



Town of Whitby

By-law # 7389-18

Town Lands Encroachment By-law

Being a By-law to Permit Encroachments on Town Lands

Whereas the Municipal Act, 2001, S.O. 2001, c.25, as amended (hereinafter the "Municipal Act") provides that a municipality may pass by-laws within the following spheres of jurisdiction: Highways, including parking and traffic on highways at section 11(3) 1; Culture, parks, recreation and heritage at section 11(3) 5; and Structures, including fences and signs at section 11(3) 7;

And Whereas section 9 of the Municipal Act provides that a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under the Municipal Act, 2001 or any other Act;

And Whereas section 8(1) of the Municipal Act shall be interpreted broadly as to confer broad authority on the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues;

And Whereas section 11(1) of the Municipal Act provides that a municipality may provide any service or thing that the municipality considers necessary or desirable for the public;

And Whereas section 391(c) of the Municipal Act provides that a municipality may impose fees or charges on persons for the use of its property, including property under its control;

And Whereas section 446(1) of the Municipal Act provides that a municipality, in default of it being done by the person directed or required to do it, the matter or thing shall be done at the person's expense;

And Whereas Section 446(2) of the Municipal Act provides that for the purposes of section 446(1) the municipality may enter upon land at any reasonable time;

And Whereas Section 446(3) of the Municipal Act provides that the costs incurred by a municipality in doing things under section 446(1) may be recovered by adding the costs to the tax roll and collecting them in the same manner as property taxes;

Now therefore, the Council of The Corporation of the Town of Whitby hereby enacts as follows:

1. Definitions

1.1. For the purposes of this by-law:

1.1.1. "**alter**" means a change in grading, form or substance from its original state;

1.1.2. "**applicant**" means each person who seeks or obtains either a permit or enters into an encroachment agreement;

- 1.1.3. **“boulevard”** means that part of a public street or highway that is not used, or intended to be used, for travel by the general public, and is situated between the travelled portion or designed to be travelled by vehicles of the road and the adjoining property line, including the 0.3 metre reserve, where applicable;
- 1.1.4. **“Clerk”** means the Town Clerk of The Corporation of the Town of Whitby or his/her designate;
- 1.1.5. **“Commissioner”** means:
- 1.1.5.1 the Commissioner of Corporate Services or designate, for lands managed by the Corporate Services Department;
 - 1.1.5.2 the Commissioner of Community and Marketing Services or designate, for lands managed by the Community and Marketing Services Department; or
 - 1.1.5.3 the Commissioner of Public Works or designate, for lands managed by the Town’s Public Works Department;
- 1.1.6. **“Council”** means the Council of The Corporation of the Town of Whitby;
- 1.1.7. **“easement”** means an interest in land owned by another person, consisting in the right to use or control the land, or any area above or below it, for a specific limited purpose, but does not include an interest created by a license;
- 1.1.8. **“encroachment”** means any type of landscaping or vegetation, natural or man-made object or item of personal property of a person that is located wholly upon, or extends from a person’s premises onto, public lands and shall include any aerial, surface or subsurface encroachments;
- 1.1.8.1 **“aerial encroachment”** means any projection of an object, other than a tree or other planting, that is located on a person’s premises and projects at least 30 centimetres (approximately 12 inches) above the surface of public lands (as measured from the highest point of the object that projects over public lands),
 - 1.1.8.2 **“major encroachment”** means an encroachment on public lands including a highway deemed by the Commissioner to be of major size and significance,

