

Correspondence To: Mayor J. Jordan and Members of Council

From: Adam Mottershead

Subject: Responses to Delegation Positions on Proposed By-Law 20-83, Main Street Heritage Conservation District Study

Date: November 2, 2020

Foreword

The purpose of this document is to respond and bring contrast and context to comments and positions taken by various delegates regarding the proposed Main Street East Heritage Conservation District Study, By-Law 20-83.

While this document, for the most part, uses fact-based evidence to support a position, any opinion expressed is solely and strictly the personal opinion of the author. Further any opinion expressed herein should not be construed as professional advice.

Topic 1: Lack of Public Notice Prior to HCD Study Consideration/Commencement (Peters, Evans)

In her delegation request package, Dr. Peters asks the following:

“When did you notify home owners and businesses on Main St East and how?”

“When did you put notification about this in the newspaper to warn community members?”

Ms. Evans expresses about:

“[...] certain members of council failing to provide transparency to their constituents, specifically those directly impacted along Main Street.”

Analysis: The *Ontario Heritage Act* (OHA) has no requirement to notify the public or property owners in the proposed study area prior to the commencement of an HCD study.

If an HCD study is undertaken under s.40(1) of the OHA and does not implement a corresponding Interim Control By-Law (ICBL) restricting activity within the study area, no notification of the study commencement is required.

If an HCD study is undertaken with an ICBL under s.40.1(1) of the OHA that restricts activity within the study area, then after its passing notification requirements do come into force. These notification requirements are prescribed in s.40.1(3) of the Act:

“Notice of by-law

(3) If the council of a municipality passes a by-law under subsection (1), the council shall, within 30 days after the by-law is passed, cause notice of the by-law,

(a) to be served on each owner of property located in the heritage conservation study area and on the Trust; and

(b) to be published in a newspaper of general circulation in the municipality. 2005, c. 6. s. 29.”

Thus, statutory obligations regarding public notice for an HCD study only exist after an ICBL for the study area is passed. The legislation does not preclude prior public notification, but a review of completed HCD studies suggest such actions would be highly unusual.

In this instance, there is no legal requirement for the Town of Grimsby to notify property owners or the community before the consideration of an HCD study By-Law or if that study is undertaken without a corresponding ICBL.

Topic 2: Lack of Public Consultation (NHBA/WEHBA, Evans)

Similar to the above concern is the belief that there must be public consultation before the council of a municipality can consider an HCD study as put forth by NHBA/WEHBA and Ms. Evans.

Specifically, the NHBA/WEHBA states:

“[...] must consult with both their heritage committee and the public in the development of an HCD.”

“One of the most essential aspects of the Provincial planning process that must always be respected is the requirement for public consultation.”

“[...] with the proposal brought forth by a Councillor and the Town of Grimsby’s Heritage Advisory Committee to introduce an HCD Study Area, we are very disheartened to see the lack of stakeholder engagement [...]”

“Proper consultation requires engagement with all stakeholders impacted by this by-law, not just with selected activist groups.”

Ms. Evans states:

“No involvement from homeowners.”

Analysis: The statements as provided by NHBA/WEHBA wrongly infer that there is a statutory requirement for public consultation and engagement before the passing of an HCD study By-Law.

NHBA/WEHBA may have misconstrued an “HCD Study”, which is the By-Law before Council and an “HCD Plan” which is the final conservation plan to be instituted at the end of the HCD process, in the issuance of their position.

The OHA states that only before the adoption of an HCD plan, the by-product of an HCD study, that requires public consultation:

“Consultation

(6) Before a by-law adopting a heritage conservation district plan is made by the council of a municipality under subsection 41 (1) or under subsection (2), the council shall ensure that,

(a) information relating to the proposed heritage conservation district plan, including a copy of the plan, is made available to the public;

(b) at least one public meeting is held with respect to the proposed heritage conservation district plan; [...]”

A documentary review of numerous completed HCD studies/plans reveals that as per the OHA, public/stakeholder engagement occurs once an HCD study has been commenced. In general, there is no consultation prior to the commencement of a study.

