

CITY OF VAUGHAN

EXTRACT FROM COUNCIL MEETING MINUTES OF FEBRUARY 16, 2016

Item 1, Report No. 10, of the Committee of the Whole (Working Session), as amended, by the Council of the City of Vaughan on February 16, 2016, as follows:

By approving the recommendation in the report of the Acting Deputy City Manager, Community Services and the Director of By-law & Compliance, Licensing & Permit Services, dated February 9, 2016.

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REVIEW OF ENCROACHMENT BY-LAW

The Committee of the Whole (Working Session) recommends that consideration of this matter be deferred to the Council meeting of February 16, 2016.

Recommendation

The Acting Deputy City Manager, Community Services and the Director of By-law & Compliance, Licensing & Permit Services recommend:

1. That a permissive encroachment by-law, substantially as set out in Attachment 3 and in a form satisfactory to the City Solicitor, be approved; and
2. That Encroachment By-law No. 244-2005 and related Encroachment Policy DEIP-12 be repealed.

Contribution to Sustainability

By introducing an enhanced and more permissive Encroachment By-law that recognizes the functional and aesthetic needs of residents, balancing those needs against the City's interest in safeguarding its assets and protecting the greater public interest, the recommendations in this report reinforce the City's ongoing commitment to fostering a vibrant community life.

Economic Impact

The proposed by-law changes do not involve any anticipated increase in work or any changes in procedures that will require the allocation of additional resources. Similarly, the cost of diffusion of information and training of staff across relevant departments shall be absorbed into the current budget. As such, there is no anticipated financial impact to the City as a result of the adoption of the recommendations in this report.

However, the lessened need to apply enforcement in this area will permit these resources to be redeployed to other pressing matters in line with Council priorities.

Communications Plan

There are three main groups that would be specifically targeted through the communications strategy if Council approves the report's recommendations:

1. Property Owners with Notices of Violation in Abeyance

Notices of Violation were placed in abeyance when it became clear to staff that changes to the current by-law were required that, if approved, may void many of the cited violations. Upon adoption of the proposed by-law, a further assessment of the previously identified violations would be undertaken to confirm whether the violations still exist under the new regulatory provisions. In cases where violations no longer exist, property owners would be advised

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accordingly. In cases where violations do exist, By-law and Compliance staff would issue new Notices of Violation based on the new provisions and then work with those property owners to achieve voluntary compliance within a reasonable time frame.

2. The Broader Public and Most Specifically Property Owners

A number of channels would be utilized to optimize public awareness, including mailings to all Registered Rate Payers Associations, through the City of Vaughan's Twitter and Facebook accounts, and in more detail on the Department's web page.

3. Relevant Administrative and Enforcement Staff

The new regulations will have an impact on both administrative and compliance processes, cutting across a number of City departments. In conjunction with relevant departments, By-law and Compliance will identify staff affected and coordinate information sessions and training on the new provisions and the associated changes in processes.

In order to inform and train staff, and plan the roll-out of the new regulations, staff are proposing that the By-law come into effect and force approximately two months after the adoption by Council of this report.

Purpose

The purpose of this report is to obtain approval from City Council to adopt a new Encroachment By-law that is in principle better aligned with resident needs and expectations with respect to the use of the public boulevard abutting their properties.

This report was prepared in consultation with the Office of the City Clerk (Risk Management), Transportation Services and Parks & Forestry Operations, Capital Delivery and Asset Management, and Development Engineering & Infrastructure Planning.

The City Solicitor is in agreement with the recommendations in this report and the City Treasurer concurs with their economic impact on the City's operating budget.

Background

This report arose out of a need that became evident in late fall of 2014, to review current encroachment regulations when over five hundred encroachment issues were forwarded to By-law and Compliance by Public Works. The issues were identified as Public Works undertook a physical pre-winter season review of city sidewalks to identify any potential hazards to snow clearing equipment and the performance of any other City operations. Most of the potential hazards identified related to unauthorized encroachments. In accordance with the provisions of the Encroachment By-law, By-law and Compliance staff began to issue Notices of Violation requiring property owners to remove the offending encroachments or, where applicable, to otherwise apply for a permit. A cursory review of a sample of these encroachments revealed that many of them involved landscaping and paving, and that sometimes these encroachments had fallen into disrepair, creating possible hazards.

