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|--|---|--|------------|
|  | DATE: July 12, 2006 REPORT: 2006-47.1 | TITLE: Encroachment Policy (on City owned Parks, Open Space, Trails and Environmental Lands) | CAO |
| WARD: All | PREPARED BY: Anna Marie Cipriani | | |
| FILE: | DEPARTMENT: Public Works Services | | |
| ATTACHMENTS: Appendix A: Encroachment Policy Appendix B: Letter of Comfort Agreement Appendix C: Encroachment Removal and Restoration Process Appendix D: Public Comments | CLEARANCE: Directors: May 8, 2006 CMT: May 17, 2006 Council: May 29, 2006 July 24, 2006 | | |

RECOMMENDATIONS

1. That Council approve report 2006-47.1 which comprises the final version of the Encroachment Policy (on City owned Parks, Open Space, Trails and Environmental Lands).

EXECUTIVE SUMMARY

Report PWS 2006-47.1 outlines the Encroachment Policy. The primary policy intention is to ensure that encroachments onto City-owned lands are removed and that such lands be restored to the satisfaction of the City at the expense of the encroaching party (contractor, tenant and/or owner of land).

This report speaks to encroachments on non-highway lands. Lands that are part of a public highway or road allowance are statutorily protected from possessory claims and title to such lands cannot be lost regardless of the nature of an encroachment. The law that applies to non-highway lands is less clear and hence this report speaks to the City's response to such matters.

The report outlines a process of encroachment removal whereby an encroaching party is responsible for the removal of an encroachment and restoration of such land. If the encroaching party is non-compliant in removing and restoring the lands, the City of Waterloo may designate persons to complete such works. Under by-laws 03-059 and 03-039 where anything required to be done in accordance with the removal of an encroachment and restoration of the encroached upon lands is not done by the encroaching party, the municipality may recover the costs of so doing by adding the costs to the tax roll and collecting them in the same manner and with the same priority as municipal taxes.

BACKGROUND

This report presents an updated Encroachment Policy. This report is in response to the direction given by Council on October 3, 2005 in report PWS 2005-16 where Council supported Option 2 – Movement towards a proactive approach in dealing with encroachments in Waterloo as per an updated Encroachment Policy. On May 29, 2006 Council approved a Public Input Process for the proposed policy. The report was made available for public comment from June 1- July 9, 2006. This included a Public Open House on June 20, 2006 and web posting of the proposed policy. Comment was directly solicited from the Waterloo Citizens' Environmental Advisory Committee, Waterloo Region Homebuilders' Association and the Neighbourhood Associations. The comments received from the public are included in Appendix D.

| General Comment | City Response |
|--|---|
| 1. Policy not enforceable nor firm enough | <ul style="list-style-type: none"> • Upon legal opinion and staff experience the Encroachment Policy and the associated bylaws are enforceable |
| 2. Concerns regarding special consideration: Partners In Parks Program | <ul style="list-style-type: none"> • Special consideration to allow vegetation that has been planted on public land may be granted upon a written agreement through the Partners in Parks program. • Revisions to the Partners in Parks program for all long-term projects on municipal parkland is currently being undertaken, as a means to further standardize the program and set out clear responsibilities, processes and guidelines. • Council will receive the revised Partners in Parks Procedures and Guidelines Manual in November/December 2006. It is not anticipated that these changes will impact the encroachment policy, how it will be administered nor its process of final approval |
| 2. Response Time – no timelines specified No guarantee complaint will be investigated | <ul style="list-style-type: none"> • With the current level of staff resources it is not possible to specify a response time for every case. Every complaint is recorded and prioritized. Every effort is made to resolve cases as they are identified. |
| 3. Beneficial to be more proactive | <ul style="list-style-type: none"> • This policy provides the foundation of Encroachment work. From it will come a more proactive, community education program, particularly once a backlog of cases is addressed. |
| 4. Special Consideration: Ambiguity expressed re: the applicability of 1m mowed buffer strip | <ul style="list-style-type: none"> • Every resident adjacent to naturalized public greenspace may mow a 1m buffer strip of public lands immediately adjacent to their property as stated in the Encroachment Policy. |

Identified in the City of Waterloo’s Environmental Strategic Plan (2002) were three strategic actions which are particularly related to encroachments.