- 1.1.8.3 “**minor encroachment**” means an encroachment on public lands including a highway deemed by the Commissioner to be of minor size and significance,
- 1.1.8.4 “**surface encroachment**” means an encroachment that is located anywhere between the following: the surface of public lands to a height less than 0.304 metres (12 inches) and beneath the surface of public lands to a depth of not more than 2.54 centimetres (1 inch), and
- 1.1.8.5 “**sub-surface encroachment**” means an encroachment that is located beneath the surface of public lands to a depth exceeding 2.54 centimetres (approximately 1 inch).
- 1.1.9. “**encroachment agreement**” means a document prepared by the Town allowing an encroachment on public lands and shall take either of the following two forms:
 - 1.1.9.1 a permit for all minor encroachments on highway or boulevard land, and
 - 1.1.9.2 an agreement for all other types of encroachments, each of which shall be signed by the applicable Commissioner or their designate;
- 1.1.10. “**encroachment application**” means an application submitted by the applicant to the Town for its consideration as to whether the encroachment is acceptable to proceed through permitting process;
- 1.1.11. “**encroachment permit**” means a licence (permit) issued by the Town to a person, granting the person authority to erect, place, alter or continue an encroachment under this by-law;
- 1.1.12. “**expenses**” means any and all money actually spent or required to be spent by the Town, and shall include but not be limited to all charges, costs, application fees, administrative fees, dispute resolution/mediation fees, survey fees, taxes, outlays, legal fees and losses;
- 1.1.13. “**fees**” means all fees associated with this by-law as set out in the Fees By-law, as amended;
- 1.1.14. “**fence**” means a barrier or any structure, except a structural part of a building, that wholly or partly screens from view, encloses or divides a yard or other land, or marks or substantially marks the boundary between adjoining land, and includes any shrubbery or other plantings that have the same effect;

- 1.1.15. **“highway”** means a common and/or public highway, whether assumed or unassumed, and includes any street, sidewalk, bridge, trestle, viaduct, or other structure forming part of the highway and, except as otherwise provided, includes a portion of a highway which is under the jurisdiction of the Town;
- 1.1.16. **“Municipal Act”** means the Municipal Act, 2001, S.O. 2001 c. 25, as amended;
- 1.1.17. **“non-residential”** means property that is not located within a ‘residential zone’ category in the Town’s Zoning By-laws;
- 1.1.18. **“notice”** means any notice required to be given by the Town to the owner with respect to this by-law and that is either delivered or sent by prepaid registered mail to the owner’s address. A notice includes an order issued under sections 444 and 445 of the Municipal Act. In the event such notice is mailed, it is deemed delivered on the third business day after mailing;
- 1.1.19. **“officer”** means a police officer or a municipal law enforcement officer appointed by the Town for the purpose of enforcing this by-law;
- 1.1.20. **“owner”** means the registered owner of a parcel of property as such person is described in the records of the appropriate land registry office;
- 1.1.21. **“patio permit”** means an outdoor sidewalk patio café permit issued by the Town pursuant to the Outdoor Sidewalk Patio Café By-law No. 4223-98, as amended;
- 1.1.22. **“person”** includes an individual, partnership, association, firm or corporation, business entity or club, incorporated group or organization, federal or provincial government, crown agents, school boards and regional municipalities, to whom the context can apply in accordance with the Legislation Act, 2006, S.O. 2006, c. 21, Sched. F, as amended, but specifically excludes the Town;
- 1.1.23. **“personal property”** means any object or items of property other than real property;
- 1.1.24. **“premises”** means a parcel of real property under registered ownership and includes all buildings and structures thereon;
- 1.1.25. **“public lands”** means lands owned by, leased, licensed to or under the management of the Town, and shall include but not be limited to the boulevard, any public highway, road allowance, street, avenue, parkway, lane, alley, square, place, viaduct or trestle, water, thoroughfare, way or bridge, park, woodland, greenbelt, storm water management facility, open space, municipal golf course or cemetery,

and all parts thereof, including any surface, grassed area, boulevard, ditch, curb, gutter and sidewalk, but does not include property owned by the Regional, Provincial, Federal Government, a Crown Corporation, Hydro, Utility or Railway Company;