As a result, staff began to identify the need to re-frame the approach to encroachments on the Boulevard, recognizing that there are community needs and wants that can be met while still protecting broader public interests, such as health and safety.

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Under the proposed approach there would be two categories of allowable encroachments: Simple and Complex. A Simple Encroachment refers to any type of landscaping, vegetation or man-made object that extends from a person's property onto the Boulevard, but which does not interfere with City infrastructure, appurtenances, operations, or that otherwise, by their nature, create a potential public hazard or nuisance. Under the proposed by-law, Simple Encroachments would be allowed as of right and would not require an Encroachment Permit. Examples of Simple Encroachments include decorative pavers and flower beds. On the other hand, Complex Encroachments are those that, by their nature, can interfere with City infrastructure, appurtenances, or operations, and therefore would need to go through a clearance and approval process. Under the proposed by-law, Complex Encroachments would require an Encroachment Permit.

Community Needs and Expectations

The prevalence of encroachments on the Boulevard is not uncommon across a greater municipal environment, and arguably points to both a common need for use of the public boulevard in a quasi-private fashion and a level of acceptance and expectation within the community about such use. Because most property lines, delineating a person's private property from the City's (public) property, dissect what is commonly perceived as the front yard, property owners are in effect afforded a type of easement by way of their driveways. Many residents perceive this same easement to apply to the entire frontage or flank of their property, and not just to the driveway portion. As a result, it is not uncommon to see property owners paving or landscaping to the curb. In some cases, property owners may add decorative appurtenances, such as raised curbs and decorative columns, at the base of their driveways or install heated driveways; these are all encroachments. Similarly, residents whose homes back onto City or other lands (such as Toronto Region Conservation lands), and especially when a clear demarcation is not present, sometimes extend landscaping or other elements unto these adjoining lands. Despite being relatively common, most encroachments are carried out without the City's knowledge and in some cases may be creating unintended negative consequences for the delivery of City services (such as those affecting sidewalk snow clearing or windrow cleaning), or may, in other instances, be even creating hazards or nuisances for the broader public (e.g., uneven surfaces or visual obstructions).

As a result of the identification of many of these encroachments, staff from various relevant Departments (i.e., By-law & Compliance, Transportation Services and Parks & Forestry Operations, City Clerk's Office (Risk Management), Capital Delivery and Asset Management, and Development Engineering & Infrastructure Planning) entered into discussions with respect to the best way to address community needs and expectations while still protecting City infrastructure (i.e., any City asset, whether located below, on, or above grade) and not hampering the delivery of City services. The discussions led to a consensus amongst the various departments that the by-law regulating encroachments should be more permissive and focus only on mitigating the negative impacts of such encroachments.

Insurance Requirements and Risk Exposure

At the same time, the former Licensing & Risk Management Section of the Office of the City Clerk, which administered the encroachment permit process, became aware of a change in the practices of many insurers to no longer provide residential certificates of insurance that show the City as an additional insured. Such a certificate is currently a requirement to obtain an encroachment permit under the existing by-law. Thus, the change made the granting of an encroachment permit effectively impossible for many residential property owners. This puts home owners and the City in the difficult position of having to deal with dozens of cited violations on the one hand and the unavailability of relief through the permit application process on the other. As a result, staff also began to look at reviewing the requirement for such insurance provisions.

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Current Situation

There are currently over 120 Notices of Violation outstanding; these were put in abeyance once it became clear that recommendations would be forthcoming to Council to better align the provisions of the Encroachment By-law with the needs and expectations of residents. If the recommended approach is adopted by Council, staff expect that many of the instances under Notice will no longer be violations. In those cases where the violations still stand, staff will continue to work with residents to achieve voluntary compliance.

Analysis and Findings

Staff explored a number of possible approaches to dealing with encroachments and, in determining what policies make the most sense for the City of Vaughan, considered the interests of citizens in how public lands are used and then balance them against the more general public interest to ensure the health, safety and well-being of people and their communities.

Jurisdictional Scan

Approaches to encroachments on city lands vary considerably from jurisdiction to jurisdiction. Some cities, like Toronto, take a more permissive approach; others, like Markham, take a much more restrictive approach.

Toronto

In the City of Toronto, soft landscaping, defined as the area of the boulevard or front yard that supports the growth of vegetation and permits water infiltration into the ground, is a permitted encroachment on the Boulevard that does not require an encroachment agreement with the City. Other permitted encroachments include fences and retaining walls under 0.9 metres high, walkways narrower than 1.5 metres, stairs, driveway curbs, and precast concrete stones. These encroachments (assuming they comply with setback requirements) require a street-work permit (which is free of charge).

