned residence with a symmetrical arrangement of façade and wings influenced by the Art Moderne use of smooth stucco and the delicate use of Art Deco decorative motifs.

The property is located at the corner of St. James Place and James Street South and sited so that it is slightly angled towards James Street South and has generous front and side yards.

As reported in Canadian Homes and Gardens in 1936, the house was built of a structural steel skeleton with stucco cladding and cork insulation. The front façade is symmetrically arranged with three bays on the main façade and a projecting volume on each end – a single bay garage at the east end and a porch at the west end. The façade is adorned by reliefs in the stucco above and around the windows and entrances, over the garage door, and along the top of the porch openings, as well as by metal railings around the porch and in front of the ground floor windows. The shallow hip roof disappears behind a parapet and there is a chimney at each end of the roof.

The original steel casement windows have mostly been replaced with vinyl casement windows, although at least two sets of steel windows remain on the east side façade of the garage. The roof was originally clad with zinc and now has asphalt roofing.

~~The property has design value as a representative example of the Art Moderne style within the City of Hamilton~~ The property has design value as a rare example of a classically proportioned residence with a symmetrical arrangement of façade and wings influenced by the Art Moderne use of smooth stucco and the delicate use of Art Deco decorative motifs within the City of

Hamilton ~~and the use of a steel structure in residential construction~~. The property has physical value as a rare combination of the use of residential building construction materials of structural steel, concrete floor slabs and insulating cork and demonstrates a high degree of technical achievement. Technical achievement is demonstrated in the comprehensive steel framing of the entire residential structure, the use of three inches of insulating cork, a zinc roof, and the use of a pressurised air conditioning system and insulating, double glazing.

~~The property has historical associations with Hutton and Souter, architects, and the Pigott Construction Company, as well as associations with the theme of the development of modern construction materials, practices and conveniences.~~ The development of the property and its cul-de-sac setting is directly associated with the theme of early to mid-twentieth century suburban development located outside Hamilton Downtown and immediately below the Escarpment base. The residence demonstrates the work of the well-known, Hamilton based architectural firm of Hutton and Souter as well as the work and ideas of the Pigott Construction Company Limited in the use of modern construction materials and innovative building practices.

Description of Heritage Attributes

The heritage attributes of the two storey building are derived from the property's built heritage value as an example of the Art Moderne style of architecture, as designed by Hutton and Souter and built by the Pigott Construction Company. The heritage attributes include, but are not limited to:

- ~~All exterior façades of the existing house~~, All exterior features of 1 St. James Place including all building facades of the existing house, the cross-hip roof and existing chimneys, including the projecting end volumes, and all associated construction materials and techniques;
- All interior structural steel, concrete floor slabs and insulating cork; and,
- The landscaped open space of the front and side yards and view of the house from James Street South.

SCHEDULE 3**EXHIBITS LIST**

- Exhibit 1: Affidavit of Service of Notice of Hearing on the Parties, Conservation Review Board
- Exhibit 2: Affidavit of Service of Public Notice of Hearing, City of Hamilton
- Exhibit 3: Correspondence May 16, 2015, Shannon Carrick, CRB Case Coordinator, to City of Hamilton directing the publishing of the Public Notice of Hearing
- Exhibit 4: Witness Statement and Document Book, City of Hamilton
- Exhibit 5: Supplementary Document Book, City of Hamilton
- Exhibit 6A: *Canadian Homes and Gardens*, Jan-Feb 1936 extract, City of Hamilton
- Exhibit 6B: *Canadian Homes and Gardens*, March 1936 extract, City of Hamilton
- Exhibit 7: J.M. Pigott, Daily Journal, 1935 extract, City of Hamilton
- Exhibit 8: Revised Notice of Intention to Designate, City of Hamilton
- Exhibit 9: City of Hamilton Planning and Economic Development Dept. Planning Division, Report of August 27, 2008, re Process for Property Designation Under Part IV of the *Ontario Heritage Act* (PED08211) (City Wide), Objectors
- Exhibit 10: J.M. Pigott, Daily Journal, 1935 extract, City of Hamilton
- Exhibit 11: Document Book of Wei Fan, Victor Veri and David Sa, Objectors
- Exhibit 12: Heritage Designation Process in the City of Hamilton, Objectors
- Exhibit 13: June 1, 2015, Statement of Facts, City of Hamilton and Objectors
- Exhibit 14: Minutes 12-005 Hamilton Municipal Heritage Committee Thursday, May 17, 2012, City of Hamilton
- Exhibit 15: Hamilton Municipal Heritage Committee, Changes to the Agenda Thursday, May 29, 2014 (with public correspondence re 1 St. James Place), Objectors

- Exhibit 16A: J.M. Pigott, Daily Journal, 1935 extract, Objectors
- Exhibit 16B: J.M. Pigott, Daily Journal, 1936 extract, Objectors
- Exhibit 17: Canadian Intellectual Property Office, Patent (11) CA 355247, Objectors
- Exhibit 18: *The Hamilton Spectator*, September 17 and October 10, 1935 extracts, Objectors
- Exhibit 19: J.M. Pigott Daily Journal 1937 frontispiece, Brochure: Insulated Steel Frame Construction, Objectors
- Exhibit 20: Witness Statement, Victor Veri, Objectors
- Exhibit 21: Witness Statement, Kenneth Schroeder, Objectors
- Exhibit 22: Photographs of Kenneth Schroeder P. Eng: Interpretation by David Cuming, City of Hamilton