To engage the public and stakeholders prior to the commencement of a study, as suggested by the NHBA/WEHBA, would be very unusual to say the least.

There is no statutory requirement for the Town of Grimsby to undertake public consultation or engagement prior to commencing an HCD Study. If as a result of that study there is a desire to institute a final HCD Plan, it is then that public consultation becomes mandatory.

Topic 3: Lack of Staff Input on By-Law (Peters, Evans, NHBA/WEHBA)

All three of the above delegation requests raise the issue of the lack of staff input on the HCD study By-Law and/or concern that a Councillor has brought forth the By-Law.

Dr. Peters in her request states:

"[...] not actually be the fault of the staff, since they did not seem to have been informed about the unfolding of this proposal either."

"[...] they [Planning Staff] failed to mention anything about the potential for such a Heritage District Study [...]"

"I certainly would have expected a 'heads up' at some point during my numerous communications with the Planning Department [...]"

Ms. Evans states:

"Town planners haven't been given the opportunity to have input, sufficient time that allows consideration to have input for a plan."

"Council assisting in writing bi-laws [sic]."

"Work with town planners, to discuss a preliminary vision plan, inclusive of homeowners along Main Street, paying taxpayers, heritage input, without dictating the plan."

The NHBA states:

"[...] the lack of respect and regard given to Town staff in this process, whom are the planning professionals, trained in the writing of by-laws [...]"

"[...] with the proposal brought forth by a Councillor [...]"

"[...] The abrupt proposal [...] has completely by-passed the involvement of Town staff and the ability for Town staff to provide an educated and informed recommendation report on the proposal [...]"

Analysis: The statements above should be taken in context of the following facts:

1. A public delegation on a Main Street East HCD Study presented to the Planning & Development Committee on January 14, 2020 and to Council on January 21, 2020. Planning staff were in attendance for the Planning meeting and commented on the delegation's request.
2. Town Planning Staff had input to a Main Street East study budget item, which was passed by Committee of the Whole on February 18, 2020 and thus had knowledge of a study as of that date.

3. Town Staff in attendance of the October 6, 2020 Heritage Grimsby Advisory Committee (HGAC) meeting stated they had completed a draft report on options for the Main Street East study.
4. The HGAC, as part of the passed resolution recommending the HCD study, forwarded a copy of the draft By-Law to the Planning Department for comments. There was almost a two-week period for review prior to the October 19, 2020 Committee of the Whole meeting.
5. No report or comments were submitted by the Planning Department for the October 19, 2020 Committee of the Whole meeting.
6. Consideration of the draft By-Law at Council was deferred until November 2, 2020. Another two-week review period was presented.
7. As of this writing, no report or comments appear to have been submitted by the Planning Department for the November 2, 2020 Council meeting.

Further consideration should be given to the *Council-Staff Partnership And Relationship Policy* in which the following is stated under "Role of Staff":

"4.3. Provide timely reports to Council outlining factors that will assist in their decision-making process, research policy issues as required, provide sufficient information based upon analysis and best professional expertise and judgement;"

A significant period of time has elapsed since the initial public delegation to the Planning Committee and from the one-month timeframe since the HGAC passed their recommendation. In this time not a single document on the draft By-Law or a Main Street East study has come forth from the Planning Department.

The second element of this topic, is the notion that there is some legal requirement or qualification as to who can propose By-Laws. Both NHBA/WEHBA and Ms. Evans appear to be misinformed as to who can write a By-Law.

There are no qualifications or requirements under the OHA or *Municipal Act* as to who may propose any By-Law. This may be a municipal heritage committee, Members of Council, Town Staff, planning consultants or even members of the public. Unless so licensed to practice law in Ontario, none of these entities in the view of the Ontario judiciary would be considered "experts at law".

To be also noted is that under the *Ontario Heritage Act* at s.40(3), the only body that Council is required to consult with in initiating an HCD study is the municipal heritage committee. While input from Town Staff may provide clarification and additional guidance, there is no legislative requirement for them to be consulted at this step.

