

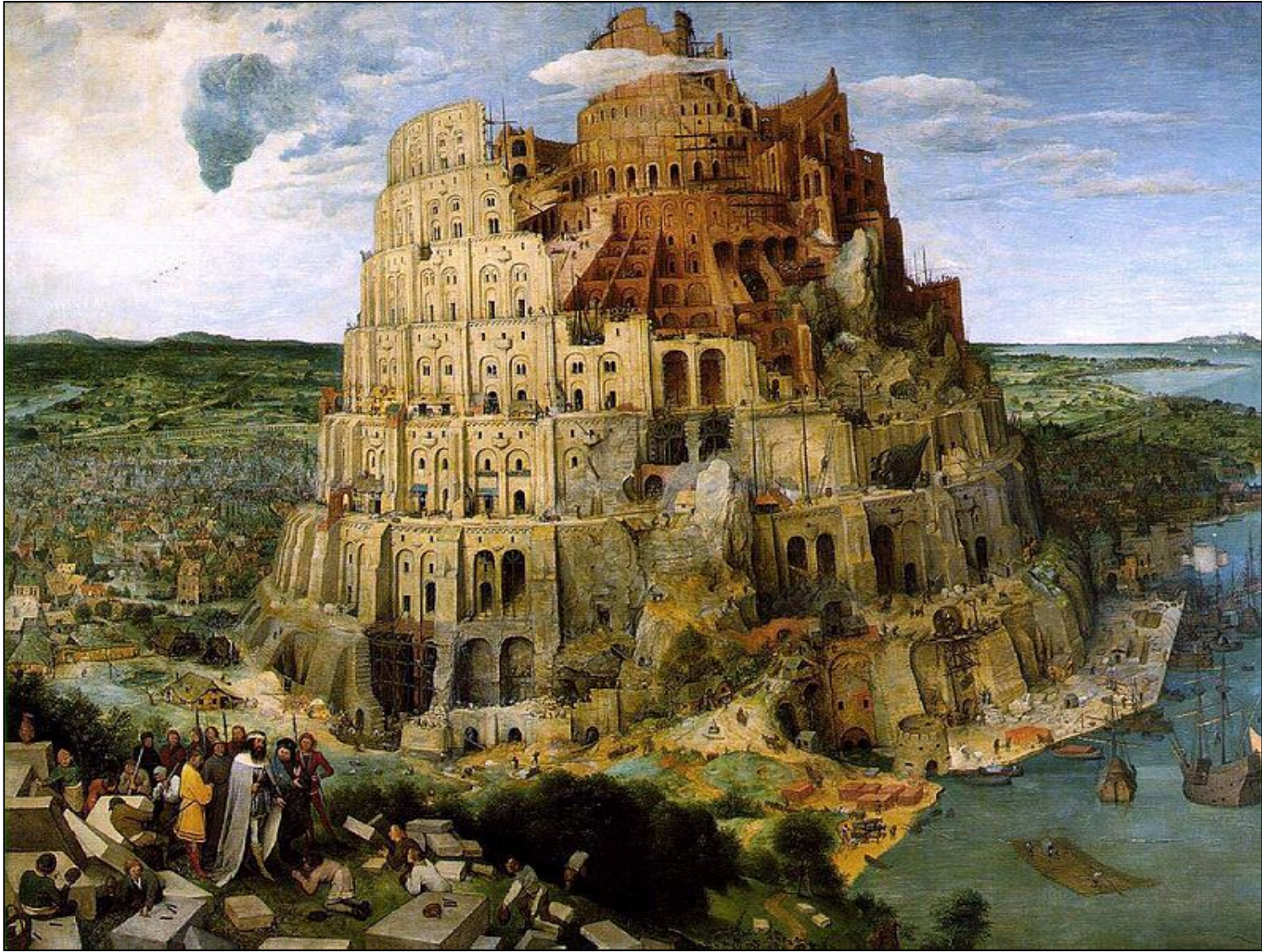
# “Making the Case for Heritage”

The Ontario Heritage Case Law Project



**Marcus R Létourneau, PhD, MCIP, RPP**  
Golder Associates Limited  
Heritage Canada Summit  
Montreal, PQ  
October 12, 2011





# Heritage Programs should be about community value!

“The popular answer is that cultural heritage is the things, places and practices that define who we are as individuals, as communities, as nations or civilisations and as a species. It is that which we want to keep, share and pass on.”