- 1.1.26. “**Region**” means The Regional Municipality of Durham;
- 1.1.27. “**residential**” means property that is located within a ‘residential zone’ category in the Town’s Zoning By-laws;
- 1.1.28. “**right-of-way**” means a person’s legal right, established by usage or by contract, to pass through grounds or property owned by another person;
- 1.1.29. “**sign**” means a ‘sign’ as defined in the Town’s Permanent Sign By-law, as amended or successor thereto;
- 1.1.30. “**temporary permit**” means a Road Occupancy Permit or other Town permit to manage the activities on or adjacent public lands;
- 1.1.31. “**Town**” means The Corporation of the Town of Whitby or the geographic limits of the Town of Whitby as the context requires;
- 1.1.32. “**Town Solicitor**” means the Solicitor for the Town or his/her designate;
- 1.1.33. “**Town’s Zoning By-laws**” means and includes any of the following Town Zoning By-laws: #2585, #1784 and #5581-05, as may be amended from time to time, or successor(s) thereto;
- 1.1.34. “**Treasurer**” means the Treasurer for the Town or his/her designate; and
- 1.1.35. “**unauthorized encroachment**” means any encroachment not authorized by this by-law.

2. Interpretation

- 2.1. The provisions of this by-law apply to public lands within the Town.
- 2.2. Unless otherwise specified, references in this by-law to parts, sections, subsections, clauses and appendices are references to parts, sections, subsections, clauses and appendices in this by-law.
- 2.3. References to this by-law, to any statute or statutory provision include references to that statute or statutory provision as it may from time to time be amended, extended or re-enacted.
- 2.4. This by-law shall be read with all changes in gender or number as the context requires.

- 2.5. References in this by-law to items in the plural include the singular and references to the singular include the plural, as applicable.
- 2.6. The words “include”, “includes” or “including” are not to be read or interpreted as limiting the words, phrases or descriptions that precede it.
- 2.7. The definitions contained in this by-law shall be applicable to such provisions in: (a) the Town’s Fees and Charges By-law governing any fees related to the matters provided for in this by-law; and (b) such other policies, procedures, or guidelines that relate to or implement the provisions of this by-law.

Severability

- 2.8. If a court of competent jurisdiction declares any section, or any part of any section of this by-law to be invalid or to be of no force or effect, it is the intention of the Town that every other provision of this by-law be applied and enforced in accordance with its terms to the extent possible according to law.

Compliance with Other Laws

- 2.9. This by-law and the provisions contained within are intended to be complementary to other by-laws passed by Council and in the event that any other applicable law requires a higher standard than the provisions contained in this by-law, the higher standard shall apply.

3. Prohibited Encroachments

- 3.1. No person shall erect, place or maintain, or cause to be erected, placed or maintained, an encroachment of any kind on public lands, or on any right-of-way or easement in favour of the Town, except where permitted to do so in accordance with this by-law.
- 3.2. Notwithstanding subsection 3.1, the provisions of this by-law do **not** apply to the following encroachments affecting public lands:
 - 3.2.1. encroachments by temporary signs, as authorized through By-law Number 5696-05 , as amended (the “**Temporary Sign By-law**”);
 - 3.2.2. encroachments by permanent signs, as authorized through By-law Number 5695-05, as amended (the “**Permanent Sign By-law**”);
 - 3.2.3. encroachments from properties which are designated by the Heritage Permit and Delegation By-law Number 6769-13, as amended, as being of historic or architectural value or interest pursuant to the Ontario Heritage Act, R.S.O. 1990, c. O.18, as amended (the “**Heritage By-law**”);
 - 3.2.4. outdoor sidewalk patio cafés, as authorized through By-law 4223-98, as amended (the “**Outdoor Sidewalk Patio Café By-law**”);

- 3.2.5. encroachments on public lands or boulevards which are governed under the Property and Boulevard Maintenance By-law # 6937-15, as amended (the “**Property and Boulevard Maintenance By-law**”);
- 3.2.6. a temporary encroachment arising as a result of construction, maintenance or other activity as authorized under a valid temporary permit issued by the Town;
- 3.2.7. encroachments permitted as a result of a written and signed agreement with the Town prior to the date of this by-law;
- 3.2.8. encroachments arising as a result of a Committee of Adjustment decision; and
- 3.2.9. encroachments arising from surface changes made in connection with residential driveways, which have received prior approval, provided such encroachments do not breach any other municipal by-law or regulation including the Road Occupancy and Municipal Access By-law 6291-10, as amended.

