

Table of Contents

Part I. Short Title, Purpose and Scope	1
Short Title.....	1
Purpose	1
Scope.....	1
Part II. Interpretation.....	2
Headings	2
Gender and Number	2
References to Applicable Law	2
Definitions.....	2
Part III. General Prohibition	3
Part IV. Request for Encroachment Agreement.....	3
Encroachment Agreement Application.....	3
Incomplete Application.....	4
Encroachment Agreement Application – Subject to Approval.....	4
Part V. Execution of Encroachment Agreement.....	4
Part VI. Maintenance of Encroachments	5
Part VII. Contravention of Other Laws Prohibited.....	5
Part VIII. Liability and Indemnification	5
Part IX. Registration of Agreement	5
Part X. No Vested Rights	5
Part XI. Access to Encroachments	6
Part XII. Emergency Situations	6
Part XIII. Unauthorized Encroachments	6
Part XIV. Recovery of Expenses.....	6
Part XV. Infractions and Penalties.....	7
Part XVI. Prohibition Order	7
Part XVII. Enforcement.....	7
Part XVIII. Exceptions and Grandfathering.....	7
Part XIX. Conflict and Transition	7
Conflict.....	7
Terms Severable	7
Enactment	8

Consolidated Version

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Consolidated for Convenience Only

This is a consolidation copy of a City of Owen Sound By-law for convenience and information. While every effort is made to ensure the accuracy of this by-law, it is not an official version or a legal document. The original by-law should be consulted for all interpretations and applications on this subject. For more information or to view by-laws please contact the Clerks Department

The Corporation of the City of Owen Sound

By-law No. 2020-100

A By-law to regulate encroachments on public land

WHEREAS the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "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; and Structures, including fences and signs at Section 11(3) 7; and

WHEREAS section 9 of the 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 Act; and

WHEREAS section 391(c) of the Act provides that a municipality may pass by-laws imposing fees or charges on any class of persons for the use of its property including property under its control; and

WHEREAS section 446(1) of the Act provides that a municipality may proceed to do things at a person's expense which that person is otherwise required to do under a by-law or otherwise but has failed to do so; and

WHEREAS section 446(2) of the Act provides that for the purpose of section 446 (1) the municipality may enter upon land at any reasonable time; and

WHEREAS Section 446(3) of the Act provides that the costs incurred by a municipality in doing a thing or matter under Section 446(1) may be recovered by adding the costs to the tax roll and collecting them in the same manner as taxes; and

WHEREAS on August 24, 2020, the Council of The Corporation of the City of Owen Sound (the "City") passed Resolution No. R-200824-010 directing staff to bring forward a by-law to regulate encroachments on public land, in consideration of staff report CR-20-023;

NOW THEREFORE THE COUNCIL OF THE CORPORATION OF THE CITY OF OWEN SOUND HEREBY ENACTS AS FOLLOWS:

Part I. Short Title, Purpose and Scope

Short Title

1. This by-law shall be known as the "Encroachment By-law".

Purpose

2. This by-law has been enacted to regulate Encroachments onto Public Lands in order to promote responsible use, safety and accessibility.

Scope

3. This by-law shall apply to all Encroachments onto Public Lands save and except:
 - a. signs as authorized by the City's Sign By-law;
 - b. Encroachments permitted as a result of a written and signed agreement with the City, other than an Encroachment;
 - c. temporary encroachments arising as a result of construction, maintenance or other activity authorized under a Street Occupation Permit;
 - d. Encroachments permitted as a result of a written and signed agreement with the City prior to the date of this by-law;

Part II. Interpretation

Headings

4. The division of this by-law into parts and the insertion of headings are for convenient reference only and shall not affect interpretation of the by-law.

Gender and Number

5. In this by-law, unless the contrary intention is indicated, words used in the singular shall include the plural and words used in the male gender shall include the female gender or vice versa, where applicable.