Topic 4: Cost of the HCD Study (Evans, NHBA/WEHBA)

At the October 19, 2020 meeting of the Committee of the Whole one Councillor stated that the study may cost "\$1 million". This comment appeared to create some contention between Members of Council. The comment was further qualified that it was based on the advice of an expert and "[...] that this study alone is going to be almost half a million dollars for the area [...]", with added costs coming in the form of legal costs for "LPAT hearings and judicial hearings".

Of similar concern, Ms. Evans states:

"Lack of clarity this would cost the community, cost of Heritage Conservation Study would likely cost 3-5 times as much [...]"

“The transparency to community the cost of legalities associated with builders/developers and individual homeowners fighting this bylaw, and the cost to taxpayers [...]”

NHBA/WEHBA states:

“The discussion at the Committee of the Whole provided an estimation that the total costs for the execution of the study, as well as legal fees and appeals, would cost upwards of \$1 million.”

Analysis: Based on a review of previously completed HCD Plans/Studies, these figures including the \$1 million amount appear to be highly speculative. The budgeted cost provided by the Town’s planning professionals, whom Council relies on to provide objective opinion and advice to Council, was \$100,000.

A sample review of HCD studies/plans of various scales from other municipalities revealed the following actual costs or budgets adjusted for inflation to 2020 levels:

- Bradford HCD Study 2017 – Cost \$40,000
- Bradford HCD Plan 2020 – Budgeted \$55,000
- New Tecumseth Beeton HCD Study 2017 – Actual \$50,000
- New Tecumseth Beeton HCD Plan 2018 – Budgeted \$51,000
- Thornhill HCD Update Study & Plan 2018/19 – Budgeted \$143,000
- Whitby Downtown Study & Plan 2012 – Actual \$150,000
- City of Toronto Queen Street East HCD Study 2013 – Budgeted \$140,000
- City of Toronto Queen Street East HCD Plan 2013 – Budgeted \$60,000

It should also be noted that the City of Toronto’s 2020-2029 Capital Budget Plan has allotted \$7.1 million to their Heritage Conservation District program over ten years. This represents an average yearly budget of \$710,000 for their HCD program including studies and plans. These figures can be referenced in “2020 Budget Notes City Planning” which can be found at:

<https://www.toronto.ca/legdocs/mmis/2020/ex/bgrd/backgroundfile-145913.pdf>

Given the sample budgets, actuals and scale of projects, the claimed figure of \$1 million or \$500,000 for a Main Street East HCD Study simply is not realistic. The consideration of legal fees due to appeal is negligible, as will be discussed further, HCD study By-Laws are rarely appealed.

Based on these findings, it is my position that the \$100,000 budgeted by the Town reflects a realistic cost to complete a Main Street East HCD study.

Topic 5: Property Values Negatively Impacted By HCDs (Evans)

In her correspondence, Ms. Evans states the following concerns over property values:

“Homeowners being impacted by the impact this could have on a potential sale of their home.”

Analysis: While the basis of Ms. Evans concern is largely confined to the final implementation of an HCD, not when a study is taking place, it is still worth examining the validity of the statement.

Recent studies have shown that property values in HCD’s rise similarly or even greater than those in non-designated areas:

“Real estate values in Heritage Conservation Districts generally rise more consistently than surrounding areas.”

Source: "[Heritage Districts Work! – More Stories of Success](#)", 2012. Architectural Conservancy of Ontario, Robert Shipley, University of Waterloo

"[...] it appears that heritage designation in the form of a conservation district, does not negatively impact the value of properties. Rather, it may enhance value over time."

Source: "[The Economic Value of Heritage Districts: How Assessment Growth in Heritage Conservation Districts Compares With Non-designated Areas in Hamilton](#)", 2016. Urban Insights bulletin, CivicPlan.

Property owners concerns over negative impact on property values from an HCD district are not supported by evidence. While the studies detail implemented HCD plans, it is a reasonable extension of those findings that an HCD study would, in a similar fashion, not negatively affect values.

