

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 04, 2017

CASE NO(S): MM160012

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

Appellant: Christina Biscoe, Ana Hribar and Frank Hribar
Appellant: Jean Carberry
Appellant: Dino Facin
Appellant: Rex Teskey and Verona Teskey and others
Subject: By-law 2016-006 – Village of Botlon Heritage
Conservation District
Municipality: Town of Caledon
OMB Case No.: MM160012
OMB File No.: MM160012
OMB Case Name: Biscoe v. Caledon (Town)

Heard: May 29 through June 2, 2017 in Caledon, Ontario, with
Written Submissions completed June 11, 2017

APPEARANCES:

Parties

Counsel*/Representative

Town of Caledon

Signe B. Leisk*
Michael Mahoney*

Janice Kaikkonen

Self-represented

Jean P. Carberry;
Robert B. G. Palmateer;
Christina Biscoe, Ana Hribar
and
Frank Hribar;
Carmen Guaragna;
159555 Ontario Limited and
159556 Ontario Limited;
Royal Courtyards Property
Management;
S.B.A. Catering Ltd.;
Loretta Larouche;
Dino Facin;
Tony Viola, Franca Viola,
Luke Solda and
Tangelko Productive Dev. Inc.

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD

INTRODUCTION

Background

[1] The Village of Bolton (“Village”) is one of the communities within the Town of Caledon (“Town”). The Town has adopted By-law No. 2016-006 (“By-law”) to designate the *Village of Bolton Heritage Conservation District* (“HCD”) and adopt the *Village of Bolton Heritage Conservation District Plan* (“HCD Plan”).

[2] A number of appeals under the *Ontario Heritage Act*, R.S.O. 1990, c. O. 18, (“OHA”) were filed by those opposing the HCD. These appellants include Janice Kaikkonen, who is self-represented in these proceedings, and several other interests represented by Counsel Baker in these proceedings.

[3] This matter was the subject of two prehearing appearances and a written motion. In addition to determining the parties and participants, two principal matters were dealt with in these earlier proceedings: an initial proposal for an Issue List of more than 30

entries was reduced to six and a request by Ms. Kaikkonen to be accepted by the Board as an expert witness was denied. The decision regarding the Issue List was issued on February 3, 2017; the decision regarding the request for expert witness status was issued on March 7, 2017.

[4] The parties represented by Counsel Baker appeared in opposition to the HCD, particularly as it encompasses the commercial core of Bolton. Counsel Baker's list of clients is extensive in this matter. For ease of reference in this decision, the Board will refer to the group collectively as "Carberry".

[5] At the first prehearing appearance, the Board added 1916671 Ontario Inc. as a party to these proceedings. Prior to the start of the hearing of the merits, this party indicated to the Board that it now wished to withdraw and take no further part in these proceedings. The Board agreed and 1916671 Ontario Inc. did not attend and did not call a case in this matter.

[6] Also at the first prehearing, the Board added nine participants to these proceedings. None of these participants filed participant statements, as required by the Procedural Order and none otherwise asked to address the Board in these proceedings.

Witnesses Heard

[7] The Board heard from four witnesses, all of whom the Board qualified to provide independent expert opinion evidence in the areas noted below:

1. David Cuming, qualified in land use planning and heritage conservation planning, called by Carberry
2. Sally Drummond, qualified in heritage planning and called by the Town
3. Lindsay Reid, qualified in heritage architecture and called by the Town

4. Marissa Williams, qualified in land use planning and called by the Town

ANALYSIS AND FINDINGS

Relationship between the Requirements of the Planning Act and the Ontario Heritage Act

[8] The By-law adopted by the Town has two elements: it designated lands in the Village as an HCD and it adopted the HCD Plan. In doing so, the Town engaged two statutes: the OHA and the *Planning Act*, R.S.O. 1990, c. P.13 ("PA").