Planning and Growth (p28-30)

- Enhance existing policy – protect natural areas
- Prevent damage to sites before approvals are granted

Environmental Awareness (p46)

- Encourage environmental education
- Ensure environmental compliance
- Promote communication

Greenspace (p49)

- Enhance, restore, protect existing greenspaces
- Increase community partnerships
- Monitor terrestrial resources

In working towards these ideals, it is important that the City of Waterloo systematically and consistently apply the associated by-laws that address encroachment onto public lands. This encroachment policy outlines in detail the processes involved in enforcing these bylaws. The intention in this policy is to provide solid footing and understanding across the organization regarding how incidences of encroachment are to be addressed.

FINANCIAL IMPLICATIONS:

With final approval of this report by Council, the PWS Fee Guide will include the fees chargeable to an encroaching party. All costs associated with the removal of an encroachment and the restorations of the associated lands are recoverable under the applicable by-laws. The fees that can be charged to an encroaching party include but are not limited to:

- Labour (staff association and CUPE)
- Materials
- Equipment
- Fringe (41%)
- Other Fees (i.e. Storage Fees, Tipping Fees)
- Administrative fee (\$60.00) or 7% whichever is greater
- GST (6%)

In the rare occasion where the City enters into an encroachment agreement additional chargeable fees include but are not limited to:

- Letter of Comfort Application Fee (non-refundable): \$100
- Letter of Comfort Execution Fee \$400
- Registration Fee \$70.70 (approximately)
- Ontario Land Surveyor Costs

| | |
|---|-----|
| <i>Project Number</i> | n/a |
| <i>Project Description</i> | n/a |
| <i>Funding Source</i> | n/a |
| <i>Expenditure Request</i> | n/a |
| <i>Projected Account Balance</i> | n/a |

LEGAL CONSIDERATIONS:

The City solicitor has reviewed this report including its attachments (excluding Appendix D) and is in agreement with the specifications outlined in this report.

Submitted by:

Signature

Name: Anna Marie Cipriani

Position: Environmental Promotions Officer, PWS

Appendix A

Encroachment Policy

Executive Summary

Report PWS 2006-47.1 outlines the Encroachment Policy. The primary policy objective is to ensure that encroachments onto City-owned lands are removed and that such lands be restored to the satisfaction of the City at the expense of the encroaching party (contractor, tenant and/or owner of land).

This report speaks to encroachments on non-highway lands (i.e. Parks, Open Spaces, Trails and Environmental Lands). The report outlines a process of encroachment removal whereby an encroaching party is responsible for the removal of an encroachment and restoration of such land. If the encroaching party is non-compliant in removing and restoring the lands, the City of Waterloo may designate persons to complete such works. All associated costs are the responsibility of the encroaching party and under the associated by-laws such costs can be added to the tax roll and collected in the same manner and with the same priority as municipal taxes. Current program delivery is primarily reactive. In other words, encroachment work is done at present on a complaint basis only.

Although the primary policy objective is to have encroachments from public lands removed, there are however, specific situations and rare occasions when encroachments may persist. Special consideration may be granted under the following programs or conditions:

- 1 m mowed buffer strip
- Partners in Parks Agreement (PIP) – Long-term Agreements
- 12" (0.305m) Rule
- Letter of Comfort Agreement
- Adverse Possession
- Disposition of Lands

Council endorsed the proposed policy on May 29, 2006. The report was made available for public comment from June 1- July 9, 2006. This included a Public Open House on June 20, 2006 and web posting of the proposed policy. Comment was directly solicited from the Waterloo Citizens' Environmental Advisory Committee, Waterloo Region Homebuilders' Association and the Neighbourhood Associations. The comments received from the public are included in Appendix D.

Encroachment Policy Statement

The primary policy intention of the City of Waterloo is to ensure that encroachments onto City-owned lands are removed and that such lands be restored to the satisfaction of the City at the expense of the encroaching party (contractor, tenant and/or owner of land).

Determining the Location of a Property Line

Demarcations posts are installed in many City greenspaces; having been installed every 30 m or less where the property line changes direction (see the Landscape Design Process and Requirements Manual). For City purposes the location of property lines will be determined by City of Waterloo survey staff. If however, a dispute arises over the City's findings or a Letter of Comfort Agreement is to be established, the encroaching party will assume the costs of having the property lines identified by an Ontario Land Surveyor.