4. Application for Encroachment

- 4.1. Any person requesting authorization to erect, install or maintain an encroachment on public lands shall be required to submit an application to the Town seeking permission to do so, along with payment of the non-refundable application fee.
- 4.2. The form and content of the application shall be as prescribed by the Town Solicitor from time to time, a copy of which may be obtained from the Town’s Legal and By-law Services Department;
- 4.3. Where an application to erect, install or maintain an encroachment has been approved, the Town Solicitor shall prepare an encroachment agreement, and once the applicant has been notified in writing that the encroachment agreement is ready for execution, the applicant shall execute same and pay the applicable fees.

5. Registration of Agreement

- 5.1. Where the Commissioner deems it appropriate, an encroachment agreement may be registered against title to the applicant’s property with the land registry office and all expenses related thereto shall be paid for in advance by the applicant.

6. Authority of the Town Solicitor

- 6.1. The Town Solicitor shall have delegated authority to:

- 6.1.1. approve or reject any application submitted for an encroachment agreement, in consultation with the relevant Commissioner;
- 6.1.2. impose such terms and conditions to any application and/or encroachment agreement as a Commissioner may deem appropriate;
- 6.1.3. impose such fees, including annual fees, as approved by Council, pursuant to the Fees and Charges By-law, as amended, for the continued inspection and administrative costs of the Town to ensure that the encroachment agreement is being complied with; and
- 6.1.4. determine whether any encroachment agreement expiring on a date after the date of enactment and passage of this by-law shall be renewed and/or extended, in consultation with the relevant Commissioner.

7. Revocation

- 7.1. The execution of an encroachment agreement in respect of an encroachment does not create any vested right in the owner or occupant of the premises to which the encroachment is appurtenant, or in any other person, and the encroachment agreement may be revoked in accordance with the terms set out therein.

8. Access to Encroachments

- 8.1. No person shall obstruct, hinder or interfere with the free access to any encroachment by an employee, officer or agent of the Town.

9. Discontinuance of Encroachments

- 9.1. If the owner of any premises to which an encroachment is appurtenant desires to permanently discontinue the encroachment, they shall notify the Town Solicitor in writing and the Town Solicitor shall thereafter cause a notice to be sent to the owner advising that the encroachment shall be removed or filled in and closed up, and the public lands shall be restored to their former condition by the owner at their own expense.
- 9.2. If the Town Solicitor or the Commissioner is at any time of the opinion that a breach of the terms and conditions attached to an encroachment agreement has occurred and that the encroachment should be discontinued, or where an encroachment agreement has expired, the Town Solicitor may cause a notice to be sent to the owner advising that the encroachment be removed or filled in and closed up, and the public lands be restored to their former condition by the owner at their own expense.
- 9.3. Where an owner fails to comply with the notice described in subsection 9.1 and/or 9.2 within the time period stipulated therein, the encroachment may be removed or filled in and closed up by the Town, and the public lands restored

to their former condition, or as the Town deems appropriate, at the expense of the owner, such expense to be recovered in full in the manner provided in Section 11 below, and until the encroachment is so removed or filled in and closed up and the public lands restored to their former condition, all expenses incurred by the Town in respect thereto shall continue to be paid by the owner.

