

March 22, 2023

BY EMAIL

Mayor Scott Gillingham
The City of Winnipeg
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Councillor Markus Chambers
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Councillor Cindy Gilroy
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Councillor Sherri Rollins
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Councillor Jeff Browaty
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Councillor Vivian Santos
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Councillor Shawn Dobson
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Councillor John Orlikow
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Councillor Evan Duncan
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Councillor Jason Schreyer
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Councillor Ross Eadie
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Councillor Devi Sharma
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Councillor Matt Allard
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Councillor Brian Mayes
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Councillor Russ Wyatt
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Councillor Janice Lukes
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Dear Sirs/Mesdames:

Re: Crescentwood-Enderton Park Heritage Conservation District Plan
Our File: 23058

I represent property owners opposed to the proposed Crescentwood-Enderton Park Heritage Conservation District and anticipate being retained by additional property owners in the coming weeks. The property owners that I currently and anticipate representing are opposed to the pending HCD designation for a variety of reasons, including the lack of in-person consultation and the alteration of the proposed boundaries (and exclusion of similar nearby properties) for reasons that are not heritage-related.

However, I do not appear before you to raise those various overlooked concerns. Instead, and in the hopes of avoiding litigation, I have been asked to draw the following two issues to your collective attention because they may result in the HCD designation being overturned.

Proposed By-Law is Impermissibly Vague

Municipal by-laws can be successfully challenged in the Court of King's Bench on a number of grounds, including vagueness. As one Ontario judge put it, "[a] municipality has an obligation to write a by-law that is certain".¹ As another stated:

*"When a municipal council purports to legislate under the powers found in the Municipal Act and thereby creates obligations to be observed by its citizens, the failure to observe which attracts punishment, it is to be expected that the by-law creating such obligations will itself be so explicit that a well-intentioned citizen seeking to observe the provisions of the by-law may, from a reading of the by-law, without the enlargements of its requirement by the order of a municipal servant, be able to satisfy himself that he has complied with its requirements"*²

Designating an area of Winnipeg as an HCD creates obligations on property owners and tradespeople that are enforceable with significant fines for contraventions. Section 5(1) of By-Law No. 87/2018 reads as follows:

Unless a person has obtained a heritage permit in respect of a property located within an HCD, that person must not

¹ *Lawrence v. Muskoka Lakes (Township)*, 2005 CanLII 16587

² *R. v. Sandler* (1971) 21 D.L.R. (3d) 286

- a) *Demolish or alter, or permit to be demolished or altered, any character-defining element located on or within that property; or*
- b) *Construct, erect or locate a permanent or temporary building or structure on that property.*

Section 31(1) of By-Law No. 87/2018 makes it an offence for a property owner or tradesperson to contravene the By-Law. Section 31(2) goes on to impose a fine of up to \$1 million per contravention (or per day of an ongoing contravention).

The primary vagueness concerns with the proposed HCD designation arise from section 2.4 of the HCD Plan (page 23).³ Section 2.4 lists five categories of CDEs:

- (a) Area;
- (b) Streetscape;
- (c) Buildings;
- (d) Yards; and
- (e) Parks.

Two of the five CDE categories are problematic from the perspective of vagueness: Buildings and Yards. Each of these two categories contain references to multiple types of CDEs. The two subsections for Building CDEs are lengthy run-on sentences that contain both inclusionary and exclusionary language while referring to multiple types of buildings.

The vagueness concerns are compounded by conflicting and/or confusing statements throughout the HCD Plan. For example:

- (a) Despite the lengthy run-on sentences contained in the two Building CDE subsections, the document thereafter relies on the concepts of “heritage” and “non-heritage” buildings. The document does not explain how a property that has “historical or architectural integrity” for the purposes of By-Law 55/2014 or “special architectural or historical interest” for the purposes of repealed By-Law 1474/77 satisfies the requirements of the Building CDE subsections. Put differently, simply stating that a property located within the proposed HCD is a “heritage” building does not mean that it qualifies as a CDE;
- (b) Appendix D states that non-heritage buildings are not CDEs but:
 - (i) Section 2.4(3)(b) suggests that some non-heritage principal buildings may be CDEs;
 - (ii) Section 4.1(5) nonetheless imposes a requirement for a heritage permit with respect to non-heritage buildings;
 - (iii) Section 5.4.5 imposes mandatory policy and design guidelines for alterations to non-heritage buildings;

³ Section 2.4 of the HCD Plan contains the CDEs proposed by the City’s Historical Buildings and Resources Committee – see section 4.5 of the HCD Study from 2020.

