

RESEARCH PAPER:
Heritage Properties - Demolition by Neglect and the Public Interest

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Private Property and the Public Interest (08-98-971-58)

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Properties of cultural heritage value or interest are an integral part of a community's history. Meanwhile, heritage properties have the capacity to inform and enhance the future of their community. Formal municipal designation under the authority of the *Ontario Heritage Act*¹ acknowledges the design, historical or contextual value of heritage properties, while functioning to promote the public interest in their conservation and protection. Conversely, preservation controls and requirements applied to designated properties can be seen as placing undue restrictions on private property rights. Designation has faced particular resistance in circumstances where it has been applied in order to prevent the demolition of heritage properties by private developers. In response, enhanced legal mechanisms and standards regulations have been adopted throughout Ontario municipalities in order to better protect property preservation. However, as this research paper will explore, recent examples of “demolition by neglect” showcase how private property interests continue to prevail. In order for Ontario law to effectively manage this tension between private and public property interests, greater proactive procedures are required alongside a focused conceptualization of the public interests advanced by heritage property preservation.

Ontario Heritage Property Designation

The *Ontario Heritage Act*, alongside municipal regulations and other related law, govern Ontario heritage preservation. Enacted in 1975, the *Heritage Act* was created to protect historic resources following Canada's 1974 signing of the World Heritage Convention.² The United Nations Educational, Scientific and Cultural Organization (UNESCO) 1964 *Venice Charter*, to which Canada is a signatory, influenced this legislation by promoting that it is the duty of

¹ *Ontario Heritage Act*, RSO 1990, c O.18 [*Heritage Act*].

² Robert Shipley, Kayla Jonas & Jason Kovacs, “Heritage Conservation Districts Work: Evidence from the Province of Ontario, Canada” (2011) 47:5 *Urban Affairs Rev* at 615 [Shipley, “Heritage Conservation Districts”].

governments to ensure the protection and preservation of cultural heritage.³ Section 29(1) of the *Heritage Act* executes this duty by enabling municipalities to pass by-laws that formally designate heritage properties. In order to receive designation, a property must meet the criteria for determining cultural heritage value or interest as prescribed by *Ontario Regulation 9/06*.⁴ This criterion includes that a property have design or physical value, historical or associative value, or contextual value. Design and physical value are determined by qualities such as having high craftsmanship, artistic merit, technical achievement, or being representative of a specific type of construction. Historical and associative value are characterized by elements such as a property's community association, cultural information, or design by a significant community architect. Meanwhile, contextual value may be found by evaluating the character, historical linkage, or landmark status a property lends to its surroundings.

A property is typically identified as having cultural heritage value or interest by Municipal Heritage Committees, or as a result of a community cultural planning process or study.⁵ In accordance with s 28(1) and (2) of the *Heritage Act*, although it is not required, the council of a municipality may establish and appoint members to a Municipal Heritage Committee. Where a committee has been established, its members assist in the identification, research, and evaluation of heritage properties. Likewise, a property owner, community individual, or group may also recommend a property for designation.⁶ Ultimately, whether the designation process proceeds is a decision of municipal council. As stated in s 29(1.1) and (5) of the *Heritage Act*, if council intends to designate a property, notice must be served on the property owner and the Ontario Heritage Trust, upon which any notice of objection must be served within

³ Robert Shipley, "Heritage Designation and Property Values: Is there an Effect?" (2000) 6:1 *The Intl J of Heritage Studies* at 1 [Shipley, "Heritage Designation"].

⁴ O Reg 0/06 [*Regulation 9/06*].

⁵ Ontario, Ministry of Culture, "Designating Heritage Properties", Ontario Heritage Tool Kit (Ontario: Queen's Printer for Ontario 2006) at 8.

⁶ *Ibid* at 8.

30 days. Objections are then referred to the Conservation Review Board for a hearing. However, council is not bound to follow any recommendations made during the hearing, and may proceed with the designation regardless.⁷

Once council passes a heritage designation by-law, it is registered at the land registry office and listed on the municipal and provincial registrars. The property also becomes eligible to be listed on the Canadian Register of Historic Places. In addition to the listing of designated individual properties, the registrars also list valued properties that have yet to receive formal designation, as well as entire heritage conservation districts. In this manner, designation and listing works to publically acknowledge the design, historical or contextual value of heritage properties. Correspondingly, heritage designation also functions to protect and conserve valued properties, as will be further discussed, by regulating alterations, property standards, and preventing demolition.