**Donald Horne Institute for Cultural Heritage  
University of Canberra**



## Cultural Heritage is. . .

*Heritage in itself is not simply a public good; indeed, it has often been a basis for conflict.* There is much evidence, in the past and also today, of heritage as a divisive force if it becomes a tool for resistance and the expression of difference. . .

*The concept of heritage that moves far beyond the traditional notion of old buildings and historic sites may be for academics and intellectuals, but remains underdeveloped in national, regional and local cultural and heritage strategies.*

Heritage in today's world has become transdisciplinary; its preoccupation with traditional principles of conservation and archaeology has been replaced by a profound preoccupation with the processes of education, the economy, and the enrichment of cultural life. . . .

We must continually recognise that objects and places are not, in themselves, what is important about cultural heritage. *They are important because of the meanings and uses that people attach to them, and the values they represent.*

**Robert Palmer**

**Director of Culture and Cultural and Natural Heritage, Council of Europe**



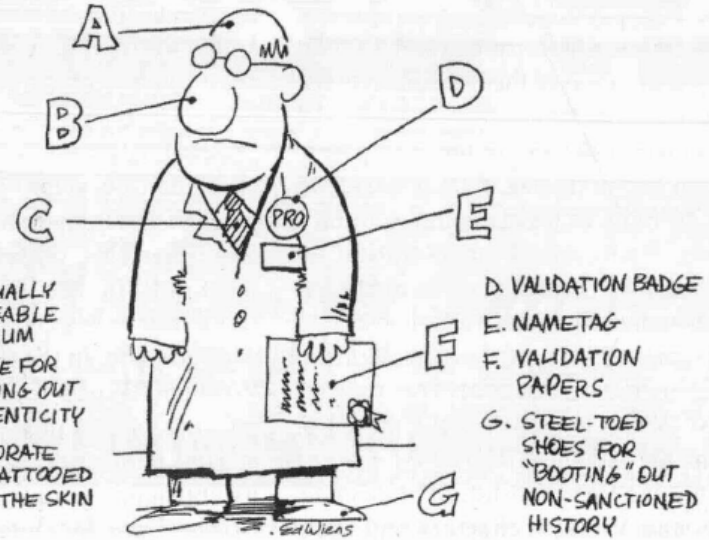
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VS.



Heritage Conservation is also undertaken within specific political and procedural milieus.

These are not overly well understood, even by members of the heritage community.

Different legislation is often conflated and confused - (adjacency).



# Origins

## **The Salmoni Building (2005) - Amherstburg**

“The Board noted that the expert opinion evidence of the qualified land use Planner Jean Monteith, while challenged in cross-examination by the appellants, was not be contradicted or shaken. [sic] Further, the expert opinion evidence of Planner Monteith was not contradicted by any other land use planner.”

