

To: The Honourable Michael Tibollo  
Minister of Tourism, Culture and Sport

From: Gerald E. Finley, BA, MA (Toronto), PhD.(Johns Hopkins), FRSC  
Emeritus Professor of Art History, Queen's University

Helen S. Finley, BA, MA (Toronto) –Slavic Studies

Donald R. Taylor, BSc Eng (Queen's), DPhil (Oxford)  
Emeritus Professor of Engineering Physics, Queen's University

Re: Response to the Ontario Heritage Act (OHA)  
Proposed Revisions under Bill 108

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We are three citizens of Kingston who reside in the Old Sydenham Heritage Conservation District. We have done so since the early sixties and early seventies, that is, since before the Kingston Act (1970) and the initial Ontario Heritage Act. During this period of more than 50 years, we have invested in and resided in heritage properties in the Kingston area and have completed major restoration of a total of 9 houses plus one heritage apartment building. All are designated under Part IV and 8 of them under Part V as well. Three have won awards for heritage conservation.

We have also been active in providing leadership in community efforts in protesting against demolitions and preserving Kingston's built heritage. This has involved volunteering on local committees that make recommendations to Council under the OHA, and others which involved planning and development issues. We are founding members of the Frontenac Heritage Foundation and have two lifetime achievement awards, one from the Frontenac Heritage Foundation, the other from the Architectural Conservancy of Ontario. Our comments are based on those years of involvement and our combined experience.

In recent years we have observed with increasing concern that there are fundamental weaknesses in the post-2005 version of the Act. These have greatly reduced the protection of heritage properties, particularly in Heritage Conservation Districts (HCDs). The changes proposed under Bill 108 ignore these fundamental problems, and in doing so, the government is missing an ideal opportunity to clarify and strengthen the OHA with minor revisions that would better enable the OHA to achieve its objectives. We offer some comments on the provisions of Bill 108 as they affect the OHA, in particular, the role of the Municipal Heritage Committee (MHC). We also make a number of recommendations that we believe would improve the Act.

## **Proposed Changes to the Ontario Heritage Act in Bill 108**

A number of the proposed Bill 108 changes deal with deadlines for municipalities to make decisions on designations, appeals, etc. We agree that all procedures under the OHA should be clear, and that municipalities should deal with them expeditiously. We also find reasonable the proposed requirement to notify the owner when Council adds a property to its Heritage Properties Register and the right of the owner to file an objection with Council. We are of the opinion that acceptable grounds for objection should be set out in the Act.

One significant change is that property owners who object to Council decisions on designations or alterations may appeal to the Local Planning Appeal Tribunal (LPAT), not to the Conservation Review Board. This is a concern, particularly since the LPAT decision is to be final. There is no guarantee that the LPAT membership will have any knowledge, let alone expertise in built heritage. The risk that the LPAT will not provide acceptable protection to heritage properties is high. The Conservation Review Board review system, we believe, has served municipalities and their built heritage well. It has injected a high level of expertise into the appeal process and provided expeditious resolution of disputes. Furthermore, adding heritage appeals to the LPAT's duties will only increase the backlog of that tribunal.

Another significant change under the proposed revision is that the meanings of “demolition” and “removal” have been extended to include demolition or removal of a heritage attribute as well as a structure. This should have little impact on properties designated under Part IV since such removals are to be reviewed by the MHC regardless, but it could be important for Part V properties since only demolitions, and not alterations, are required to be reviewed by the MHC. This change may provide greater protection for properties in a HCD. However we doubt that in practice it will provide effective protection, and urge that the Act needs to include stronger measures for alterations in HCDs.

### **Opportunities for improvement to the current Ontario Heritage Act.**

Major weaknesses in the current OHA have become evident to us in recent years through our experiences in Kingston. Other municipalities may have been less troubled but the problems that have occurred here are serious and can occur elsewhere. They fall under three headings:

- Delegation of Council's authority in Part IV:
- The role of the Municipal Heritage Committee under Part V:
- Alteration notices and appeals of decisions on Part V alterations.