Heritage Properties and the Public Interest

As this process suggests, the *Heritage Act* and corresponding municipal by-laws do not require consent of a property owner in order for heritage designation to be implemented. This was confirmed in the 2003 Ontario Superior Court of Justice case, *Tremblay v Lakeshore (Town)*, which concluded that required consent of a property owner is inconsistent with the *Heritage Act* and its purpose.⁸ *Tremblay* goes on to state, “the object of the Act is the conservation and protection of the heritage of Ontario. This may interfere with individual property rights”.⁹ Similarly, a Notice of Intention to Designate under s 30(1) can be issued without owner consent, prior to formal designation, in order to effectively void building or demolition permits issued to a recently identified property of heritage value or interest. As the

⁷ *Ibid* at 10.

⁸ [2003] 68 OR (3rd) 109, 232 DLR (4th) 356.

⁹ *Ibid* at para 23.

Ministry of Culture describes, “in some cases, council may have to act in the public interest to conserve a significant property, despite objections by the owner”.¹⁰ Accordingly, while the intent to designate and designation of heritage properties without owner consent is rare, it can serve as an important public interest tool.

Recognition and conservation of heritage properties is identified as a public interest for the numerous resulting benefits it offers to the public. Cultural heritage conservation is acknowledged as a provincial interest within the *Planning Act*¹¹, which stipulates in s 2(d) that the Minister, municipal councils, local boards, planning board and Municipal Board shall have regard to the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest. This is furthered by policies pertaining to heritage conservation within chapter 3.1.5 of the Toronto Official Plan, which describe heritage properties as representing a collective past, and whose protection, use and reuse enriches daily city experiences.¹² The plan continues on to describe the preservation of cultural heritage as contributing to other social cultural, economic and environmental goals of the city.¹³

Such enrichment and contribution showcase how heritage properties offer much more than aesthetic or historical value. Furthered value stems from the ability of heritage properties to stimulate growth, development, and strength in a community. As Chapman outlines, “courts have long recognized that historic preservation is an essential tool for local governments to improve the quality of life for their citizens”.¹⁴ Conserving heritage properties preserves a community’s richness and depth, while acting as a tool for avoiding monotony in urban environments.¹⁵ The

¹⁰ *Supra* note 5 at 10.

¹¹ *Planning Act*, RSO 1990, c P.13.

¹² Toronto, City Council, *Toronto Official Plan* (June 2015) at 3-11.

¹³ *Ibid* at 3-12.

¹⁴ Tyler Chapman, “To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement” (1997) 77:111 BUL Rev at 143.

¹⁵ *Ibid* at 149.

Ministry of Culture likewise reflects these sentiments concerning heritage properties and the public interest. In their Ontario Heritage Tool Kit for understanding heritage conservation, properties of cultural heritage are praised as playing a significant role in economic development. As the Ministry describes, these places help to “enhance a community’s quality of life, strengthen its distinctiveness, stimulate revitalization and attract tourist dollars”.¹⁶

These examples of how heritage properties are considered to serve community values across various levels of government illustrate the broad range of ideals encapsulated by the “public interest”. In this manner, heritage property designation and preservation is representative of how the public interest is a malleable concept that can be used to justify a wide range of public goals. This is attributable to the various ways the public interest is identified, assessed and determined in Ontario planning decisions, as observed by Valiente.¹⁷ Examining interpretation by municipal council, Valiente highlights how the public interest is a political decision that must balance official policies, numerous competing viewpoints, and what is best for the community.¹⁸ However, Valiente also notes that in practice, many voices of local society are not heard, while private interests can be highly influential.¹⁹ Such influence is indicative of how private property interests often compete or are in tension with procedures and decisions made in the interest of the public. Resistance to heritage property designation showcases this tension through the influence of private interests upon how property is conceptualized, and whether the public interest in heritage conservation is actualized.