Removal of Encroachment

When an encroachment is removed, removal and the associated expenses are the responsibility of the encroaching party. Should the encroaching party not remove the encroachment within the specified period of time, then the City shall do so at the expense of the encroaching party. The City may take all reasonable steps to restore the area. All sums expended for this purpose may be added to the tax roll of the encroaching party and may be collected in like manner as municipal taxes as outlined in By-Laws 03-039 and 03-059 or from the Developer Securities with any subdivision agreement. In the event that the encroaching party does not own property in Waterloo, wherever possible the encroaching party may be invoiced for the associated costs of removal and restoration of the encroachment. Where an invoice is not paid, the invoice may proceed through the usual collections process.

Setting the Compliance Timeline

Staff will endeavour to negotiate a compliance timeline that is amenable to both the encroaching party and to the City. It is recognized that some encroachments will be more onerous a task of removal than others; whereas some orders of compliance may be readily achieved by simply ceasing a particular activity (i.e. mowing). In some cases where significant environmental impact or hazard is possible, the timeline may be as short as 24-48 hours.

Determining the fees associated with cost recovery

The following is a list of anticipated fees that may be charged (but this list is not limited to only these items) in encroachment cases.

- Labour (staff association and CUPE)
- Materials
- Equipment
- Fringe (41%)
- Other Fees (i.e. Storage Fees, Tipping Fees)
- Administrative fee (\$60.00) or 7% whichever is greater
- GST (6%)

Special Consideration

The primary policy intention is to have encroachments from public lands removed. There are however, specific situations and rare occasions when encroachments may persist. The following section speaks to the conditions under which special consideration may be granted.

- 1 m mowed buffer strip
- Partners in Parks Agreement (PIP) – Long-term Agreements
- 12" (0.305m) Rule
- Letter of Comfort Agreement
- Adverse Possession
- Disposition of Lands

1 m mowed buffer

Natural landscaping exists in many City greenspaces and in all City of Waterloo buffer areas (Natural Landscaping Policy forthcoming). The City of Waterloo will allow residents to mow or otherwise cut a maximum of a 1 metre mowed buffer into a naturalized area on public lands immediately adjacent to their private property. It is understood that in terms of plant physiology, this 1 m mowed buffer will not keep vegetation from spreading onto private lands, but it will provide some aspect of a psychological buffer or piece of mind for the adjacent resident(s). A similar 1 m buffer provision between private properties, extends to private property owners under the City of Waterloo Lot Maintenance By-Law # 03-073 as described in the By-Law. In such one metre mowed buffer areas on public lands, there is to be no application of pesticides including weed and feed.

Partners in Parks – Long Term planting and/or maintenance projects

The Partners in Parks (PIP) program was established in 1996 as a community initiative to include Waterloo residents in improvement projects on public parkland. The intent and purpose of PIP Long-term Planting and Maintenance Projects is consistent with the City's Environmental Strategic Plan (2002), in which one of the key strategic actions recommends community involvement in "greening our city".

Terms and Conditions

Consideration to enter into a PIP Long-term Planting and Maintenance Agreement will only be given when the following criteria are met:

- Adhere to relevant City By-laws, particularly as per Article 3h of Municipal Parks By-law 03-059, which makes provisions for planting vegetation on public lands provided written permission is granted by the municipality
- Project meets Park Standards throughout the duration of the agreement
- Volunteers commit to a five year renewable term
- Negative impacts to drainage and public safety of the area are minimized
- The land and all its contents remain as public parkland and continue to allow for free and clear access by staff and the public (i.e. Creating an extension of private property, would not be permissible through this program)

The Process

The Partners in Parks program follows an outlined process whereby residents collaborate with their neighbourhood to gain support of a project on public lands and submit a written request to City staff. A City Review Team then reviews the project in terms of environmental and community benefits, objectives, scope and feasibility. Upon approval, a PIP Agreement is signed by Volunteers from two separate households and the Volunteers may then carry out the project based on the terms of the agreement. The Partners in Parks Program is currently being revised, as a means to further standardize the program and set out clear responsibilities, processes and guidelines for any future PIP project on municipal parkland. (It is not anticipated that these changes will impact the encroachment policy and its process of final approval.)