[9] The OHA establishes the authority for a municipality to adopt an HCD and sets out the requirements before a municipality may do so. The first requirement is found at s. 41(1):

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

[10] The Town Official Plan ("OP") contains provisions relating to the establishment of heritage conservation districts. This first requirement of the OHA is met.

[11] Designation of an HCD and adoption of an HCD Plan, as in this case, is done by a municipality through the passage of a by-law.

[12] Section 24(1) of the PA states:

Public works and by-laws to conform with plan

24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

[13] The Town's By-law designating the HCD and adopting the HCD Plan must conform to the Town's OP.

[14] Once the HCD Plan is in effect then s. 41.2 of the OHA applies.

[15] Section 41.2 states:

Consistency with heritage conservation district plan

41.2 (1) Despite any other general or special Act, if a heritage conservation district plan is in effect in a municipality, the council of the municipality shall not,

(a) carry out any public work in the district that is contrary to the objectives set out in the plan; or

(b) pass a by-law for any purpose that is contrary to the objectives set out in the plan. 2005, c. 6, s. 31.

Conflict

(2) In the event of a conflict between a heritage conservation district plan and a municipal by-law that affects the designated district, the plan prevails to the extent of the conflict, but in all other respects the by-law remains in full force. 2005, c. 6, s. 31.

[16] There is no conflict between the requirements of s. 24(1) of the PA and section 41.2 of the OHA.

Village of Bolton Heritage Conservation District Study

[17] Prior to adopting the By-law, the Town undertook a heritage analysis of the Village in the *Village of Bolton Heritage Conservation District Study* (“Study”). The Study is not the HCD Plan. The Study’s role, as set out in the OHA, is that of background analysis to assist in the determination by a municipality of whether an area within the municipality should be designated as an HCD.

[18] The requirements for the area study are set out in s. 40(1) of the OHA:

Area Study

40. (1) The council of a municipality may undertake a study of any area of the municipality for the purpose of designating one or more heritage conservation districts. 2005, c. 6, s. 29.

Scope of study

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

(a) examine the character and appearance of the area that is the subject of the study, including buildings, structures and other property features of the area, to determine if the area should be preserved as a heritage conservation district;

(b) examine and make recommendations as to the geographic boundaries of the area to be designated;

(c) consider and make recommendations as to the objectives of the designation and the content of the heritage conservation district plan required under section 41.1;

(d) make recommendations as to any changes that will be required to the municipality's official plan and to any municipal by-laws, including any zoning by-laws. 2005, c. 6. s. 29.

Consultation

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

[19] The Study included a draft statement of cultural heritage value for the Village that included a description of the historic Village, a review of its cultural heritage value, identification of the Village's heritage attributes and a building inventory.

[20] The building inventory was undertaken in collaboration with the volunteers in the Albion-Bolton Historical Society. In addition to archival materials, the building inventory for the Study was also based on the earlier *Built Heritage Resources Inventory* undertaken by the Town.

[21] The Study included a summary of the building inventory. The summary noted whether a property was considered to have the status of contributing to the cultural heritage value of the Village or considered to have the status of non-contributing to that same cultural heritage value.

[22] The Study utilized several techniques of community consultation. These techniques included:

1. questionnaires mailed out to property owners in the Study area,
2. community information meetings,
3. a project steering committee that included Town Councillors, staff and community representatives, and

4. meetings with individual property owners.

[23] The Study was adopted by Council in September, 2014. Work to produce the HCD Plan was then undertaken.

Village of Bolton Heritage Conservation District Plan

[24] HCD plans for any community have one thing in common: they are all designed to manage change. The change they are managing is physical change to the HCD, most often in proposals for additions, renovations or redevelopment of existing built structures and properties. Managing change is also what official plans attempt to do. The singular difference between an official plan managing change and an HCD plan that manages change is that an HCD plan manages change through the lens of heritage conservation as the primary test.

[25] An HCD plan often sets criteria to be met for applications for demolition of a building, for renovation or expansion of a building or redevelopment of a property. Those standards might be different for different classes of buildings or properties or they might be the same. In the case of design guidelines in the HCD Plan, they are the same for all classes.