References to Applicable Law

6. All references to applicable law are ambulatory and apply as amended, extended or re-enacted from time to time.

Definitions

7. For the purposes of this by-law:

“Applicant” includes an Owner seeking an Encroachment Agreement;

“By-law Enforcement Officer” means a By-law Enforcement Officer appointed by the City;

“City” means The Corporation of the City of Owen Sound;

“City Clerk” means the Clerk of the City;

“Council” means the Council of the City;

“Easement” means an interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose, but does not include an interest created by a licence agreement;

“Encroachment” means any type of landscaping, vegetation, man-made object or item of personal property of a person which exists wholly upon, or extends from a Person’s Premises, onto Public Lands and shall include any aerial, surface or subsurface encroachments:

- a. “aerial encroachment” means an encroachment that is located at least thirty (30) centimetres above the surface of public lands;
- b. “surface encroachment” means an encroachment that is located anywhere between the following: the surface of Public Lands to a height less than thirty (30) centimetres and beneath the surface of Public Lands to a depth of not more than three (3) centimetres;
- c. “sub-surface encroachment” means an encroachment that is located beneath the surface of public lands to a depth exceeding three (3) centimetres;

“Encroachment Agreement” means an agreement prepared by the City for execution by the City and an Owner granting authorization to erect, install, place or maintain an Encroachment on Public Lands and shall take one of the two following forms:

- a. “Limited Encroachment Agreement” means an agreement that allows a specific encroachment to remain on Public Lands for so long as the encroachment continues to stand provided that the City may direct removal of the Encroachment upon six (6) months’ notice to the Owner;
- b. “Lifetime Encroachment Agreement” means an agreement that allows a specific encroachment to remain on Public Lands for so long as the encroachment continues to stand;

“Expense” means any and all sums of money actually spent or required to be spent by the City, and shall include but not be limited to all charges, costs, administrative fees, HST, outlays, legal fees and losses;

“Highway” means a highway within the meaning of the Act.

“Notice” means any notice required to be given by the City to the Owner or Applicant with respect to this by-law and that is either hand delivered or sent by prepaid registered mail to the Owner’s address. A notice includes an order under sections 444 and 445 of the Act. In the event such notice is mailed, it is deemed delivered on the third business day after mailing;

“Owner” means the registered owner of a parcel of property as such person is described in the records of the land registry office;

“Person” includes an individual, a sole proprietorship, a partnership, an unincorporated association, a trust, a body corporate or a natural person;

“Personal Property” means any object or item of property other than real property;

“Premises” means a parcel of real property under registered ownership and includes all buildings and structures thereon;

“Public Lands” means lands owned by, leased, licenced to or under the management of the City and shall include but not be limited to any public highway, road, street, avenue, parkway, lane, alley, square, place, viaduct or trestle, water, thoroughfare, way or bridge, park, woodland, greenbelt, storm water management facility, open space, cemetery, and all parts thereof, including any surface, grassed area, boulevard, ditch, curb, gutter and sidewalk;

“Right-of-Way” means a person’s legal right, established by usage, deed or by contract, to pass through grounds or private property which affords access to abutting lots and does not include a highway; and

“Unauthorized Encroachment” means any encroachment not authorized by this by-law.

Part III. General Prohibition

8. No Person shall erect, install, place or maintain, or cause to be erected, installed, placed or maintained, an Encroachment of any kind on Public Lands, or on any Right-of-way or Easement in favour of the City, except where permitted to do so in accordance with this by-law.

Part IV. Request for Encroachment Agreement

Encroachment Agreement Application

9. Any Person requesting authorization to erect, install, place or maintain an Encroachment on Public Lands, or on any Right-of-way or Easement in favour of the City shall be required to submit an application to the City seeking permission to do so.
10. The form and content of the application shall be as prescribed by the City Clerk or designate from time to time.
11. An Application shall be deemed to be complete when the Applicant has provided in full:
 - a. all information required on the application;
 - b. payment of the prescribed, non-refundable Encroachment Application Fee as provided in the City’s Fees and Charges By-law; and
 - c. A survey, reference plan or drawing using metric units, that accurately depicts the location and measurements of the Encroachment and the City’s interest in the lands that are being encroached upon, which meets with the satisfaction of both the Manager of Engineering, or designate, and the Manager of Planning & Heritage, or designate.
12. Every Applicant shall provide any other pertinent document or information as may be requested by the City at any time during the determination of the application.