12" (0.305m) rule

City staff responsible for determining property lines are not Ontario Land Surveyors. The property lines they identify are accurate but not considered "legal". In light of this, and in order to reduce the margin of error while employing City survey staff on an encroachment case and not Ontario Land Surveyors, some encroachments which extend less than 12" onto public lands may persist. Consideration will only be given when the following criteria are met:

- the encroachment is not on environmental lands, and
- it continues to allow for free and clear access by staff, and the public, and
- no permanent structures are present

An Encroachment Agreement may be required.

Adverse Possession

Where it is likely that the encroachment has existed for a period of at least ten (10) continuous years under the Registry Act, the use has been exclusive to the encroaching party, the possession of the lands has been open, notorious and carried out with the intention of excluding all others and there exists a high probability that the occupant may be able to bring a successful legal claim for adverse possession, consideration may be given to the disposition of the occupied lands for costs including, but not limited to, survey, legal and registration fees (attempts may be made to receive some compensation towards the value of the lands). The City may also defend or pursue in court its right to the lands in question.

The preferable option in such a situation is to consider a Letter of Comfort Agreement (Appendix B) for a period equal to the shorter of:

- a) as long as the occupant owns the adjoining lands or
- b) until the encroachment is removed

Letter of Comfort

In cases where a claim of adverse possession is likely to be successful, consideration may be given to granting a Letter of Comfort Agreement to the encroaching party.

Such an encroachment agreement shall be authorized in writing by using the form set out in **Appendix B** while following the process set out in the Encroachment Process **Appendix C**. The term of the Letter of Comfort Agreement (Appendix B) will be for a period equal to the shorter of:

- a) as long as the occupant owns the adjoining lands or
- b) until the encroachment is removed

Costs relating to the process shall be the responsibility of the encroaching party. Staff seeking Council approval, shall forward a report outlining the details of a proposed Letter of Comfort.

The Letter of Comfort Agreement (Appendix B) is to be registered on title. There is a Letter of Comfort Execution Fee of \$400.00. The encroaching party will be responsible for all costs, including survey and registration costs. Further, the encroaching party will be responsible for all administrative costs associated with the occupation and use of the lands that may include but not be limited to such things as taxes and maintenance. Staff, seeking approval, shall forward a report outlining the details of any proposed agreement of this nature. It is Council that will formally approve such an agreement.

Disposition of lands

The Encroachment Policy emphasis is on the City maintaining ownership of its public lands. In the rare instance that a successful claim of adverse possession is likely, and based upon the City solicitor's recommendation, consideration may be given to the disposition of lands. Clerks staff will oversee this process.

Cautionary Note Regarding Special Considerations

Having outlined these special considerations, it is important to note that it is the primary policy intention of the City of Waterloo that encroachments onto City-owned lands be removed and that such lands be restored to the satisfaction of the City.

Appendix B

Letter of Comfort Agreement

Application for Letter of Comfort Agreement

Completeness of the Application

Black Arrows (▶) on the left side of the section No.s indicate the information in this form that **must be provided by the applicant. The mandatory information must be provided with the fee of \$100.** If the mandatory information and the fee are not provided, the City of Waterloo will return the application or refuse to further consider the application until the information and fee have been provided.

| |
|---|
| No. _____ |
| Date File Received: _____ |
| Fee Received <input type="checkbox"/> _____ |
| Office use only |

The application form also sets out other information that will assist the City of Waterloo in its planning evaluation of the application. In the absence of this information, it may not be possible to do a timely review for making a decision. As a result, the application may be refused.

Submission of the Application

The undersigned hereby applies to the City of Waterloo for a Letter of Comfort Agreement as described in this application.