Ontario Municipal Board Decision #2487



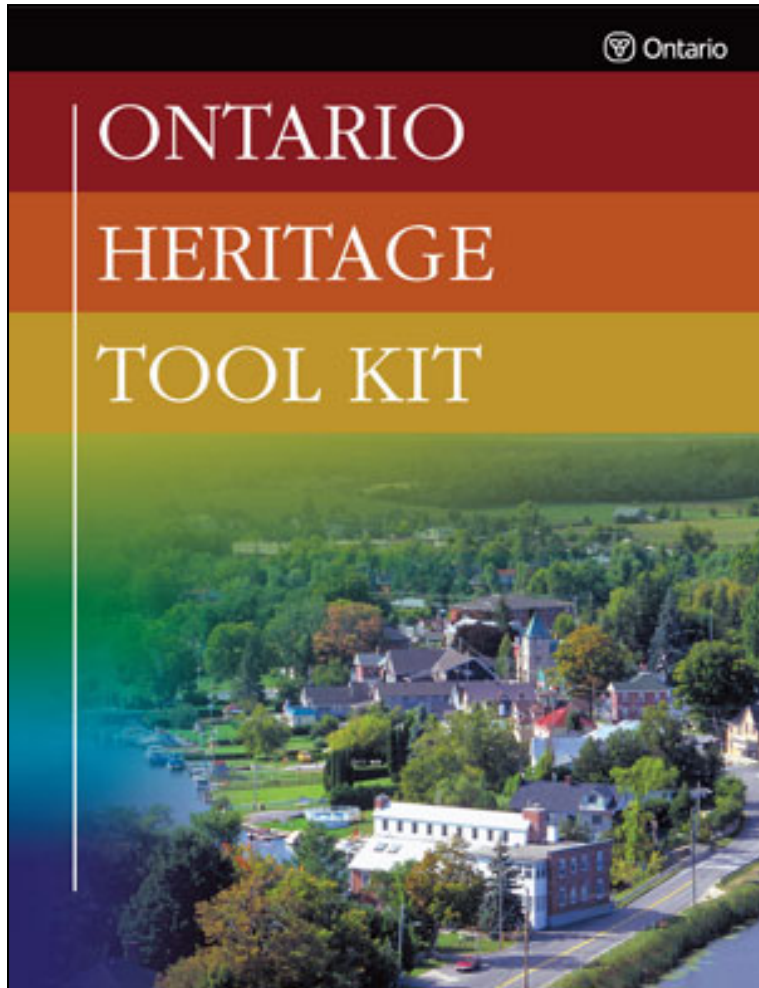
# 186 Frontenac Street - Kingston





# Heritage Planning

## A Philosophical Shift & A Policy/Legislation Shift



- Increased litigiousness;
- Shift to values-based heritage management;
- Changes in the roles of the volunteer sector;
- Need to greater rigor and transparency; and,
- Broader concept of what is a cultural heritage resource or historic place.