¹⁶ *Supra* note 5 at 1.

¹⁷ Marcia Valiante, “In Search of the ‘Public Interest’ in Ontario Planning Decisions” in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 104.

¹⁸ *Ibid* at 124.

¹⁹ *Ibid* at 124.

Private Property Interests and Heritage Designation

Resistance to heritage property designation is rooted in perceptions that it decreases property value, causes unreasonable landowner burden, and threatens private development, among other detriments to private property interests. However, as this discussion will highlight, private property interests are not as hindered by heritage designation and the interests of the public as they might appear. While the *Heritage Act* and municipal by-laws are framed within the interests of the public, pragmatically, private interests are afforded great deference.

Formal designation of properties as protected heritage is stigmatized by perceptions of resulting lowered property values. As Shipley explains, “it is argued that designation restricts what the owner can do with his or her property. This in turn, it is said, limits the number of buyers willing to accept such restrictions”.²⁰ Meanwhile, the author’s research focusing on sales history trends of designated heritage properties and districts in numerous Ontario communities concludes otherwise. As found by Shipley, properties designated under the *Heritage Act* perform at or above average across sales history trends, garner increased property values, and are resistant to market down-turns.²¹ While restrictions are a product of designation, many buyers are willing to pay more for the status and community value of a heritage property and engage in enhanced property maintenance as a result.

Although such restrictions may not negatively impact property values, they are still regarded by some as causing an unreasonable burden to landowner private property rights. For example, if an owner wishes to alter their designated heritage property, they must apply to council and await a decision within 90 days. This approval process is implemented to ensure that

²⁰ Shipley, “Heritage Designation”, *Supra* note 3 at 2.

²¹ *Ibid* at 19.

any changes are made in respect of a property's heritage value.²² Meanwhile, as observed through a further study by Shipley et al focused on designated heritage conservation districts, almost all requests are approved and occur within or under the designated timeline.²³ This example highlights that while procedural burdens exist, they may not directly translate into restrictions on landowner use or plans for their private property in the end.

Furthermore, this perception of burdens or restrictions to landowners is influenced by expectations of individual private property rights as superseding those of the public. Within the United States, as observed by Chapman, defiance against government attempts to control private land use for the public good has spurred a property rights movement towards greater private authority over property.²⁴ Chapman's examination of the property rights movement exemplifies conceptions of property and the rights it is assumed to confer upon owners. As stated by Harding, "the concept of ownership in a single person or entity persists and pervades our understanding of the concept of property".²⁵ This singular ownership is reflective of the prevalent understanding of property as a bundle of rights, notably including one's right to exclude, transfer and control.²⁶ In this regard, the tension between private and public interests is structurally inherent within the conceptualization of property itself. Such conceptualization poses a challenge for the community goals of heritage to be attached to or imposed upon private property. Moreover, as Fincham argues, heritage and property are separable concepts that should be properly distinguished as two distinct bodies of law.²⁷ The author describes, "Heritage produces different characteristics and relationships between other objects and groups of people

²² *Supra* note 5 at 6.

²³ Shipley, "Heritage Conservation Districts", *Supra* note 2 at 21.

²⁴ *Supra* note 14 at 129.

²⁵ Sarah Harding, "Justifying Repatriation of Native American Cultural Property" (1997) 72:3 *Ind LJ* at 159.

²⁶ Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 3.

²⁷ Derek Fincham, "The Distinctiveness of Property and Heritage" (2011) 115:3 *Penn St L Rev* at 645.

than property does...by exposing the obvious and subtle differences...we can expose the gaps and shortcomings in the discourse of the law”.²⁸

However, rather than further separating heritage and property as distinct legal concepts, an efficient approach towards easing property tensions is encouraging a holistic and balanced expectation of private property. This includes an understanding that public burdens are balanced by other benefits enjoyed. Chapman expresses this notion, stating the “exchange of benefits and burdens is fundamental to the citizenship we all enjoy”.²⁹ In this manner, while heritage designation may burden private property interests in certain respects, those private interests also benefit from burdens allocated elsewhere.