Despite its more permissive approach to encroachments and its more varied and complex streetscape, the City of Toronto has not experienced any major issues or been the subject of any significant liability claims as a result of this policy approach.

Encroachments on City of Toronto parklands is prohibited without an encroachment agreement; such agreements include a \$300 fee to the City for reviewing the request, \$60 to the Province to register the encroachment on title, another \$500 to the City for legal preparation, and anywhere from \$900 to \$1,800 for a legal survey, paid by the applicant to a private survey company.

Markham

The City of Markham regulates encroachments through its Road Occupancy By-law. Its provisions prohibit any obstruction within 0.3 metres of a sidewalk, or the construction, installment or placement of any fence, post, light post, rocks or decorative walls on the boulevard. Markham also prohibits, without proper permission, any projections beyond the main wall of buildings if they encroach upon a highway.

Not surprisingly, the City of Markham has been experiencing compliance-related challenges similar to Vaughan's and is currently considering undertaking a review of its own encroachment regulations.

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Mississauga

The City of Mississauga's Encroachment By-law is very similar to the City of Vaughan's current regulations. Mississauga does not permit any type of encroachment without an encroachment agreement. The exceptions include: signs (subject to the Sign By-law), temporary encroachments arising from construction (and allowed through permit), and encroachments arising from surface changes to residential driveways, provided such changes do not breach any other by-laws. The City of Mississauga's approach differs in that it does not require proof of insurance from property owners.

Recommended Approach for Vaughan

Despite the prohibitions in the current by-law, unauthorized encroachments continue to be fairly prevalent and are often not addressed unless they are the subject of a specific complaint or have been identified through some other City action. This can be problematic, as enforcement staff are often put in the position where they may be called upon to deal with a violation that may be only one of numerous other conspicuous violations on the same street or block. Depending how this scenario is approached by the attending officer, questions of fairness and transparency can easily be raised.

Thus, the approach taken by staff in making their recommendations is that the responsible and reasonable use of the public Boulevard by property owners meets both functional and aesthetic needs as well as the expectations of many residents. Regulation should therefore be restricted to circumstances where health, safety or the hindrance of City operations are at issue. Thus, the by-law that is being proposed is a more permissive by-law that limits regulation to the mitigation of material risks that could arise from encroachments.

Applicability

The proposed by-law would allow, as of right, Simple Encroachments on the City's Boulevard, subject to the conditions set out in the by-law. The Boulevard is defined as that part of a public street or highway that is not used, or intended to be used, for vehicle travel by the general public, and is situated between the travelled portion of the road and the adjoining property line. Save the City's Boulevard, encroachments shall not be permitted on any other Public Lands, such as parks, golf courses, or other City owned properties, as there is no overriding public interest served in doing so.

Under the proposed approach, Encroachment Agreements would no longer be issued. Instead, only Complex Encroachments would now require permits; the fee for such permits would remain unchanged. At the same time, existing Encroachment Agreements and Encroachment Permits would continue to be in force until:

- The owner of the property relating to the encroachment advises the City of the discontinuance of the encroachment;
- The City advises the owner of the property relating to the encroachment that the encroachment shall no longer be permitted; or
- The owner of the property associated with the encroachment alters or permits to be altered the encroachment so that it falls outside of the scope of the Encroachment Agreement or Encroachment Permit.

Upon discontinuance, the regulations under the proposed by-law would apply.

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General Restrictions

The proposed by-law would permit, as of right, the use of the City's Boulevard for any Simple Encroachment unless it were to:

- (a) create an unsafe condition or a hazard;
- (b) interfere with regular City operations;
- (c) modify or interferes with City Infrastructure;
- (d) not be maintained in a state of good repair; or
- (e) contravene the new by-law or any other bylaws of the City.

Where there might be a conflict between the Encroachment By-law and any other by-law of the City, the regulation that established the higher standard would prevail, thus ensuring that the public interest is always protected.

Exemptions

The proposed Encroachment By-law would continue to not apply to signs, waste, maintenance of private property, newspaper boxes, heritage properties, and encroachments regulated by other agreements or permits. Instead, these encroachments would continue to be governed by their corresponding by-laws, agreements, or decisions.