## The Ontario Heritage Law Project

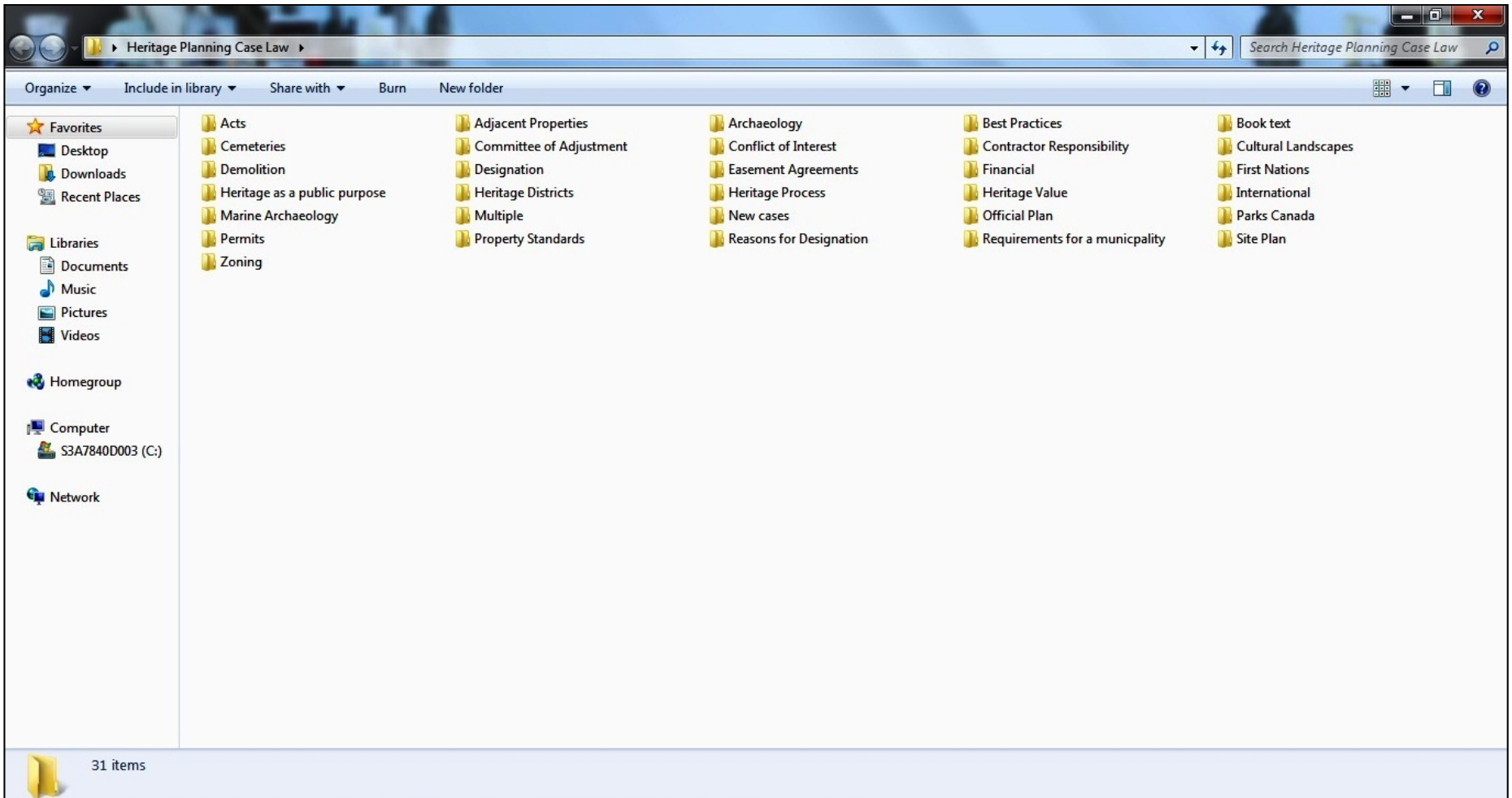
- The project started from a need. As a heritage planning professional relatively new to the Ontario heritage field, there were no readily available sources on heritage legislation beyond the publications of the Ministry of Culture. (The Ontario Heritage Toolkit was not yet published.)
- These publications are of limited use to specialized professionals.
- The same heritage arguments were being made again and again – “you can’t tell me what to do!”



## The Ontario Heritage Law Project

- Started as a binder for use by the cultural heritage unit in Kingston.
- Now consists of over 400 cases from Federal sources, Provincial sources, and Boards.
- Includes many different categories.
- Conversation with Dr Robert Shipley in Collingwood at the ACO/CHO conference in 2008.
- Still very much a work in progress.





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# There is still much to do!

- This has been a voluntary effort.
- A dedicated webpage still has to be developed.
- Commentary has to be added as does supporting documentation (best practice documents).
- The final product will be a book and web-based collection.
- However. . .
  - People are already coming forward to add their input and individual collections; and,
  - Some key lessons have already been discerned.



## **Federal**

The Canadian Environmental Assessment Act  
The Heritage Railway Stations Protection Act  
The Heritage Lighthouse Protection Act  
The Building Code of Canada  
Supreme Court Decisions

## **Ontario**

The Cemeteries Act  
The Environmental Assessment Act  
The Aggregate Resources Act  
The Building Code Act  
The Ontario Heritage Act  
The Planning Act/Provincial Policy Statement  
Fire Protection and Prevention Act, 1997  
The Municipal Act

## **Local**

Official Plans  
Zoning By-laws  
Secondary Plans  
Heritage Conservation District Plans  
City Policy/Council Resolutions



*The Ontario Heritage Act* was enacted to provide for the conservation, protection and preservation of the heritage of Ontario. ***There is no doubt that the Act provides for and the Legislature intended that municipalities, acting under the provisions of the Act, should have wide powers to interfere with individual property rights.*** It is equally evident, however, that the Legislature recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large, not at the cost of the individual property owner, and certainly ***not in total disregard of the property owner's rights.*** *St. Peter's Evangelical Lutheran Church v. Ottawa*, [1982] 2 S.C.R. 616, File No.: 16445