Heritage property designation faces additional criticism for its hindrance to urban development. As Strahilevitz argues of the “right to destroy”, a notable absence from what is typically included amongst the property rights bundle, “denying owners the right to destroy property that becomes embarrassing, unfashionable, unproductive, or obsolete threatens the impulses that spur future creation”.³⁰ In Ontario, this hindrance is linked to the restrictions on demolition imposed on designated properties by the *Heritage Act*. However, prior to 2005, an owner’s ability to demolish or remove a designated property was enabled even if their application to do so was refused by city council. Demolition work could be commenced after refusal, provided that the owner obtained building permits to erect a new building on the demolition site, and waited 180 days from the decision date of city council. Furthermore, heritage properties were only required to meet the minimum municipal code standards for property maintenance and occupancy.

²⁸ *Ibid* at 670.

²⁹ *Supra* note 14 at 147.

³⁰ Lior Strahilevitz, “The Right to destroy” (2005) 114:4 Yale LJ at 821.

On April 28, 2005 amendments to the *Heritage Act* received Royal Assent in an effort to improve Ontario heritage preservation. These amendments afford provincial and municipal governments greater authority to prevent demolition long term. Under s 34(1) of the *Heritage Act*, an owner of a designated property cannot demolish or permit demolition without written consent of city council. In addition, as per s 27(3), owners of properties that are not designated but listed on the register must provide city council 60 days notice of any intent to demolish or remove a building or structure. At this stage, if the city wishes to preserve the building, a Notice of Intention to Designate may be issued as previously described. The previous 180-day waiting period and building permit provisions providing only interim controls to municipalities have been removed. By contrast, an owner can appeal council's refusal to allow demolition, which is heard by the Ontario Municipal Board whose decision is final.

The *Heritage Act* amendments also enable municipalities to require enhanced property maintenance standards for heritage properties. Section 35.3(1) provides that council may by by-law prescribe minimum standards for the maintenance of heritage attributes of designated properties, if property maintenance standards are in effect in the municipality under the *Building Code Act*³¹. For example, Article V of *Toronto Municipal Code Chapter 629*³² was adopted in March 2007 to amend existing city property standards. The amendment prescribes minimum property standards and repair requirements specific to heritage properties in order to preserve and protect heritage values and attributes. In addition, as contained in 629-24B, owners are mandated they protect vacant heritage properties against the risk of fire, storm, neglect, intentional damage as well as damage from other causes. The *Heritage Act* further empowers municipalities to require owners by by-law to repair and maintain their heritage property in order

³¹ *Building Code Act*, 1992 SO 1992 c 23.

³² *Toronto Municipal Code* c 629.

to ensure conformity with these enhanced standards. Despite these increased municipal powers to better protect and preserve the integrity and longevity of heritage properties, demolition and private development interests are nevertheless able to prevail. As the following examples within the city of Toronto highlight, demolition of heritage properties can still occur through a process of neglect.

Demolition by Neglect

Protecting against neglect and deterioration served as an impetus for the 2005 *Heritage Act* amendments discussed above. Likewise, under the Toronto Official Plan chapter 3.1.5 on Heritage Conservation, the protection against deterioration by neglect through the enforcement of heritage property standards is cited as a city policy.³³ However, in spite of city policy, enhanced property maintenance standards and enforcement mechanisms, examples of heritage property “demolition by neglect” continue. Demolition by neglect is the process by which, “the owner or tenant of a designated heritage property, either intentionally or unintentionally, allows the buildings and/or structures on the property to deteriorate to the point that they are beyond reasonable repair”.³⁴ This deterioration causes the building or structure to eventually collapse, and typically requires city demolition of what remains in the interest of public safety. Cases of demolition by neglect can be found throughout Ontario, often occurring after municipal council has rejected demolition and development plans for a site and subsequently designated it as a heritage property. The issue is notably prevalent in Toronto, as the following examples signify, where land values are typically higher than the heritage properties occupying them.³⁵ Once a

³³ *Supra* note 12 at 3-13.

³⁴ Hamilton, Planning and Economic Development Department, “Minimum Property Standards”, by Tim McCabe, Planning and Economic Development Department (August 17, 2007) at 2.