[26] The HCD Plan has different heritage permit approval requirements between residential and commercial properties. Heritage permit applications for residential properties are reviewed by staff and only go to Council on appeal of the staff decision. Heritage permit applications for commercial properties are reviewed by staff with a recommendation to Council. All heritage permit applications for commercial properties must be decided by Council.

[27] The HCD Plan also has different requirements regarding demolition for those buildings considered to hold the status of contributing to the heritage value of the HCD than for those considered to hold the status of non-contributing to the heritage value of the HCD.

[28] At policy 6.1.1 of the HCD Plan:

Heritage Permit applications to demolish contributing buildings will be discouraged, except in extraordinary circumstances, such as structure instability or damage resulting from a catastrophic event, where the building has been assessed by qualified professionals...and has been deemed to be beyond repair.

[29] For non-contributing buildings, the requirements are set out in policy 6.2.1:

Heritage Permit applications for demolition of non-contributing buildings will generally be accepted as long as the design of the replacement building is compatible with the cultural heritage value of the District and complies with the Plan's Design Guidelines.

[30] There was no challenge to the categorization of properties as residential or commercial. The challenge arose in the categorization of buildings as contributing or non-contributing.

[31] To understand the analytical thread for the identification and categorization of built heritage resources in the Village, it is necessary to understand the relationship between the *Built Heritage Resources Inventory* ("BHRI"), the Study and the HCD Plan.

[32] The BHRI was the first of the three studies undertaken.

[33] The Study utilized the BHRI, relying on the work already done and adding to it but not undertaking an entirely new inventory and not, apparently, re-examining each entry in the earlier analysis.

[34] The HCD Plan for Bolton builds upon, but is not identical to, the Study.

[35] At Appendix 5, the HCD Plan included the building inventory summary sheets from the Study for those buildings within the HCD Plan boundaries. The individual entries simply migrated from the Study into the HCD Plan and identified the buildings listed in the summary as either contributing or non-contributing.

[36] The quality and accuracy of the underlying analysis in the Study that led to the determination of whether a property is contributing or not becomes particularly important

for the individual property owner when the resulting status is lifted up and into the HCD Plan.

[37] Carberry and Ms. Kaikkonen challenged the accuracy of the analysis that led to the categorization of contributing or non-contributing in the Study, as then picked up in the HCD Plan. The challenge focused on the commercial core character area and had two elements.

[38] The first element was whether the use of contributing/non-contributing was appropriate categorization. The second was whether the analysis properly identified the cultural significance of each contributing property.

[39] The term 'contributing' has come to be used as a short-form identifier for those buildings that contribute to the cultural heritage value of the heritage district. The Board is satisfied that the use of contributing and non-contributing categories is sufficiently well-accepted and quite reasonable for both the Study and the HCD Plan. The sufficiency of the analysis is a separate matter.

[40] Ms. Drummond was the principal Town contact for the work undertaken in the Study and then in the preparation of the HCD Plan. She was not called to testify on the sufficiency of the analysis in the building inventory as presented in the Study or repeated in the HCD Plan.

[41] The BHRI was a significant source for the determination of whether a building was contributing or non-contributing. Ms. Drummond, and the consultants who undertook the Study, were well aware of problems with the BHRI.

[42] In December, 2013, e-mail exchanges with the consultants, filed as Exhibit 15 in these proceedings, Ms. Drummond acknowledged two principal problems with the BHRI. The first is that the BHRI used a different time period for analysis than was being used by the Study consultants, a difference which she acknowledged could lead to confusion. The second problem had to do with the questionable reliability of the BHRI

itself.

[43] The e-mails were produced under a freedom of information request with certain portions redacted by the Town.

[44] In her e-mail of December 6, 2013, Ms. Drummond wrote to the Study consultants as follows:

...Lots of secondary sources out there causing more confusion too, and showing up the weaknesses in our BHRI – which is getting depressing! Heather B told me the [redacted] book on Bolton requires careful use as apparently it is prone to error...