Topic 6: LPAT Appeals of the HCD Study & ICBL (Peters, Evans, NHBA/WEHBA)

Raised both in the Committee of the Whole meeting of October 19, 2020 and in the above three delegation packages was the prospect of legal challenges to the HCD study and/or any Interim Control By-Law for the study.

Ms. Peters states:

"If this vote somehow gets through, is there any way for us to become exempt, or is an appeal process our only option?"

Ms. Evans writes:

"The transparency to community the cost of legalities associated with builders/developers and individual homeowners fighting this bylaw [...]"

In language lifted nearly verbatim from the *Heritage Tool Kit: Heritage Conservation Districts*, NHBA/WEHBA states:

"The controls are also subject to appeal, which can further delay the completion of the study. The Town cannot pass another by-law to designate another study area that includes a previously designated study area for a three-year period if an appeal is upheld."

Analysis: The OHA does provide for an appeal mechanism once an HCD study with an ICBL has been approved by a municipality. Specifically:

"Appeal to Tribunal

(4) Any person who objects to a by-law passed under subsection (1) may appeal to the Tribunal by giving the clerk of the municipality, within 30 days after the date of publication under clause (3) (b), a notice of appeal setting out the objection to the by-law and the reasons in support of the objection, accompanied by the fee charged under the *Local Planning Appeal Tribunal Act, 2017*. 2017, c. 23, Sched. 5, s. 65."

Unlike most appeals to the Tribunal, those s.40.1(4) appeals of HCD studies with ICBLs are very rare. These should not be confused with s.41(4) appeals which can be lodged when a municipality intends to put in place the final HCD district plan, which routinely appear before the Tribunal.

Despite the comfort that s.40.1(4) appears to offer those who may oppose an HCD study and its ICBL, the reality is that in a search of historical LPAT decisions, only two such appeals were located.

In *Liu v. Toronto (City)*, MM150018, fourteen (14) appellants, mainly consisting of large development corporations, appealed City of Toronto [By-Law 277-2015](#) regarding an HCD study and ICBL of “Historic Yonge Street”. The disposition of this matter was that the appeals were allowed in part, resulting in more clarifying language in the study By-Law. Despite the successful appeals, the study and its ICBL were not overturned.

Secondly, in *Trolleybus Urban Development v. Orangeville (Town)*, MM170068, the Tribunal was to hear appeals from landowners and residents opposed to being included in an HCD study. The disposition of this matter was that the By-Law was repealed by the Tribunal on the fact that the Town of Orangeville had completed their study and already repealed the By-Law.

The important takeaway from the Orangeville case was that despite the appeal, the HCD study proceeded while the appeal was pending and was completed before the LPAT hearing could even commence.

Clearly, the notion of a successful s.40.1(4) LPAT appeal, in whole or part, resulting in the complete cancellation of an HCD study appears to be a far and remote outcome. Should a successful appeal be brought against an HCD study in progress, the most likely Order of the Tribunal would be for an amendment of the study By-Law.

The suggestion that a successful appeal will immediately result in a repeal of an HCD study By-Law and imposition of a three-year prohibition on re-studying the area is faulty.

Topic 7: Steps to HCD Designation – Official Plan Provisions (NHBA/WEHBA)

In their position statement, NHBA/WEHBA expounds on the steps required to be undertaken for a Heritage Conservation District to be implemented. The statement focuses on the “Official Plan provisions” and that:

“[...] we have not seen any corresponding municipal Official Plan provisions related to the establishment of an HCD, as required by the *Ontario Heritage Act*.”

“Discussion of these policies and whether sufficient provisions do exist in the Town’s current OP would typically be presented to Council at this time by Town staff, to ensure a Town’s Official Plan does allow for district designation.”