³⁵ *Ibid* at 2.

building or structure is demolished, heritage restrictions no longer apply to the property, allowing owners to pursue alternative development plans.

The James Chalmers Building was located at 6 Howard Street in north St. James Town, an at-risk “priority” neighborhood located east of downtown Toronto. A walk-up apartment, the 1914 Victorian property was left vacant for many years. In 2004, the owner of the property applied for demolition approval, which was denied by municipal council for reasons including a lack of replacement rental housing.³⁶ Following this decision, municipal council designated the building as a heritage property under the *Heritage Act*. Images taken of the building prior to its collapse captured brick piles arranged near one chimney, as well as lumber jutting out of a hole in the roof.³⁷ Shortly after in March 2006, the roof collapsed, leading the Chief Building Official to order that the property be demolished. The building was determined to be structurally unsound and as posing a danger to neighboring buildings.³⁸ This structural threat not only resulted in demolition of the heritage property, but also caused the evacuation of low-income tenants in the building next door. Furthermore, the history of the James Chalmers Building appears to have been lost alongside the building itself. Detailed elements of the building’s design, historical or contextual value that resulted in its heritage designation are not easily researched. The fate of this building, now an empty lot, alongside numerous other vacant, deteriorating, boarded up buildings within St. James Town, influenced the city of Toronto’s March 2007 implementation of enhanced property standards for heritage properties.

However, as the history of Walnut Hall demonstrates, unless city officials strictly enforce heritage property standards, deterioration will continue to the point of demolition. Walnut Hall

³⁶ Toronto, City Planning Division, “Staff Report for Action - Enhanced Property Standards for Designated Heritage Buildings”, (January 17, 2007) at 3.

³⁷ Bozikovic, Alex, “Safe as Houses? Maybe Next Year”, *The Globe and Mail* (7 October 2006), online: <www.theglobeandmail.com>.

³⁸ Toronto, City Planning Division, “Staff Report for Action – North St. James Town”, (September 11, 2013) at 4.

was located on Shuter Street in Toronto's Moss Park area, a similar low-income district to St. James Town. A rare 3.5 storey Georgian style residential complex with notable exterior architectural details, the 1856 building was designed by John Tully and was one of the first buildings to be inventoried as a Toronto heritage property in 1973.³⁹ It was not until years later in 1997 that the property was officially designated under the *Heritage Act* by the city in an effort to prevent the building's demolition for a proposed development project. If kept in tact, the original structure of Walnut Hall was a spacious and seemingly adaptable property for a myriad of contemporary uses. Regardless, the building was left vacant and neglected for many years following, prompting inspection engineers to recommend its demolition to the city in 2002.⁴⁰ Despite these recommendations, demolition and property standards were not imposed on the property, and it continued to fall into disrepair. The building collapsed in May 2007, after which its remains were demolished by the city due to public safety concerns. A new condominium by a subsequent developer now stands on the property, while numerous development proposals for similar projects permeate the area. Home to several shelters and public housing, such development plans for Moss Park are criticized as evidence of the city catering the downtown core to condo developers at the expense of displacing disadvantaged citizens further away from needed city resources.

Neglect of a heritage property not only risks demolition due to deterioration and collapsing, but also damage due to other causes such as fire as in the case of the former Empress Hotel. Located at 335 Yonge Street in downtown Toronto, the red brick Empress Hotel property was the only surviving example of a late 19th century commercial building on its block.⁴¹ As the

³⁹ Toronto, Economic Development & Culture Division, "102-110 Shuter Street – Walnut Hall", (June 5, 2002) at 2.

⁴⁰ Nick Kyonka, "Historic Building Dies of Neglect", *The Toronto Star* (20 May 2007), online: <www.thestar.com>.