Please print and complete the appropriate boxes

▶ 1. Applicant information

Note: Unless otherwise requested, all communications will be sent to the agent, if any

| | | |
|--|--------------------|------------------------|
| 1.1 Name of Encroaching Party | Home Telephone No. | Business Telephone No. |
| 1.2 Address | Postal Code | Fax No. Email: |
| 1.3 Name of Agent (if any) | Telephone No. | Business Telephone No. |
| 1.4 Address | Postal Code | Fax No. Email: |
| 1.5 Name of any Mortgagees, Holders of Charges or other Encumbrances | Telephone No. | Business Telephone No. |
| Address | Postal Code | Fax No. Email: |

▶ 2. **Location of the Subject Land (Complete applicable boxes in 2.1)**

| | | | |
|-------------------------|-----------------|--------------------|----------|
| 2.1 Registered Plan No. | Lot(s) Block(s) | Reference Plan No. | Part No. |
| Name of Street | Street No. | | |

2.2 Are there any easements or restrictive covenants affecting the subjected land?

No Yes If Yes, describe the easement or covenant and its effect.

▶ 3. **Encroachment**

3.1 What is the nature and extent of the Encroachment for which the Letter of Comfort Agreement is being applied?

3.2 Sketch Plan **Certified by an Ontario Land Surveyor (OLS)**

A sketch is required showing the following:

- a. The boundaries and dimensions of the Subject Lands
- b. The location of all existing buildings and structures on the Subject Land, indicating the encroachments onto Municipal Property
- c. The location of the subject lands and encroachment in relation to adjacent properties
- d. The boundaries and dimensions of any encroaching items
- e. The location, width and name of any roads within or abutting the Subject Land indicating whether it is an unopened road allowance, a public traveled road, a private road or a right of way
- f. Indicate North with an arrow on the sketch

3.3 Dimensions of Encroachment

Width of Encroachment _____ Depth of Encroachment _____

▶ 4. **Reasons**

4.1 What is the reason for this encroachment request?

Denied for the following reasons;

The Corporation of the City of Waterloo

General Manager of Public Works Services

Date

Or Approved as indicated in the Letter of Comfort Agreement below:

The Terms and conditions of this Agreement if approved, as set out in this application, are as follows (as amended March 2009):

THIS AGREEMENT made this ... day of, 200....

B E T W E E N:

THE CORPORATION OF THE CITY OF WATERLOO

Hereinafter called the “City”

OF THE FIRST PART;

- and -

.....

Hereinafter called the “Owner”

OF THE SECOND PART;

WHEREAS the Owner owns the lands and premises known municipally as [insert municipal address] in the City of Waterloo, more particularly described in Schedule “A” attached hereto (the “Lands”);

AND WHEREAS the City agrees to permit [describe permitted encroachment];

AND WHEREAS the parties have agreed that the encroachment is permitted according to the terms of this Agreement;

NOW THEREFORE this Agreement witnesseth that in consideration of the premises and the sum of TWO (\$2.00) DOLLARS of lawful money of Canada now paid by the Owner to the City, the parties agree to and covenant as follows:

1. The encroachment which is the subject of this Agreement refers to the encroachment [describe permitted encroachment], more particularly described as Part [insert part number] of Reference Plan [insert Reference Plan number] (the “Encroachment”).
2. The Owner agrees that if the Encroachment is removed or otherwise altered by the Owner, or by a third party, at any time, without the express written consent of the City, or if the Owner transfers the Lands to a third party, the Owner’s rights under this Agreement shall be immediately terminated. Once the Owner’s rights have been terminated, the Encroachment shall be immediately removed by the Owner, at the Owner’s sole cost, and the lands on which the Encroachment exists shall be put in the same condition as it existed prior to the Encroachment by the Owner, and as approved by the City, acting reasonably.
3. The Owner shall not acquire title by possession or prescription to the lands on which the Encroachment exists and the Owner expressly acknowledges that the lands on which the Encroachment exists is owned by the City.
4. The Owner agrees to ensure that the Encroachment complies with all relevant City By-Laws.
5. The Owner agrees that the City may register this Agreement on the title of the Lands or on the title of the lands on which the Encroachment exists, at the City’s sole and absolute discretion, and at the Owner’s sole expense. The Owner shall not register this Agreement without the express written consent of the City.
6. The Owner agrees to indemnify and hold harmless the City, its Councilors, employees and agents, at all times hereafter, from any and all claims for loss, costs, charges, expenses or damages arising from the wilful acts or neglect of the Owner, tenants or anyone for whom the Owner is at law responsible, in respect of the maintenance, alteration, use or occupation of the Encroachment. The Owner shall provide the City with proof of insurance in a form and amount satisfactory to the City to support this indemnity.