Specific Restrictions

Specific restrictions in the proposed by-law would be intended to deal with issues of health and safety and/or impediments to City operations and other related work.

To accommodate the safe, effective and efficient cleaning of snow on sidewalks and the clearing of windrows, no encroachments above grade would be allowed within 30 centimetres of a sidewalk or within 100 centimetres of a curb. To safeguard City assets, no encroachments would be permitted at all within 100 centimetres of a public boulevard appurtenance, such as a hydro box or City tree (see Figure 1). For fire hydrants, no encroachments would be permitted within this same 100 centimetre radius and additionally no encroachments that extend beyond 30 centimetres above grade would be permitted within a 200 centimetre radius. In the instance of the access side of an outdoor transformer installation, no encroachments would be permitted within 300 centimetres, in accordance with required working spaces under the Ontario Electrical Code Standards. The aforementioned thresholds are in keeping with those widely used by other Ontario municipalities.

Furthermore, to assist with vehicular and pedestrian traffic safety, encroachments would be restricted within sight triangles: no encroachments 30 centimetres or more above grade would be allowed within a sight triangle; and trees would have to be trimmed back to ensure adequate visibility (see Figure 2).

Protection of City Infrastructure

One of the main considerations in establishing standards for encroachments is the need to protect City infrastructure. No encroachment would, in any way, be allowed to result in the removal, relocation, modification, damage, obstruction, impediment or restriction of any City infrastructure. To this end, any encroachment that extends more than 20cm below grade could only be placed or erected under an Encroachment Permit. The permitting process would be aimed at determining whether or not a proposed encroachment could be accommodated and what conditions would have to be met to ensure the integrity of City infrastructure.

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Fences

Subject to all other conditions set out in the by-law, encroaching fences, including any shrubbery or other plantings, could be placed or erected to a maximum height of 1.2 metres for that portion of the fence fronting a residential property, and 1.8 metres for any fence located along the property's side yard. In the instance of a corner lot where the rear yard abuts a front yard, the fence would be restricted to a maximum height of 1.8 metres. These restrictions mirror the current standards in the Fence By-law. Fences would not be permitted within a sight triangle.

In addition, encroaching fences would not be permitted to enclose any City infrastructure or appurtenance. All encroaching fences would be required to be maintained by their owners to the same standards imposed on private fences under other municipal bylaws, such as the Property Standards By-law.

Trees

Trees on private property that have branches and foliage that overhang onto a sight triangle would be required to be trimmed back to the property line to a minimum height of 1.8 metres from grade. This restriction is intended to ensure that sight lines are not obstructed and create an unnecessary hazard. All other encroachments arising from overhanging branches and foliage would be permitted as of right, subject to any other applicable by-law provisions.

In order to protect City trees, no encroachments on the boulevard would be allowed within a 100-centimetre radius of a City tree.

Insurance Requirements and Permit Fees

The requirement for an owner to have insurance that has the City as an additional insured is intended to financially insulate the Corporation from any legal action brought about by something done by a property owner on public property. However, upon scrutiny, staff concluded that although in theory there is a risk to not being an additional insured, in reality there have been no known cases of the City of Vaughan having been subject to a claim as a result of an encroachment. For this reason, staff believe that it is reasonable to eliminate the condition that the City be a named insured and to rely instead on a requirement that homeowner's insurance be in place if a residential encroachment permit is required. Where no permit is required there shall also be no obligation to hold homeowner's insurance (similar to the long-standing practice of not regulating approved driveways on the public boulevard).

Under the proposed By-law, all commercial encroachments would only be permitted under permit and would continue to be required to have commercial insurance with the City as an additional insured.

In accordance with the Fees and Charges By-law (No. 171-2013, as amended), the fees for an encroachment permit application is \$217 (for 2016) plus tax and other costs (e.g., survey, registration, etc.). Where inspections are required, the Fees and Charges By-law provides for a fee of \$275 per visit, per Department.

Municipal Work and Encroachment Removal

The City would continue to retain the exclusive right to remove any encroachment, whether such encroachment requires a permit or not, to perform any repair, maintenance or other municipal work. The City would not be liable for any damages caused to a property owner's encroachment as a result of its full or partial removal from the public boulevard. Where it is customary to do so,

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the City would notify permit owners in advance of any work being performed. This would give such owners an opportunity to remove the encroachment themselves, if they so desired. In the event of emergency work, the City would retain the right to perform any work it deemed appropriate without having to provide notice.