10. Emergency Situations

- 10.1. If the Commissioner deems that an emergency exists or may exist as a result of any encroachment being or about to become a source of danger to the health and safety of the public, the Commissioner may:
 - 10.1.1. notify in writing the owner of the premises to which the encroachment is appurtenant, requiring the repair, removal, filling in or closing up of the encroachment and restoration of the public lands to their former condition at the expense of the owner, so that the encroachment is no longer deemed to be a source of danger or potential danger to the public by the Commissioner; and/or
 - 10.1.2. take such measures on behalf of the owner, without notice to the owner, as the Commissioner may deem necessary to remove the danger or potential danger created by the encroachment.
- 10.2. Where the notice described in subsection 10.1.1 is not complied with within the time period stipulated therein, the Town may repair, remove, fill in or close up the encroachment and restore the public lands to their former condition, at the expense of the owner, such expense to be recovered in full in the manner provided in Section 12 below.
- 10.3. Where the Commissioner elects to take any action under subsection 10.1.2, the expenses incurred by the Town in so doing shall be recovered in full in the manner provided in Section 12 below.

11. Removal of Unauthorized Encroachments

- 11.1. Where the Town becomes aware of an unauthorized encroachment, the Town may give notice in writing to the owner of the premises to which an unauthorized encroachment is appurtenant, to forthwith remove, fill in or close up the encroachment and to restore the public lands to their former condition at the expense of the owner.
- 11.2. Where the notice in subsection 11.1 is not complied with within the time period stipulated therein, the Town may, on behalf of the owner, remove, fill in or close up the unauthorized encroachment and restore the public lands to their former condition at the expense of the owner, such expense to be recovered in full in the manner provided in Section 12 below.

- 11.3. Any materials or structures forming part of or attached to the encroachment and removed by the Town may, at the discretion of the Commissioner, either be deposited at the owner's premises or stored at the owner's expense, such expense to be recovered in full in the manner provided in Section 12 below. Any item so stored and not claimed by the owner within such time period as specified in the notice shall be disposed of by the Town in such manner as it deems appropriate.

12. Recovery of Expenses

- 12.1. All expenses incurred by the Town in connection with the enforcement of this by-law shall be paid within ninety (90) days of their billing date, and in the event of failure to pay the entire amount due within the said ninety (90) days, then at the discretion of the Treasurer the outstanding balance of the invoice may thereafter be added to the tax roll of the appurtenant property benefitting from the encroachment as of the year in which the expenses were added to be collected in a like manner as taxes along with any interest charges and administration fees.
- 12.2. The Town may also recover all expenses owing under this by-law by a court action as a debt due the Town.

13. Failure to Maintain an Encroachment

- 13.1. Where an owner fails to maintain an encroachment in accordance with the provisions of this by-law, an encroachment permit, or encroachment agreement, the Commissioner may send a notice to the owner advising them of the deficiency resulting in non-compliance and of the period of time provided to them to bring the encroachment into compliance.
- 13.2. Where the owner fails to bring an encroachment into compliance in accordance with the notice issued under subsection 13.1, the Commissioner may affect the removal of the encroachment and bring the public lands back to their former condition, at the owner's expense.

14. Infractions and Penalties

- 14.1. Every person who contravenes any of the provisions of this by-law is guilty of an offence and on conviction is liable to pay a fine, in addition to the Town's expenses, as provided in the Municipal Act.
- 14.2. Every person that fails to comply with a notice issued under this by-law is guilty of an offence and on conviction is liable to pay a fine, in addition to the Town's expenses, as provided for in the Municipal Act.

15. Prohibition Order

15.1. When a person has been convicted of an offence under this by-law by the Ontario Court of Justice or by any other court of competent jurisdiction, then such court may in addition to any other penalty imposed on the person convicted, issue an order prohibiting the continuation or repetition of the offence or the doing of any act or thing by the person convicted that is directed toward the continuation or repetition of the offence.

16. Enforcement

16.1. An officer, employee, or agent of the Town acting under this by-law may enter and inspect all buildings, structures or parts thereof that are subject to this by-law at any reasonable time, with or without notice at the discretion of the Town for the purposes of determining whether there is compliance with this by-law.