[45] Then in her e-mail of January 16, 2014, Ms. Drummond wrote to the Study consultants as follows:

...Yes, there are holes in the BHRI with undetermined dates and styles...Having used the BHRI for a while now, I think any premise is a better starting point than none, so please, go wild with your best guesses!

[46] The Board did not hear any evidence from any of those who conducted the Study to understand how they dealt with the known problems with the BHRI and how they undertook the analysis that then led them to categorize properties as either contributing or non-contributing. Instead, the Board heard from Ms. Reid.

[47] Ms. Reid is with the same consulting firm as those retained to undertake the Study. She was not with the firm during the Study and did not do any work on the Study. Instead, her evidence regarding the Study is that she spoke with those in her consulting firm who did the work on the Study and she then did a review of the categorization.

[48] What became quite clear to the Board is that Ms. Reid generally relied on the opinions and advice she apparently received from colleagues in her consulting firm and did not do a thorough review of the work that categorized the various buildings.

[49] Aggressive in defense of her colleagues' work and in her negative review of the expert opinion of Mr. Cuming, Ms. Reid had to be reminded several times of her duty to

the Board, as expressed in the Acknowledgement of Expert's Duty form which she signed. That duty requires, among other things, that an expert provide evidence only within that expert's area of expertise and that the evidence provided is fair, objective and non-partisan. The expert, in discharging the expert's duty, must not stray into advocacy no matter how strongly an expert opinion may be held.

[50] It was not until she was subject to cross-examination that Ms. Reid withdrew several extreme statements regarding Mr. Cuming's analysis, including that his work and opinion were misleading. It was also not until she was subject to cross-examination that Ms. Reid acknowledged that certain properties her colleagues had categorized in the Study as contributing should, instead, be categorized as non-contributing. These admissions lead to the question of whether the Study and/or the HCD Plan utilized the correct tests to meet the requirements of the OP regarding the designation of an HCD.

Official Plan Requirements

[51] The OP has a very robust set of policies dealing with heritage conservation and the manner in which the Town will consider and implement an HCD. The policy in the OP that is at issue in these proceedings is policy 3.3.3.4.2:

3.3.3.4.2 Heritage Conservation Districts

Where merited by the concentration and significance of cultural heritage resources, the Town may consider the establishment of a Heritage conservation District to conserve a settlement area's unique character.

[52] The policy establishes a two-part test, both parts of which must be met: concentration and significance.

[53] The questions are: concentration of what and significance of what?

[54] The language in the OP is "cultural heritage resources".

[55] Mr. Cuming's testimony appears to equate this phrase with cultural heritage

structures. He suggested that a fairly high percentage of structures of cultural heritage value would be needed to satisfy the OP test of concentration. While that might be a reasonable expectation if the OP specified cultural heritage structures, that is not what the OP requires. It does not equate resources with structures and it does not set a specific number or percentage of cultural heritage resources that would meet the test of concentration.

[56] Without any numerical standard, the only remaining interpretation of 'concentration' appears to be to a culturally significant specific area within the broader geography of the Town. The Village is one such area.

[57] The OP also does not specify that the significance test is a test to be met by individual properties. Both the Study and the HCD Plan include a statement of cultural heritage value that speaks to the importance of the Village historically within the broader Town.

[58] The Village has a significant cultural heritage as an historic 19th century mill village and this is not in dispute in these proceedings. What sharpens the edges of the debate is that the mill was relocated in 1845. There is no physical trace of the original mill left; there is only an historical plaque that stands at the original location. While this detail may be true, it does not change the cultural heritage value of the Village as having been the site of an historic 19th century mill village. Individual structures that are within the Village may then be classified as contributing to the cultural heritage value of the Village but not necessarily be individually significant heritage properties such as those that might be appropriate for individual designation under Part IV of the OHA.