Analysis: The NHBA/WEHBA statement on Official Plan (OP) provisions is somewhat premature as this process typically occurs when consideration of implementing a final HCD and not merely when an HCD study is being considered. The *Ontario Heritage Tool Kit* states:

“The Ontario Heritage Act requires that the municipal Official Plan have provisions relating to the establishment of a HCD. While not required before the initiation of a section 40.1 HCD study, this would a good time to check if the Official Plan policies are clear and contain the necessary provisions to allow for district designation

The *Ontario Heritage Tool Kit* is clear in that this an OP review not required before initiating an HCD study. But in consideration of that matter, it appears that the NHBA/WEHBA has not taken the opportunity to review the Town of Grimsby’s Official Plan which has these provisions already in place. Under Section 8.0 “Cultural Heritage and Archaeology”, there are many provisions for the creation of an HCD. In part, the OP states:

“ 8.3 The Town may by by-law designate a property or a district to be of cultural heritage value or interest in accordance with the following process:

- a) The property meets the criteria set out in Sections 8.9 and 8.10;
- b) Council has consulted with the heritage committee as per Section 8.2; and
- c) Proper notice of intention has been given, in accordance with Sections 29 and 41 of the Ontario Heritage Act, 1990

8.4 Prior to the designation of a Heritage Conservation District, the Town shall:

- a) Adopt a by-law designating the study area for the purpose of designating the Heritage Conservation District;
- b) Prepare and adopt a Heritage Conservation District Plan which will encourage conservation through controls and incentives, establish criteria for controlling demolition and regulating design;
- c) Hold at least one public meeting with respect to the proposed Heritage Conservation District Plan; and
- d) Pass a by-law designating the area as a Heritage Conservation District."

Although not required prior to an HCD study being initiated, the required OP provisions are clearly in place in the Town's Official Plan. The statements of NHBA/WEHBA inferring that the Town must conduct this step prior to initiating an HCD study and that the OP may not contain such provisions for an HCD is clearly a misinterpretation of and failure to read the appropriate legislation.

Topic 8: Delineation of Study Area Boundary (NHBA/WEHBA)

Similar to the above, NHBA/WEHBA misinterprets the distinct concepts of an HCD "study area" and the final HCD "plan area".

"[...] you will notice that the delineation of the boundary of the study area and potential HCD does not occur until Step 6 in the process, *after* the study of the area has agreed to be undertaken, whereas Council has already been presented with these boundaries at the outset of the request for a study to be initiated, with no justification or rationale provided as to how those boundaries have been arrived at."

Analysis: Despite the inaccuracies or other oversights in the NHBA/WEHBA statement, the above excerpt is the most troubling. In order to commence an HCD study, a study area must be selected. The *Ontario Heritage Tool Kit* specifies this in "Step 2 – Consultation with the Municipal Heritage Committee":

"Where a MHC exists, the act requires that council consult with the committee about any area being considered as a heritage conservation study area"

By their own admission, NHBA/WEHBA states that "We recognize that steps 1 and 2 have sufficiently been carried out [...]". With that, there is nothing in the contents of the HCD draft By-Law that states or otherwise infers that the "study area" is or will be the same as any possible HCD "plan area". The "plan area" is arrived at after the conclusion of the study and no such "plan area" has yet been defined.

Summary of Positions

The positions of Dr. Peters and Ms. Evans seem largely based on apprehension, which in the view of LPAT is not reasonable grounds for an appeal. Dr. Peters concerns appear to revolve around her ability to renovate her business, which may be affected somewhat by any eventual HCD plan, but whether this would be to her detriment or benefit has yet to be determined.

The issues raised by Ms. Evans while appearing to be apprehension, also point to some confusion between an HCD “study area” versus a final HCD “plan area”. Concerns of property values, costs, public engagement and appealability are sufficiently addressed within this document.

The position paper of the Niagara Home Builders Association and West End Home Builders Association however is most concerning. These two large lobbyist groups comprise of many companies and organizations including developers and planners. Based on that membership composition, the accuracy of their position statement is disappointing.

The NHBA/WEHBA statements contain a sufficient number of oversights, errors and misinterpretations that may inadvertently lead to Members of Council in believing that the By-Law before them and the process leading up to this point is fatally flawed, when in fact it is not.

Respectfully submitted,

Adam Mottershead