We offer three recommendations.

## **1. Delegation of Council's Authority in Part IV:**

Kingston City Council, in accordance with section 33(15) of the OHA, has delegated its power to approve applications for “minor” alterations to Part IV properties to the Director of Planning, Building and Licensing, She in turn assigns them to heritage planning staff, while retaining signing authority. When this practice was initiated, some time ago, we were dismayed to discover that the minor alteration applications were being approved by staff alone with no reference whatsoever to the MHC. It seems obvious to us that Council cannot delegate to staff a power that it does not have, namely the ability to approve an alteration application without consulting the MHC. Furthermore, the selection of which alterations are minor is taken by staff without consultation with the MHC, and currently it appears that the majority of Part IV alteration applications are processed under delegated authority. This has resulted in very substantial alterations being approved by staff as if the MHC did not even exist. In this way a fundamental provision of the OHA, the requirement to consult members of the community with expertise in built heritage before approving alterations, has been lost.

This misinterpretation of the power to delegate can be easily remedied, as follows.

**Recommendation 1:** Revise Section 33(6) of the proposed amended OHA by adding “*or council's delegate if one is appointed under 33(14 )*” so that it reads:

“The Council *or council's delegate if one is appointed under 33(14)*, after consultation with its municipal heritage committee and within the time period determined under subsection (7), etc. ...”

## **2. The Role of the Municipal Heritage Committee under Part V:**

While the delegation of Council's authority to approve alteration applications is also provided for Part V properties under section 42(14), the two situations are very different since the OHA does not explicitly require consultation with the MHC for alterations. However until the recent procedural changes Kingston's MHC was consulted equally on alterations on both Part IV and V properties as was required prior to the 2005 OHA amendments.

Then in 2016 when there were some revisions to the MHC's mandate, the City changed its procedures so that in Part V districts the MHC was consulted on demolitions only, not

on alterations. The result is that properties designated under Part IV which are in a HCD and governed by Part V no longer receive the benefit of input and expertise from the MHC. City staff took the view that such consultation with the MHC was contrary to the OHA as the statute did not include a requirement for consultation on alterations in HCDs.. To the best of our knowledge no other municipality has taken this view.

The City soon realized that bypassing the MHC meant that detailed discussions of individual applications would take place at Council where there was scant expertise on built heritage issues. An alternative procedure was then developed: MHC members were asked to review the application documents posted on the City's DASH (Development And Services Hub) website and invited to submit initial comments. Then, at the formal MHC meeting members were asked to comment on the staff recommendations but were not allowed to suggest amendments to them, nor to question or have any discussion with applicants. Next, the unaltered staff report, then went to Council accompanied by the committee members' comments. (Except for the motion presented for Council's consideration, neither a staff nor a consultant's report can be amended by Council as its ownership rests with the staff or consultant.)

To the detriment of our built heritage, this restrictive procedural change eliminated highly productive discussions of applications amongst committee members, applicants, and agents that were previously part of each MHC meeting. It also proved of very great concern to many residents who value our heritage buildings, since it removed almost all of Kingston's important buildings, such as City Hall, Frontenac Court House, St George's Cathedral, and Cartwright House from the oversight of the MHC. We discussed this problem with Ministry staff, including former Ministry staff responsible for drafting the 2005 amendments. They confirmed that indeed there was no requirement to consult on alterations under Part V, but they provided important context. With the growth of HCDs in large cities it seemed unreasonable to expect the MHC to review all alteration applications in many HCDs. The Ministry decided to give municipalities flexibility in handling applications from their districts. They emphasized that it was never their wish or expectation that municipalities would make decisions on alteration applications without input from knowledgeable community members.

Thus the OHA has a serious loophole which should be closed promptly, before all municipalities, in the pursuit of efficiency, convenience and control, bypass their MHCs on alteration applications. It should be possible to include committee input without excessive workload by careful use of delegated authority on certain types of minor alterations. We suggest an amendment to ensure that community consultation is required. Our built heritage needs this expertise for its protection.