**Toronto College Street Centre Ltd v. Toronto (City)**  
**1986 (Court of Appeal for Ontario )**

“There was no doubt that in passing the Ontario Heritage Act the Legislature intended that municipalities should have wide powers to interfere with individual property rights. *The Ontario Heritage Act allowing municipal interference with private property rights should be construed purposefully and liberally in order to allow municipalities to effectively preserve Ontario’s heritage. . . .* The aim of the Act is to conserve, protect and preserve the heritage of Ontario. *To achieve this, the Act must interfere with private property rights.*”



# Increased requirements for consistency and clear process

The recent changes to the PPS and the OHA, combined with recent CRB, OMB, and Court decisions, have also resulted in the onus resting with municipalities to ensure that their heritage processes are fair and transparent.

This include the following decisions:

- Tremblay v. Lakeshore, 2003 (*Divisional Court*)
- Alma Heritage Estates Corporation v. St. Thomas (City), 2007 (*Superior Court*);
- The Corporation Of The City Of Mississauga Intention To Designate The Property Known As 84 High Street East (The Hamilton Property), Mississauga, Ontario (CRB); and,
- Merrickville De-designation (CRB).

**Planning evidence must be presented at Planning Act hearings.**



- Municipalities are also faced with the challenge of identifying what “cultural heritage value” means.
- In Ontario, for Section 2.6 of the PPS and Section 27 of the OHA to be in effect, Council needs to have expressly stated (i.e. passed in a motion) that the property is of cultural heritage value and the municipality needs to be able to demonstrate how the property is of cultural heritage value (Regulation 9/06 of the OHA).



**The myths and misunderstanding of heritage conservation are coming into play in decisions relating to heritage.**

Don't "conservation, protection and preservation" all mean the same hands-off, frozen-in time approach – akin to "conservation of nature", or even "conservation of food" (*what the Applicant's Counsel called "Saran-wrap" and "pickling in formaldehyde"*)?

No. The Board already advised the Parties, in its PHC Decision of June 18, 2009 that distinctions were to be inferred between "conservation, protection and preservation"... *If those three words were intended to be synonymous, there would be no need for all three to be in the Act. As a general rule, different words are presumed to have different meanings.*

*Ontario Municipal Board O.M.B. File No. PL081065 (M. C. Denhez)*



There is also a very real danger of misuse of heritage legislation and overly bureaucratic approaches (process over value).