⁴¹ City of Toronto, by-law No.1176-2010, *To Designate the Property at 335 Yonge Street (Empress Hotel) as being of Cultural Value or Interest* (27 May 2010) at 2.

heritage by-law designating the 1888 property details, cultural value or interest attributes of the property included its distinctive tower and mansard roof, corbelled brickwork, original wood windows and decorative glass, as well as its stone detailing.⁴² Although it was included within the municipal inventory of heritage properties since 1974, the building was not formally designated until 2010 after the owners submitted an application for demolition. On April 16, 2010, a portion of the building's north façade collapsed, resulting in the partial demolition of the wall.⁴³ This collapse highlighted the deteriorating state of the Empress Hotel property, which continued on for years. Following the collapse, media attention uncovered a history of litigation between city officials and the often difficult to reach owners, continuous maintenance requests, and previous unfulfilled restoration plans. As a *Globe and Mail* article states, “until the wall collapsed, the city's attention seemed limited to the façade. City spokesman Bruce Hawkins said in an interview that it is not yet clear whether inspectors had gone inside in recent years”.⁴⁴ In January 2011, the building was destroyed by arson. Following the fire, the building was demolished once inspections indicated the building could not be saved. The city, alongside neighbours of the building, are suing the property owners for damages due to negligence as a result of inadequate security and building maintenance.⁴⁵

Notwithstanding provincial and municipal efforts to protect heritage properties in the interest of the public, these examples of demolition by neglect showcase how private interests can dominate by capitalizing on legislative and procedural weaknesses. Removal of heritage properties in this regard does not occur as a direct demolishment of heritage property without

⁴² *Ibid* at 3.

⁴³ Toronto, City Planning Division, “Staff report for action – 335 Yonge Street – Intention to Designate under Part IV, Section 29 of the Ontario Heritage Act” (17 May 2010) at 2.

⁴⁴ John Lorinc & Jeff Gray, “Explrign the Past of the Building with no Future”, *The Globe and Mail* (07 January 2011), online: <www.theglobeandmail.com>.

⁴⁵ Carys Mills, “Lawsuits Tie Up Site of Collapsed Historic Hotel”, *The Globe and Mail* (5 August 2012), online: <www.theglobeandmail.com>.

approval in contravention of the *Heritage Act*. Rather, it is attained as a result of repair and maintenance delay as well as the effects of corresponding municipal action in the name of public safety. Outside of facing negligence claims or property standards fines in accordance with heritage by-laws under the *Building Code Act*, it remains to be seen whether municipalities will pursue legal action against occurrences of demolition by neglect as an offence under the demolition provisions of the *Heritage Act*. If a person or officer of a corporation is convicted demolishing or removing a structure in contravention of the act, s 69(3) imposes a maximum fine of \$1,000,000. A Toronto staff report on the 2007 enhanced property standards recommends that council be prepared to prosecute owners under this section who have neglected heritage properties to the point of deterioration and required demolition.⁴⁶ However, in addition to difficulties in establishing an owner's role in heritage property deterioration, lacking municipal resources to pursue legal action presents a significant barrier to conviction.

Municipal resource and procedural issues at large appear to greatly affect the enforcement of heritage property protection. As the same Toronto staff report recognizes, property owners have the ability to delay necessary heritage property repairs and maintenance, despite city property standards and enforcement powers.⁴⁷ Lengthy timelines and appeal procedures can allow inadequate property standards to continue for extended periods, causing added deterioration and detriment to heritage buildings or structures. Meanwhile, as described above of the Empress Hotel, numerous municipal maintenance requests had been made towards the property owners, while inconclusive city inspection may have further enabled disrepair of the building's interior. This speaks to limited city resources to enforce property standards on owners, as well as the trend of reactive approaches to heritage property standards maintenance. Minimal

⁴⁶ *Supra* note 36 at 6.

⁴⁷ *Ibid* at 7.

inspections that focus only on established substantial threats to a property's structural and heritage integrity are insufficient to protect against deterioration over time. As the examples above indicate, properties subjected to demolition by neglect are often only formally recognized as being of heritage value once deterioration has begun and demolition permits denied.

These issues are reflective of findings on the state of Toronto's heritage in a 2011 report by Heritage Toronto and the Toronto Historical Association. Increased staff and resources to identify and protect heritage, the promotion of proactive steps to preservation, as well as improving and enforcing legislation and policies related to heritage, were among the recommendations identified in the report.⁴⁸ In order to protect heritage and better service the interests of the public, these legislative and procedural improvements are imperative. Furthermore, consideration of the comprehensive effects of demolition by neglect upon a community indicate the importance of developing a focused conceptualization of the public interests advanced by heritage property preservation.