**Recommendation 2:** Add a section 42.(4.2) to the proposed revised OHA as follows:

*The council shall, before taking any action under subsection (4) with respect to an application under paragraph 1 of subsection (1) for alteration of a property in a heritage conservation district, consult with the advisory committee established according to the district plan, or with the Municipal Heritage Committee if no such advisory committee was established.*

### **3.Alteration notices and appeals of decisions on Part V alterations:**

According to the procedures now in effect, controversial applications may be approved on a property in a HCD with little or no community consultation. Neighbouring residents have no opportunity to comment on or object to the alteration application, and indeed may not even be aware of it until the alteration is carried out. Yet a HCD is meant to foster community spirit in its residents and encourage them to be vigilant to maintain or improve the appearance of the HCD that is also their neighbourhood. In the case of applications for a minor variance to the Committee of Adjustment, the practice is that neighbours of the property are notified and invited to respond. It is surely reasonable to similarly inform neighbours in a HCD when an alteration application has been submitted.

Moreover the OHA provides an appeal process only to the owner/applicant with respect to decisions on alterations within in a HCD, so that neighbours who believe that a decision is contrary to district guidelines have no opportunity to appeal to the LPAT. Amendments are needed to provide a requirement for notices of applications and an appeal process for owners of neighbouring properties in a HCDs.

**Recommendation 3:** We are not prepared to draft such amendments but strongly recommend them.

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### **The Role of Heritage Attributes in Reviewing Applications:**

Since the 2005 amendments, the heritage attributes of a property have been given a prominent role in the consideration of applications for alterations under both Parts IV and V designations. In reviewing such applications, the principal issue is then whether the property's heritage attributes will be protected under the proposed alterations. This

approach has advantages from legal and administrative perspectives, but in practice it has disadvantages in achieving heritage protection because the identification of heritage attributes is not straightforward or reliable.

The majority of Kingston's designation bylaws were passed before 2005 and do not specifically identify and list heritage attributes. The necessary research and administrative work to revise hundreds of bylaws in a timely manner would be a prohibitive undertaking for budgetary reasons. Recent designation bylaws do include heritage attributes, but they can never be accurate or complete. Without close access to the building it is difficult to determine whether features are original or recent. It is easy to overlook the need to identify such items as doorways or chimneys that might be affected by a proposed alteration. In practice, the information about heritage attributes is not that important when committees are considering applications. There are national and provincial guidelines on good heritage conservation practice, and specific guidelines in district plans to assist judgments. In any case committee members responsible for making recommendations on alteration applications are typically the same people that have the expertise in heritage architecture and the responsibility for identifying the heritage attributes.

The emphasis on heritage attributes in the Act is in section 33.(1) and elsewhere. The statement

“if the alteration is likely to affect the property’s heritage attributes, as set out in the description of the property’s heritage attributes in the by-law.....”

opens the door to legal challenges on many alteration decisions if mistakes or omissions can be found in the attributes set out in the designation bylaw. This becomes an even greater concern if final decisions are to be made by the LPAT. Decisions by the LPAT can easily focus on whether procedures have been followed correctly rather than on heritage values. The reference, as yet unclear, to proposed regulatory “prescribed principles” may also have the effect of shifting control of heritage protection from MHC advice to legal process. Finding a better approach to heritage protection may be challenging but it would be desirable. The suggestion that follows is intended to encourage discussion and is not put forward as a recommended solution.

### **SUGGESTION:**

To section 33.(1) and similarly elsewhere add the italicized words as shown

.....”if the alteration is likely to affect the property’s *original architectural features*, or *its* heritage attributes, as set out in the description of the property’s heritage attributes in the by-law.....”

We sincerely hope that the Ministry will consider these comments carefully and make revisions to the OHA that will give better protection to Ontario's built heritage. We would be pleased to answer any questions or to discuss these issues further.

Gerald E. Finley and Helen S. Finley  
[REDACTED]

Donald R. Taylor  
[REDACTED]

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