

Town of Whitby

Staff Report

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Report Title: Adjudication of Fence By-law Exemption Requests

Report to: Committee of the Whole

Date of meeting: December 2, 2024

Report Number: CLK 08-24

Department(s) Responsible:

Office of the Town Clerk
Legal and Enforcement Services

Submitted by:

C. Harris, Director, Legislative
Services/Town Clerk

F. Santaguida, Commissioner, Legal and
Enforcement Services/Town Solicitor

**Acknowledged by M. Gaskell,
Chief Administrative Officer**

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1. Recommendation:

1. That Council delegate the authority for consideration of exemptions from Fence By-law # 4394-99, as amended, as well as exemptions from the forthcoming update to the Fence By-law, to the Municipal Licensing and Standards Committee in accordance with the Fence By-law Exemption Process appended to this Report as **Attachment 1**, and the Clerk be directed to amend the Terms of Reference for the Municipal Licensing and Standards Committee to include consideration of Fence By-law Exemptions;
2. That the Clerk be directed to bring forward a by-law to amend Fence By-law # 4394-99, as amended, to include the Fence By-law Exemption Process and repeal By-law # 7863-22 delegating authority for minor fence height exemption requests to the Commissioner of Legal and Enforcement Services/Town Solicitor;

3. That the Clerk be directed to bring forward a by-law to amend Fees and Charges By-law # 7220-17, as amended, to delete the fee for Minor Fence Height Exemptions and replace it with a new two-tier fee for Fence By-law Exemptions as noted in Section 5 of Report CLK 08-24;
4. That the fees for Fence By-law Exemptions be effective as of the date of enactment of the by-law noted in Recommendation 3, save and except that the fees will not apply on a one-time basis to those properties that currently have Fence By-law exemption requests pending before Council; and,
5. That Fence By-law exemption requests pending before Council be referred to the new Fence By-law Exemption Process through the Municipal Licensing and Standards Committee.

2. Highlights:

- Council provided direction to develop a new Fence By-law Exemption process at the Committee of the Whole meeting on September 23, 2024.
- The new Fence By-law Exemption Process will see exemptions considered by the Municipal Licensing and Standards Committee instead of by Staff or Council.
- Exemptions to the Fence By-law will be available for fences that exceed the maximum permitted height in the by-law and for fences that are located within the setback distances for intersections noted in the by-law, to an upper limit of 2.60 metres (8 feet, 6 inches).
- The new Fence By-law Exemption Process will replace and expand upon the current delegated authority for the Commissioner of Legal and Enforcement Services/Town Solicitor to approve minor fence height exemptions.
- The Municipal Licensing and Standards Committee will weigh a variety of factors when considering exemptions from the Fence By-law, including:
 - a report from Staff that includes comments, recommendations, and input from Town divisions deemed appropriate, to review the request based on the nature of the exemption being sought;
 - the impact approving the request would have to adjacent residents and whether there were objections received;
 - whether the fence request is generally appropriate for the lands in question;
 - for setback relief from intersections, that the fence is located on private property and provides sufficient visibility to maintain pedestrian and

motorist sight lines;

- the impact of approving the request would have to intersection safety and road user visibility;
 - whether the exemption maintains the general intent and purpose of the Fence By-law; and,
 - how the grading of surrounding land may limit the perceived height of fencing from the perspective of neighbouring properties.
- The Municipal Licensing and Standards Committee will have broad authority to grant exemptions to the maximum heights and setback distances from intersections for fences, however an absolute maximum fence height of 2.60 metres (8 feet 6 inches) has been established along with safety and performance standards for fences near intersections. The Fence By-law currently permits fences up to 1.0 metres (3 feet 3 inches) in height in front yards and 2.0 metres (6 feet 6 inches) in height in side and rear yards. Fences in rear yards that are adjacent to arterial roads are permitted to 2.4 metres (8 feet) in height.
 - A two-tier fee will be established of \$750 for minor fence height exemptions (a variance of up to 10% from the applicable maximum permitted height) and a higher fee of \$1,500 for all other Fence By-law exemptions.
 - Through the delegation of authority to the Municipal Licensing and Standards Committee, Council will no longer hear any Fence By-law exemption requests and decisions of the Municipal Licensing and Standards Committee will be deemed final.

3. Background:

Over the past few years, there have been an increasing number of requests for exemptions to the Fence By-law. The number of requests has increased from a historical average of near zero to between five and ten each year. The time required from Council to consider each exemption request is significant.

In an attempt to address the increasing number of exemption requests, Council considered [Report LS 03-22](#) at the Regular Council Meeting on March 7, 2022 and approved an amendment to the Fence By-law to delegate authority to the Commissioner of Legal and Enforcement Services/Town Solicitor to approve minor height exemptions to the Fence By-law, up to a 10% variance to the maximum height provisions. Despite the delegated authority granted to the Commissioner, several requests for Fence By-law exemptions exceeding the authority conferred to the Commissioner continue to be received, requiring Council to consider these matters.

At the Committee of the Whole Meeting on September 23, 2024 Council provided direction to Staff to review and report back on the current Fence By-law exemption process, including reviewing the existing scope of delegated authority to the

Commissioner, expanding the percentage variance for delegated authority over existing fence heights, reviewing associated fees, and identifying a process to handle requests beyond the authority delegated to Staff.

4. Discussion:

Council is in a challenging position when acting as the adjudicating body for licensing and standards matters as they may be required to navigate contentious circumstances between neighbouring residents. Further, considering individual by-law exemption requests takes considerable time and analysis, which is not an efficient use of senior Staff and Council's time. It's more appropriate for Council to provide broad policy direction for the adjudication of these matters by other bodies.

