

## law of the land... and lay of the land™ bulletin

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### costly mistakes of historic proportion

Whether a charming early-century brownstone in Toronto's Cabbagetown; a quaint old cottage along the river in Niagara-on-the-Lake; or a historic storefront or warehouse in Hamilton, there are plenty of cautions to heed when your client is involved with a heritage property. Before a client purchases a heritage property, they must be extremely familiar with all of the rules and restrictions under any provincial heritage legislation and, in particular, the rules relating to alteration and demolition permits.

For example, until 2005, the heritage designation of a property under the *Ontario Heritage Act* (the "Act") merely allowed a municipality to delay, but not ultimately prevent, the demolition of a heritage property. In 2005, the province of Ontario enacted amendments to strengthen the Act. Under the amended legislation, a landowner of a Part IV designated heritage property, who is refused a demolition permit by the local municipality, no longer has an automatic right to demolish but, can appeal the refusal of the demolition permit to the Ontario Municipal Board (the "OMB"). The OMB can grant or refuse to issue a permit and its decision is final.

However, if the landowner wishes to alter a Part IV designated heritage property, the process is more complex. The Act requires that the owner make an application for alteration with the municipal council, however, a denial of such an application can only be appealed to the Conservation Review Board (the "CRB"), a provincial tribunal. The CRB would then hold a hearing and make findings. Unlike the OMB, the decision of the CRB simply becomes a non-binding report back to the very same municipal council that originally denied the application. The municipal council is then free to adopt or reject the CRB's findings and there is no further recourse or appeal procedure for the applicant.

In addition to an individual property being designated as a heritage property under Part IV of the Act, a property can be designated under Part V of the Act as being located in a Heritage Conservation District ("HCD"). An HCD is an area wherein essentially all buildings, or certain parts of buildings, within a specified geographic area are considered historically significant. Applications to either demolish or alter a Part V property are made to the municipal council, however, a denial of either application can be appealed to the OMB.

Complicated enough yet? A property can also be designated under both Part IV and Part V of the Act! Once again, the rules concerning demolition and alteration

can be quite complicated under this scenario. For example, if a property is dual-designated, it is subject to the Part IV rules if the designation of the HCD pre-dates the 2005 amendments to the Act and no HCD plan has yet been adopted by the municipal council with respect to that particular district. Otherwise, a dual-designated property is subject to the rules for demolition and alteration found in Part V of the Act. Unfortunately, as is illustrated in several leading cases (*Port Dalhousie Revitalization Corp. v. PROUD* – OMB Case File PL060850 and *10360 Islington Avenue Inc. v. Vaughan* – OMB Case File PL060606), various city councils and tribunals have taken somewhat divergent views on the application of the Act. In addition, the differing appeal procedures can be quite unfair, particularly with respect to the Part IV appeal provisions for alterations.

The Part IV appeal provisions for alteration permits put the applicant in the unusual position of appealing the municipal council's refusal to the CRB. Even if the applicant is successful in convincing the CRB to recommend the granting of the alteration permit, the applicant must once again return to the very council that originally refused the permit for a final determination. The likelihood for success is extremely slim. This situation begs the question as to why an applicant would even bother? The "circular appeal" process dictated by the Act is, at best, shallow lip service to the principles of natural justice and, at worst, an extremely long and costly exercise in futility. It is unclear why a Part V alteration permit refusal is appealed to the OMB and not the Part IV alteration permit. Additionally, the difference between a Part IV designated property and a Part V designated property should not warrant a totally different appeal procedure.

Clearly, the 2005 amendments to the Act were intended to grant municipalities stronger powers to preserve historically significant properties. However, the financial burden of maintaining our heritage now rests squarely on the shoulders of the individual landowner.

Although there are many benefits to owning a piece of history, purchasing a heritage property without a full appreciation of the restrictions imposed by provincial legislation can lead to a costly mistake of historic proportions.

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#### [a cautionary note](#)

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