Protecting Heritage and Public Interest(s)

The public interest is affected by systemic deficiencies of heritage protection laws and procedures that lead to heritage loss and the advancement of private property interests. As previously described, aspects of the public interest promoted by heritage designation and protection are cited throughout government sources as including: architectural, aesthetic, and historical conservation; capturing a collective past; enriching daily experiences; advancing social, cultural economic and environmental goals; propelling economic development, revenue and tourism income; and enhancing a community's quality of life.

However, effects of the examined demolition by neglect cases in Toronto highlight how these identified elements of the public interest are broad and inconclusive. For example, beyond

⁴⁸ Toronto Historical Association & Heritage Toronto, "Heritage Voices", Report, (2011) at 9.

the loss of the James Chalmers Building's history, its demolition presented other community concerns. Specifically, the demise of the heritage property caused housing issues to neighboring low-income tenants, public safety concerns, and acted for many years as a vacant site for community crime. Similar effects are likewise consistent with Walnut Hall. Demolition of the Shuter Street building not only meant the loss of its architectural and historical significance, but its deterioration also presented danger to public safety for many years. In addition, its prolonged vacancy was presumably detrimental to neighborhood high crime rates. Moreover, while city planners initially rejected a redevelopment of Walnut Hall, a condo now stands on the site acting as a marker of the area's gentrification. Issues of public safety and skirting city planning decisions were also prevalent in the case of the Empress Hotel.

Concerns such as public safety, crime prevention, and the preservation of affordable housing in low-income neighborhoods should be acknowledged as public interests facilitated by heritage property preservation. This coincides with what Grant describes as the recognition of multiple public interests by planners in favor of advocacy and balancing political choices.⁴⁹ These specific public interests correspond with the above broad public interest elements of heritage properties, such as enhancing community quality of life and advancing social goals. However, this conceptualization of more focused public interests served by heritage protection and designation can help draw attention to the community advancements it can achieve beyond broad heritage values. This helps to align the public interests advanced by heritage with those that are strived for through general city planning.

Poor alignment between heritage and city planning was one of the issues found in the 2011 Toronto heritage report. As the report states, "heritage concerns are excluded from broader planning and development decisions...heritage considerations should be a fundamental aspect of

⁴⁹ Jill Grant, "Rethinking the Public Interest as a planning Concept" (2005) 45:2 Plan Canada at 49.

the planning process”.⁵⁰ The report is also critical that policies on heritage within the City of Toronto Official Plan are vague, while heritage is absent from other thematic sections including rental housing and neighbourhoods.⁵¹ Examining the provincial interests listed in s 2 of the *Planning Act* emphasizes how community values advanced by heritage designation and effective preservation against demolition by neglect correspond with those of city planning. This includes s 2(h) the orderly development of safe and healthy communities; (j) the adequate provision of a full range of housing, including affordable housing; (n) the resolution of planning conflicts involving public and private interest; (o) the protection of public health and safety; and (p) the appropriate location of growth and development.

Overlooking the specific public interests served by heritage protection, as well as segregating heritage from other city planning provincial interest goals, perpetuates the problem of inadequate heritage resources and reactive responses. This occurs as these oversights prevent heritage from entering the forefront of city and public concern. Furthermore, focused heritage public interests can protect against the actions of private developers from being framed under a more flexible notion of what is best for a community. Better recognition of the specific, imperative public interest roles heritage property preservation can play within a community will help translate into enhanced funding and resources. Such enhanced funding and resources can in turn be applied to implement proactive approaches towards conservation that are necessary to achieve the identified public interest goals connected to heritage preservation.

Promoting proactive approaches towards conservation and protecting against deterioration and demolition by neglect require a number of procedural changes. To start, designation of potentially threatened properties of cultural heritage or value should occur earlier.

⁵⁰ *Supra* note 48 at 5.

⁵¹ *Ibid* at 6.