17. Liability

17.1. The provisions of this by-law shall not be construed as relieving or limiting the responsibility or liability of the owner who has lawfully or unlawfully erected, placed, altered or continued an encroachment, of any kind, on public lands from any personal injury, including injury resulting in death or property damage, or from acts or omissions of such owner, or their agents, employees or contractors, in the erection, placement, alteration, continuation or removal of the encroachment. Likewise, the provisions of this by-law shall not be construed as imposing the Town, its officers, employees and agents any responsibility or liability whatsoever by reason of allowing an encroachment, either minor or major, approving the request for an encroachment agreement, or removing an unauthorized encroachment affecting public lands.

18. Indemnification

18.1. The holder(s) of an encroachment agreement or encroachment permit shall be jointly and severally responsible to indemnify, defend and save the Town harmless, its officers, employees, and agents from all losses, damages, costs, expenses, claims, demands, actions, lawsuits, or other proceedings of every nature and kind arising from, and in consequence of, the erection, placement, alteration, or continuation of an encroachment affecting public lands.

18.2. An owner who holds an encroachment agreement or an encroachment permit shall file annually with the Town a certificate of general liability insurance for the property which the encroachment relates, on the Town's form, which is satisfactory to the Treasurer and names the Town as additional insured.

19. Delegation of Authority

- 19.1. The Commissioner of Corporate Services and the Town Solicitor are authorized to execute and affix the Corporate Seal of the Town to all minor encroachment agreements.
- 19.2. The Mayor and Clerk upon the recommendation of Council will execute all major encroachment agreements.

20. Deletions or Repeals of other By-laws

- 20.1. None

21. Exceptions and Grandfathering

- 21.1. This by-law shall not apply to any of the classes of encroachments set out in subsection 3.2 and the clauses contained therein.
- 21.2. Notwithstanding subsection 21.1, any encroachment authorized under an encroachment agreement determined by the Town Solicitor to be valid and binding at the date of enactment of this by-law, shall continue to be in force and shall not require further authorization pursuant to this by-law until the encroachment agreement has expired or is terminated.

22. Conflict with other By-laws

- 22.1. Where there is a conflict or contradiction between this by-law or any other by-law of the Town, the provisions establishing the higher standard shall prevail.

23. Schedule(s)

- 23.1. None.

24. Enforcement and Penalties

- 24.1. Pursuant to Section 436(1) of the Municipal Act, an officer may enter on any land at any reasonable time without a warrant to determine whether or not there is compliance with the provisions contained in this by-law or with a direction or order pursuant to this by-law.
- 24.2. Where an officer is satisfied that there has been a contravention of a provision of this by-law, the officer may issue an order requiring the owner or occupant of the property to do work to the property or the adjacent property to correct the contravention.
- 24.3. An order issued pursuant to subsection 9.2 of this by-law shall set out reasonable particulars of the contravention, the general location of the contravention, the general nature of the work required to be done to correct the contravention and the date by which the work must be done.

24.4. An order issued pursuant to subsection 9.2 of this by-law may be served by personal delivery to the owner or occupancy or by sending it by registered mail to the last known address of the owner or the address of the owner as shown on the most recent assessment roll from the premises or by sending it by registered mail to the occupant at the last known address of the occupant.

24.5. Service of an order pursuant to subsection 9.3 of this by-law shall be deemed to have been effected on the date that it is delivered personally or three (3) business days after it was mailed, as the case may be.

25. Short Title

25.1. This by-law may be cited as the “Town Lands Encroachment By-law”.

26. Effective Date

26.1. This by-law shall come into full force and effect on the date of final passage.

By-law read and passed this 16th day of April, 2018.

Original Approved and Signed.

Don Mitchell, Mayor

Original Approved and Signed.

Christopher Harris, Town Clerk