The Municipal Licensing and Standards Committee is a citizen member Committee of Council acting in a quasi-judicial capacity. The Committee currently hears a number of appeals, including appeals of various orders and licensing matters. Members of the Committee have experience mediating contentious licensing and by-law standards matters, and as such, it is recommended that Council delegate hearing of Fence By-law exemptions to the Committee and that Council waive the ability to appeal decisions of the Committee regarding these matters.

It is recommended that the Municipal Licensing and Standards Committee consider all Fence By-law exemptions going forward and that the delegated authority granted to the Commissioner of Legal and Enforcement Services/Town Solicitor to approve minor height exemptions to the Fence By-law (up to a 10% variance to the maximum height provisions) be rescinded. This will provide overall consistency in the decision-making process for Fence By-law exemptions.

A two-tier fee will be established for exemption requests. A lower fee of \$750 will be applied to fence height exemptions of up to a 10% variance to the applicable maximum height provisions. The lower fee is appropriate for these minor variances as there are likely to be less objections from neighbours and less analysis of the exemption requests required by both Staff and the Municipal Licensing and Standards Committee. A higher fee of \$1,500 will be applied to all other Fence By-law Exemptions, including height variances above 10% of the applicable maximum height and for variances to the setback provisions around intersections. Owners will be permitted to apply for more than one variance through the payment of a single application fee (e.g. a height variance above 10% and a reduction of setback requirements from an intersection). Further details about the financial rationale for these fees can be found in the Financial Considerations section of this Report.

Persons seeking exemptions will be required to submit an application and supporting documentation as detailed in the attached Fence By-law Exemption Process document. Applications will be circulated to neighbouring residents for review and comment. Comments received from neighbouring residents will be examined and Staff will prepare a summary document/report for consideration by the Municipal Licensing and Standards Committee.

The attached Fence By-law Exemption Process document contains general guidelines to be considered by the Municipal Licensing and Standards Committee when reviewing

exemption requests. In particular, the guidelines provide the Committee with factors they should consider when analyzing an exemption request including whether the exemption is appropriate for the lands in question, whether the exemption maintains the general intent and purpose of the Fence By-law, the impact to adjacent residents, and how the grading of surrounding land may limit the perceived height of fencing from the perspective of neighbouring properties. For example, a taller fence that is installed along a property line where there is a steep grade difference between adjacent lands may be desirable if it provides both neighbouring residents with satisfactory privacy from the perspectives of their yards.

The guidelines provide the Committee with broad authority to grant exemptions to either the height provisions or the setback provisions around intersections in the by-law, however there are absolute limitations to the Committee's authority. For fence height exemptions, the Committee will be restricted to permitting fences up to 2.6 metres in height. The Fence By-law permits, as of right, fences of 2.0 metres in height in side and rear yards in most instances with fences of 2.4 metres in height being permitted in rear yards adjacent to arterial roads. For fences encroaching on the setback requirements from intersections, these exemptions will only be permitted if the fencing is located on private property and if the fencing is open fencing that provides sufficient visibility through the fence structure to maintain pedestrian and motorist sight lines.

In all instances, an exemption will not be as-of-right. Further, decisions of the Municipal Licensing and Standards Committee must adhere to the Fence By-law Exemption Process attached as Appendix 1 to this Report, as well as provisions in the Fence By-law that prohibit fences from creating unsafe conditions, or obstruct the visibility of motorists, or obstruct traffic signs or traffic control devices.

5. Financial Considerations:

The financial impacts of the new Fence By-law Exemption process are limited as only five to ten exemption requests are received each year. However, the amount of Staff time required to prepare for and consider an exemption request is significant. Requests for exemptions above a 10% variance are currently heard by Council at Committee of the Whole and Council meetings, resulting in Members of Council and senior Staff engaging in lengthy hearings.

The new Fence By-law Exemption Process will create efficiencies by removing Council as the adjudicating body for these matters and delegating authority for hearing exemption requests to the Municipal Licensing and Standards Committee.

Members of the Municipal Licensing and Standards Committee receive remuneration of \$100 per meeting and the Committee consists of five citizen members, meaning that total remuneration per meeting is \$500. The Committee is scheduled to meet on an as needed basis, and Staff attempt to coordinate so that multiple files can be considered by the Committee at the same meeting. Establishing a two-tier Fence By-law Exemption application fee of \$750 and \$1,500 provides for a better recovery of Town costs (e.g. offsets the remuneration paid to Committee Members and helps to offset Staff time involved in administering hearings, circulating notices to adjacent property owners regarding exemption requests, and preparing briefing documents for the Committee's

review).

6. Communication and Public Engagement:

Information about the new Fence By-law Exemption process will be made available to persons requesting exemptions from the provisions of the Fence By-law.

7. Input from Departments/Sources:

This Report was developed by the Office of the Town Clerk in response to direction received by Council at the September 23, 2024 Committee of the Whole Meeting. The Legal and Enforcement Services Department and Financial Services Department has reviewed and provided input into this Report.

8. Strategic Priorities:

Establishing a new Fence By-law Exemption Process is in alignment with Strategic Pillar 4 of the Community Strategic Plan – Accountable and Responsive Government. The new Fence By-law Exemption Process will allow exemption requests to be considered in a more expeditious and efficient manner by the Municipal Licensing and Standards Committee.

9. Attachments:

Attachment 1 – Fence By-law Exemption Process