[59] Additionally, for an HCD, built heritage must be placed within the context of historical associations that may constitute a further layer of heritage value on individual structures. In addition to built heritage, the HCD Plan identified other elements that contribute to the heritage attributes of the HCD.

[60] The first of these is the physical location and setting in the Humber River valley,

adjacent to the meandering Humber River. Although there is no longer any physical remnant of the old mill, there are remnants of former millraces and dams. The Humber River is part and parcel of the Village's heritage and shaped the pattern of Village development. A network of trails, parks and accessible open space reinforces the Village setting in the Humber River valley. These physical elements informed the inclusion of open space areas within the HCD boundaries.

[61] The Village today continues to reflect the fabric of the historic Village with its focus on the crossroads of Queen Street and King Street and the viewscales, such as from the Village to the Humber River valley slopes.

[62] The inclusion of viewscales as part of the heritage attributes was challenged as seeming to require that the viewer stand in the middle of a busy intersection. The Board is not persuaded by this criticism since it is clearly possible to enjoy a viewscale from the side of an intersection when standing. The point is not whether the viewer needs to stand in the middle of the intersection. The point is that there is a strong relationship between an interior location and the view that is seen when looking out that assists in appreciating the historic setting of the Village.

[63] Taken together with the built heritage, the physical elements of the Humber River and its valley lands, the viewscales, the network of publicly accessible trails and open space, and the focus on a principal crossroads within the Village fabric, the result is a sense of place that characterizes the Village and informs the HCD designation and HCD Plan.

[64] Given the admissions by Ms. Reid in cross-examination, the summary of the building inventory in the HCD Plan which identifies properties as contributing or non-contributing requires some modification. The Board deals further with that requirement below. Subject to this modification, the Board finds that the HCD Plan has met the tests set out in the OP.

Conclusions

Issue #1: Is there a sound heritage rationale for the proposed HCD designation to include the downtown Bolton commercial area?

[65] On the analysis set out above, the Board finds that there is a sound heritage rationale for the proposed HCD designation to include the downtown Bolton commercial area.

Issue #2: Is there a sound heritage rationale for (i) the delineation of the proposed HCD boundaries and (ii) the component commercial area of which it forms a part?

[66] The boundaries of the proposed HCD are slightly different, and slightly smaller, than the boundaries used for the Study. The boundaries in the HCD Plan are those recommended in the Study. The HCD includes the commercial core, some residential areas and open space areas that form part of the Humber River flood plain and valley lands.

[67] The HCD boundaries reflect the historic old Village with the commercial core. The inclusion of the open space areas recognizes the context and setting for the mill and the settlement that grew as a result. The mill used the river for power. The river includes a flood plan and valley lands that contribute to the bowl in which the mill and Village sit.

[68] The character sub-areas within the HCD, such as the commercial core, are interconnected and form part of the entire heritage context of the old Village. The proposed boundaries appropriately exclude the new subdivisions that have expanded the community but are not part of the heritage context of the old Village.

[69] The Board finds that the boundaries of the HCD, which include the commercial core, are appropriate and rest on a sound heritage rationale.

Issue #3: Do the HCD Study, the proposed HCD Plan, and the delineation of the proposed HCD boundaries (a) comply with the requirements of the OHA and regulations and (b) conform to the applicable policies in the Town OP?

[70] On the analysis set out above, the Board finds that the Study, the proposed HCD Plan and proposed boundaries comply with the requirements of the OHA and conform to the applicable policies of the OP.

Issue #4: Did the Town engage in an appropriate and supportable analysis and evaluation of the heritage attributes of lands, buildings and structures within the HCD, including with respect to (a) the downtown Bolton commercial area and (b) church buildings?

[71] As noted earlier, the Board did not hear from any witness who undertook the evaluation of heritage attributes in the Study itself. Nonetheless, the Town called Ms. Reid, the author of the HCD Plan, who was carefully cross-examined on this point. While the Board finds that Ms. Reid was able to explain and agree with many aspects of the analysis in the Study, she was unable to agree with and support the analysis and designation of certain properties identified as contributing.