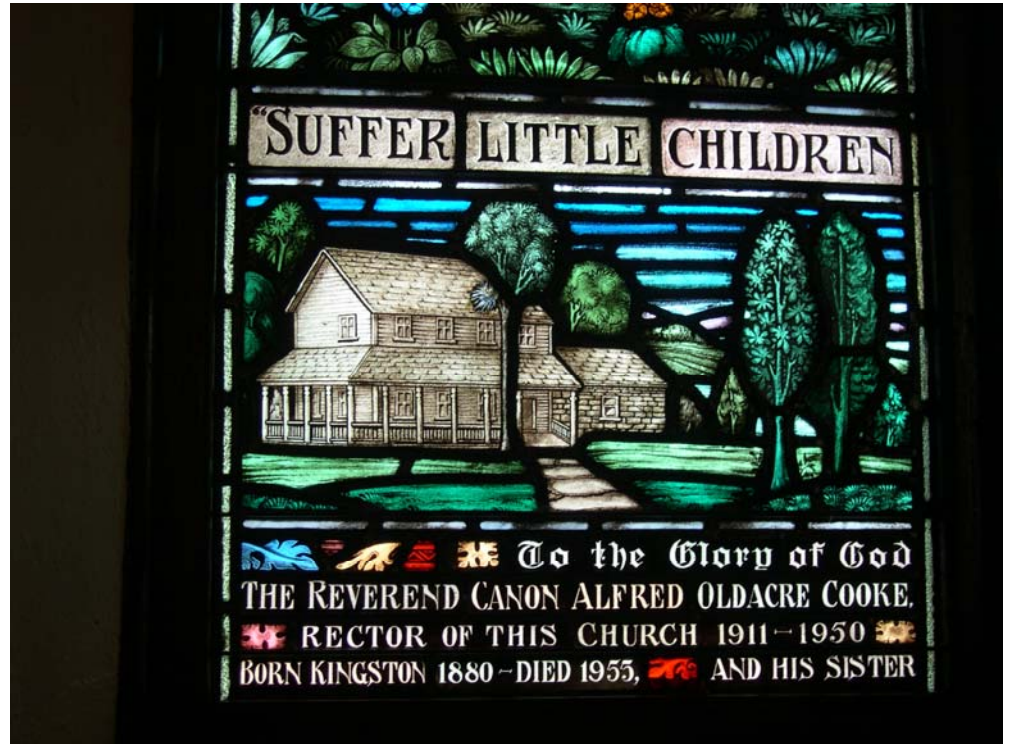
# Lessons and Implications

- There is a need for systematic training and education (capacity building);
- There is the need for greater cross sector engagement;
- There is a need for greater information sharing and conversation;
- The political and legislation systems must be understood by the heritage community;
- The heritage community must be fair, transparent, and open in the approaches; and,
- The heritage community must confront societal understandings of what it does.



# The John Marks House

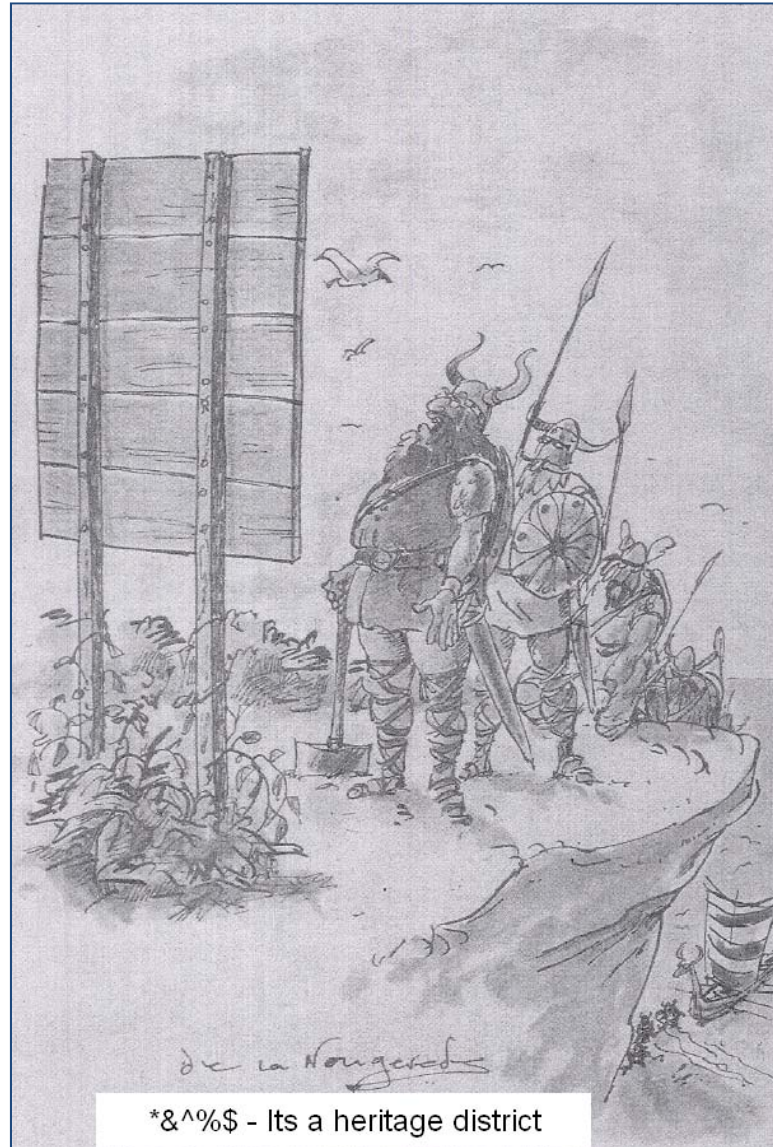








# Conclusion:



\*&^%\$ - Its a heritage district