As in the Toronto examples of demolition by neglect, designation of properties by council only occurred once demolition permits were denied and deterioration had already begun. Notably, two of these properties had been included on the city inventory of heritage properties for years prior to their designation. Prompt formal designation of properties identified as deteriorating would result in the ability to enforce enhanced heritage property maintenance standards sooner, more council attention directed to the property, and an improved chance at saving the property as a result. This can further mitigate issues associated with work order delays and lengthy timelines inherent within the legal system. In addition, inspections of vacant heritage properties should occur regardless of whether they are deteriorating or identified as posing a possible threat to public safety. This would help ensure that enhanced property standards are maintained and prevent heritage properties from falling into disrepair before it is too late. Lastly, inspections of properties that are identified as deteriorating or as not conforming to heritage maintenance standards should examine the property comprehensively. This is to avoid missing issues to the property that have not yet been identified or are easily visible, as in the case of the Empress Hotel property. These are merely examples of numerous procedural changes that can be employed by municipalities to better protect heritage properties and avoid demolition by neglect.

Proactive procedural enhancements are regarded as a more favorable approach in contrast to stringent legal mechanisms that have been implemented internationally in order to tackle demolition by neglect and related heritage preservation issues. For example, several city codes across the United States authorize the use of eminent domain as a means of protecting heritage properties from deterioration and neglect.⁵² These cities include San Antonio, Texas; Richmond, Virginia; Baltimore, Maryland; as well as Louisville, Kentucky. Eminent domain is the power of a municipality to take private property for public use. Aligning with the Canadian equivalent of

⁵² United States, National Trust for Historic Preservation, "Demolition by Neglect", (Washington: 2009) at 7.

expropriation, this would entail the government being authorized to take neglected heritage properties without owner consent in exchange for compensation. Likewise, strict local ordinance provisions have also been enacted throughout the US in order to promote heritage property preservation and maintenance. For example, in Portland, Maine, violation of the Preservation of Protected Structures ordinance, either willfully or through gross negligence, may subject the property to a special 25-year alteration and construction standard, imposed whether or not the property is historic.⁵³ This provision directly inhibits owners from neglecting properties in an effort to shed all heritage property standards provisions upon demolition.

While these demanding legal provisions may effectively prevent demolition by neglect and serve public interest goals connected to heritage preservation, they run the risk of tipping the balance between private and public heritage property tensions. For example, in describing issues with expropriation, Smit notes how even overcompensation cannot accommodate property owners' loss to fully recalibrate the balance between the public interest and the protection of private property interests.⁵⁴ As explored, under current heritage practices, Ontario private property interests are afforded great deference, despite enhanced heritage standards and requirements. Accordingly, demolition by neglect has shown the importance of improving the implementation of municipal laws in order to prevent private property interests from superseding public interests and city planning decisions. However, it is equally imperative to do so in a way that is not overly detrimental to private property rights in order to preserve a balance of benefits and burdens inherent within the private property regime.

Conclusion

⁵³ *Ibid* at 7.

⁵⁴ Anneke Smit, "Making up for the Loss of 'Home': Compensation in Residential Property Expropriation" in Smit & Valiante, *supra* note 17, 280 at 294.

Recognition and preservation of heritage properties is identified as a public interest across numerous government documents for the resulting benefits it offers to the public, as well as the broad public interest goals it can serve. However, the extended effects of demolition by neglect showcase how heritage property preservation contributes to distinct areas of public interest beyond merely aesthetic or historical value and generalized areas of public focus. Rather, heritage property preservation is intimately connected to public concerns such as public safety, crime prevention, and the preservation of affordable housing in low-income neighborhoods. Demolition by neglect also illustrates how private property interests are able to dominate as a result of resource issues and procedural weaknesses. As laws under the *Heritage Act* are currently enforced, private interests prevail as developers have become adept at skirting heritage protection mechanisms, enabling gentrification and influencing city planning. The problem of inadequate heritage protection resources and resulting reactive responses to threatened heritage properties is perpetuated by segregating heritage from other city planning goals, as well as overlooking the specific public interests serviced by heritage designation. While amendments to the *Heritage Act* enable municipalities to require enhanced property maintenance standards for heritage properties, proactive approaches towards heritage conservation are critical. Achieving improved heritage conceptualization, resources, and enforcement measures will not only result in better preservation of heritage properties, but will also accomplish a more effective balance between private property interests and the public interest.

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