[72] In its final written submissions, the Town included what it suggested was a revised schedule to comply with the evidence of Ms. Reid where she acknowledged that certain properties should not be categorized as contributing.

[73] Since the revised schedule was not put to Ms. Reid during her testimony, and has not come to the Board on consent, the Board declines to use it to amend the HCD Plan at this point. The Board agrees that the list of contributing properties in the HCD Plan requires amendment.

[74] The Board directs the Town to prepare and file a revised list to amend the HCD Plan by replacing Appendix 5 with this revised list. The revised list is to be to the satisfaction of the Town solicitor in these proceedings and come to the Board on consent or with no objection from Ms. Kaikkonen and Carberry.

[75] The Board wishes to be very clear on this point: the list is to be amended to alter only those properties from the contributing category to the non-contributing category that were put to Ms. Reid in cross-examination and which she agreed that she could not confirm the accuracy of the description of the heritage attributes of the property, could not confirm their status as contributing or on which she agreed they were not contributing. The list is not to include any other changes or reference to properties not put to Ms. Reid during the hearing.

[76] If difficulties arise, the Board may be spoken to.

Issue #5: Was the evaluation of the heritage attributes of the lands, building and structures within the proposed HCD downtown Bolton commercial area transparent and traceable?

[77] The Board agrees with the Town that there is no explicit requirement that the analysis be transparent and traceable. There is, however, an appropriate standard of proper research that demands that analysis of this sort indeed should be both transparent and traceable.

[78] The known problems with the *Built Heritage Resources Inventory* on which the Study's analysis appears to have been based, the lack of evidence from an expert who conducted the analysis in the Study, and the inability of Ms. Reid to be able to provide clear and concise evidence on the analysis of certain properties, leads the Board to conclude that the analysis fell short of being transparent and traceable as it relates to certain built heritage resources.

[79] The issue then becomes whether this lack is sufficient to undermine the entire evaluation of the heritage attributes of the proposed HCD. The Board finds that it is not sufficient to do so, particularly with the opportunity to correct the analysis and categorization of certain properties that were specifically questioned during the course of the hearing.

Issue #6: Does the HCD as constituted prevent the exercise of freedom of religion under the *Ontario Human Rights Code*?

[80] This issue was placed on the issue list by Ms. Kaikkonen. Although Ms. Kaikkonen cross-examined certain Town witnesses, she called no evidence in these proceedings, including calling no evidence in support of this issue.

[81] Ms. Kaikkonen then attempted to argue this issue in her final written submissions with no evidence called in the hearing to support her submissions.

[82] While Ms. Kaikkonen is not a lawyer, the Board ensured through advice to her during the prehearings that she fully understood her responsibilities as a party and the need to place on the issue list only those matters the party intends to call evidence in support.

[83] The Board finds that the HCD as constituted does not prevent the exercise of freedom of religion under the *Ontario Human Rights Code*.

ORDER

[84] The Board orders that the appeal by Janice Kaikkonen is allowed in part.

[85] The Board orders that the appeals by Jean P. Carberry, Robert B. G. Palmateer, Christina Biscoe, Ana Hribar and Frank Hribar, Carmen Guaragna, 159555 Ontario Limited and 159556 Ontario Limited, Royal Courtyards Property Management, S.B.A. Catering Ltd., Loretta Larouche, Dino Facin, Tony Viola, Franca Viola, Luke Solda and Tangelko Productive Dev. Inc. are allowed in part.

[86] By-law No. 2016-006 is to be amended by amending the proposed Village of Bolton Heritage Conservation District Plan in accordance with the submission to the Board as set out in paragraphs 74 and 75 above. The Board's final order with respect to By-law No. 2016-006 is withheld until the Board receives the materials to be filed in accordance with paragraphs 74 and 75.

“Susan de Avellar Schiller”

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

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Ontario Municipal Board

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