7. No alterations or improvements shall be made to the Encroachment, at any time, without the express written consent of the City and any alterations or improvements to which the City has consented shall be performed and completed at the Owner's sole expense.
8. The Owner agrees that this Agreement may be terminated on sixty (60) days' notice by the City to the Owner and, in such case, the Encroachment shall be removed by the end of the notice period by the Owner, at the Owner's sole cost, and the lands on which the Encroachment exists shall be put in the same condition as it existed prior to the Encroachment by the Owner, and as approved by the City, acting reasonably.
9. This Agreement is not transferable or assignable by the Owner without the express written consent of the City. Any attempt to transfer or assign any of the rights, duties or obligations of this Agreement by the Owner, without the City's express written consent, is void.
10. This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns and shall run with the lands over which this Agreement may be registered.
11. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions of the parties. There are no warranties, representations or other agreements in connection with the subject matter of this Agreement except as specifically set forth herein.

IN WITNESS WHEREOF the parties have executed this Agreement.

SIGNED, SEALED and DELIVERED)

in the presence of)

[Insert name of Owner]

[Insert name of Owner])

)
) **THE CORPORATION OF THE CITY**
) **OF WATERLOO**

)
) per: _____
) Brenda Halloran, Mayor

)
) per: _____
) Susan Greatrix, Clerk

)
) I/We have the authority to bind the
) Corporation.

SCHEDULE "A"

LEGAL DESCRIPTION OF THE LANDS

Legal Description:

PIN:

Municipal Address:

Appendix C

Encroachment Removal and Restoration Process

Encroachment Process

Complaint/Observation

The Encroachment Process begins with receipt of an encroachment complaint either from staff or a member of the public. A complaint from staff is typically generated through observation during regular maintenance activities, greenspace inspection, or aerial photography. It is highly recommended that staff obtain the contact information of each complainant to facilitate the process. Such information remains confidential throughout the process.

Encroachment Investigation

Once staff have identified the existence of an encroachment and have recorded and photographed its nature, a survey may be conducted. A survey is only requested of the City surveyors in instances where the property line is unclear. A survey is often not required on parklands that have demarcation posts. Demarcation posts (Figure 1 and 2) are erected along (primarily) rear property lines adjacent to parklands every 30m or when the property line changes direction. In new subdivisions where the provisions for demarcations posts were included in the Subdivision Agreement – demarcation posts are installed during the development process. In more established neighbourhood parks where demarcation posts were not a provision of the subdivision agreement, demarcations posts are installed after the development process, on a priority basis.



Figure 1 Diagram illustrating demarcation post positioning



Figure 2 Photo illustrating installed demarcation post in Forested Hills ESPA #19

Site Restoration – Encroaching Party identified

In most cases the identification of the encroaching party appears relatively obvious. In instances where contact with an encroaching party is possible, a notification is provided to the encroaching party outlining the issue and indicating a compliance date. Staff may give consideration to a timeline extension in extenuating circumstances.

A second inspection is conducted after the compliance date. If compliance has not been met, a Final Notice to Comply is provided to the encroaching party (it is recommended particularly for permanent structures that this be done by Registered Mail). After the final compliance date, a final inspection is conducted. If the encroachment has been removed and the area restored to City specifications as outlined, the case is then closed.

If compliance has not been met after the final compliance date, staff co-ordinate the removal of the encroachment and restoration of the area with a by-law officer present. The encroaching party will be invoiced for the time, labour and equipment required to perform the task.

The encroaching items that have been removed are then stored for 60 days. The encroaching party will be able to retrieve the stored goods from Public Works Services staff, upon showing proof of payment from the Finance Department at City Hall. In the event the items are not claimed by the encroaching party after 60 days, the goods may either be disposed or prepared for auctioning through the Purchasing Department.

Site restoration – Encroaching Party unidentified

In some instances, it is not possible to identify the encroaching party. In cases where it is not possible to identify the encroaching party, the City of Waterloo may opt to remove the encroachment, restore the area and assume the associated costs.

Appendix D

Public Comments Received