Non-compliant and Unauthorized Encroachments

Under the new regulations, a number of general violations relating to unauthorized encroachments would be possible:

1. Where a simple encroachment, allowed as of right, is otherwise not in compliance with the general or specific restrictions. The remedy would entail issuing a Notice of Violation requiring the property owner to bring the encroachment into compliance. Failure to comply could result in a charge being laid in the form of a ticket with an associated fine and/or the encroachment being removed at the property owner's expense.
2. Where a complex encroachment has been erected or placed without a valid encroachment permit. The remedy would entail issuing a Notice of Violation requiring the property owner to remove the encroachment with the option to otherwise apply for an encroachment permit. Failure to comply could result in a charge being laid and/or the encroachment being removed at the property owner's expense.
3. Where an encroachment is not allowed under the by-law. The remedy would entail issuing a Notice of Violation requiring the property owner to remove the encroachment. Failure to comply could result in a charge being laid and/or the encroachment being removed at the property owner's expense.

Under the current Fees and Charges By-law, there are no specific administrative charges set out for remedial action undertaken by the City to remove a non-compliant encroachment. By-law & Compliance, Licensing & Permit Services will examine and report back on ways to reduce the impact of such remediations on the tax base through an administrative fee.

Enforcement

The proposed by-law includes an expanded infractions and penalties section to include the violations described above in addition to the existing offence of obstructing, hindering or interfering.

The City of Vaughan is committed to working with residents and businesses to achieve voluntary compliance on all matters. Municipal regulations are intended to serve and protect the public interest. However, regulatory regimes are not always able to effectively address all eventualities. Specifically, where situations arise in which encroachments have been in existence in prohibited locations for extended periods of time, but where such encroachments do not pose a threat to health, safety or interfere with City operations or infrastructure, the City is committed to finding solutions that take into account all factors, while still protecting the public interest.

Impact of New Regulations

It is expected that most of the non-compliant encroachments under the current regulations would no longer be considered violations under the proposed by-law. However, in cases where the encroachment represents a health and safety issue or the encroachment interferes with the delivery of City services, the City would seek remediation or removal of the encroachment; this would apply irrespective of how long the encroachment might have been in place.

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The new regulations are aligned with the current application and approval process for curb cuts and driveway widening. Widening under permit on the public boulevard would also be permitted, subject to the distancing requirements, under the Encroachment By-law. Similarly, the proposed regulations are also aligned with the provisions and process for on-lot parking.

Relationship to Term of Council Service Excellence Strategy Map (2014-2018)

By recognizing the functional and aesthetic needs of residents and appropriately balancing those needs against the City's interest in safeguarding its assets and protecting the broader public interest, the recommendations in this report further the following term-of-Council priorities: continue to ensure the safety and well-being of citizens; manage infrastructure and assets; and meet Council tax-rate targets (by redeploying enforcement resources to other priority matters).

The recommendations in this report are also in line with the objectives and deliverables of the By-law Strategy, mainly to ensure that the City has by-laws that are relevant, effective and sustainable.

Regional Implications

No regional implications have been identified as a result of the recommendation of this report.

Conclusion

Encroachments are both a common occurrence and a sign of the functional and aesthetic need of the community for the use of the public boulevard as an extension of a property owner's front yard. For this reason, staff are recommending that establishing a regulatory framework that introduces a more permissive encroachment by-law, better aligned with the needs of the community and existing municipal landscape, be adopted. The new regulations would set standards for encroachments aimed at preventing public hazards or impediments to City operations, while allowing what is already common public practice.

Only in the case of more complex encroachments that entail below-grade installations or structures of significant permanence would a permit be required. The new regulatory regime would not materially increase the City's liability risk. The City would continue to seek voluntary compliance for unauthorized encroachments and would use enforcement and/or take remedial action only as a last resort.

The approach of the proposed by-law is intended to simplify the encroachment process, respond to the needs of the community, and is aligned with Council's ongoing commitment to fostering vibrant communities and promoting the safety, health and wellness of all residents.

Attachments

1. Figure 1 – Distancing Restrictions
2. Figure 2 – Sight Triangle Restrictions
3. Draft Encroachment By-law

Report prepared by:

Rudi Czekalla Martínez, Manager of By-law Policy

(A copy of the attachments referred to in the foregoing have been forwarded to each Member of Council and a copy thereof is also on file in the office of the City Clerk.)