- (c) Appendix D states that non-heritage buildings are not CDEs but Section 4.2(5) indicates that heritage permit exemptions are available for non-heritage buildings;
- (d) Appendix C states that heritage buildings are CDEs but Section 4.2(4) indicates that heritage permit exemptions are available for heritage buildings; and
- (e) Section 4.2 purports to provide exemptions from the heritage permit requirement, but then goes to state that the purported exemptions *“are based on the understanding that specified works are generally undertaken within a small area, are confined to areas generally out of sight from public view, constitute routine maintenance, are easily reversible and would not have a negative impact on the heritage value and character-defining elements of the HCD”*.

The failure to define all of the CDEs with appropriate clarity – and then referring to “heritage” and “non-heritage” buildings instead - prevents a property owner and/or tradesperson from knowing whether or not they require a heritage permit. The lack of clarity also makes it difficult for them to determine whether they will be granted a heritage permit if they apply and/or if any the purported exemptions dispense with that requirement.

A practical example that arises due to the lack of care in drafting the HCD Plan: Section 4.2(3)(d) suggests that property owners may be required to apply for and receive a heritage permit to plant flowers in their front yards without providing appropriate guidance on when governmental authorization for such a common task is now required. To obtain that governmental authorization, city staff require that property owners provide a copy of their land title when applying for a heritage permit (among other documents) and the fee to apply is at least \$327.60 (tax included).

With respect, property owners and/or tradespeople should not be required to consult heritage staff and meet with the HCD committee in order to understand their obligations following an HCD designation. Council can and should demand that the language used to describe the CDEs is sufficiently precise and clear before approving this HCD designation.

Proposed HCD Not Eligible to be Designated as HCD

Section 4 of By-Law No. 87/2018 reads as follows:

An HCD is only eligible to be designated as an HCD if:

- a) It is of special architectural and historical significance; and*
- b) At least 50% of its proposed character-defining elements are at least 40 years old.*

The record before Council is focused solely on the first of the two eligibility criteria. Sections 13(1), 15(2), 17(2) and 18(4) all require the first eligibility criteria to be considered before an HCD Plan is prepared and the exclusive focus on that first eligibility criteria is therefore understandable. However, as section 4 makes clear, mere “special architectural and historical significance” is insufficient for Council to proceed with an HCD designation.

There is absolutely nothing in the record before Council that assesses the second eligibility criteria, let alone provides a reasonable basis upon which any member of Council can reasonably conclude that the proposed HCD is even eligible for the proposed designation. For example, the Administrative Report prepared by Mr. Veitch and reviewed by Legal Services is completely silent on the second eligibility criteria and whether the incomplete information contained in the 2020 HCD Study is still current and accurate.

Further, the vagueness of the definitions of the CDEs adds to the considerable challenge of assessing this second eligibility criteria – if it is unknown or debatable whether something is a CDE, how can it be counted and assessed for eligibility purposes? For example, it is unknown how many of the “heritage” principal buildings satisfy one of the Building CDE subsections and therefore the number of “heritage” principal buildings is not a valid substitute for the purposes of determining eligibility.

With respect, Council cannot proceed with the proposed HCD designation until such time as the second eligibility criteria has been appropriately assessed and the proposed HCD’s eligibility is confirmed.

I appreciate the opportunity to raise these two important issues with each of you and commend them to your collective consideration.

Yours truly,

HILL SOKALSKI WALSH LLP

Per:

Kevin D. Toyne

KDT/km