Incomplete Application

13. Any Encroachment Agreement application that does not comply with the provisions of section 11 of this by-law shall be deemed incomplete and the Applicant shall be advised of same by regular mail or electronic mail to the Applicant using the municipal address or email address provided in the application.

Encroachment Agreement Application – Subject to Approval

14. Every complete Encroachment Agreement application will be subject to investigations by and comments or recommendations from municipal departments and the City Solicitor, as the City Clerk deems necessary, or as directed by Council.
15. Staff may recommend: whether to approve an Encroachment Agreement; the type of Encroachment Agreement that is appropriate (Limited Encroachment Agreement or Lifetime Encroachment Agreement); and specific conditions for inclusion in an Encroachment Agreement. The recommendations will be based on whether:
 - a. the Encroachment affects the integrity of the main structure on the applicant's property;
 - b. the Encroachment interferes with the City's intent and purpose in holding the Public Lands;
 - c. the Encroachment creates liabilities for which the City cannot assign full responsibility to the Owner of said Encroachment;
 - d. the Encroachment creates a situation that is contrary to any City by-law, City policy or resolution, or any provincial or federal regulation or legislation;
 - e. the Encroachment interferes with work, plans, efforts or initiatives of the City to maintain the Public Lands;
 - f. the Encroachment interferes with any utility or other similar installation located on the Public Lands; or
 - g. the Applicant is unable to reasonably demonstrate a need for the Encroachment.
16. Execution of Encroachment Agreements shall be authorized by by-law following a staff report and direction from Council in the form of a resolution.
17. Council reserves the right to deny any Encroachment Agreement application in its sole discretion.

Part V. Execution of Encroachment Agreement

18. Where a request to erect, install or maintain an Encroachment has been approved, the City Clerk shall prepare an Encroachment Agreement, and once the Applicant has been notified that the Encroachment Agreement is ready for execution, the Applicant shall have thirty (30) calendar days to provide the following to the City:
 - a. an Encroachment Agreement executed by the Owner in accordance with the directions of the City Clerk or designate;
 - b. the Encroachment Agreement Fees as provided in the City's Fees and Charges By-law; and
 - c. a certificate of insurance in accordance with section 26 of this by-law and the terms of the agreement.
19. If the requirements of section 18 of this by-law are not met within six (6) months of the Applicant being notified that the Encroachment Agreement is ready for execution, the application file shall be closed.
20. Where an application file is closed, a new application, completed in accordance with this by-law, will be required to reconsider the Encroachment.

Part VI. Maintenance of Encroachments

21. Every Owner who holds an Encroachment Agreement shall maintain the Encroachment(s) subject of the agreement in a state of good repair to the sole satisfaction of the City.
22. Where an Owner fails to maintain an Encroachment in accordance with the provisions of this by-law or an Encroachment Agreement, the City may send Notice to the Owner advising of the deficiency resulting in non-compliance and of the period of time provided to them to bring the encroachment into compliance.
23. Where an Owner fails to bring an Encroachment into compliance in accordance with the Notice issued under section 22, the City may repair the Encroachment at the Owner's Expense or affect the removal of the Encroachment and restoration of the site of the Encroachment at the Owner's Expense.

Part VII. Contravention of Other Laws Prohibited

24. The execution of an Encroachment Agreement under this by-law is not intended and shall not be construed as permission or consent by the City for the Encroachment Agreement Owner and/or Applicant to contravene or to fail to observe or comply with any federal or provincial law or any other by-law of the City or the County of Grey.

Part VIII. Liability and Indemnification

25. 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, installed, placed or maintained 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, installation, placement, alteration, continuation or removal of the Encroachment. Likewise, the provisions of this by-law shall not be construed as imposing on the City, its officers, employees and agents any responsibility or liability whatsoever by reason of allowing an Encroachment, approving the request for an Encroachment Agreement, or removing an Unauthorized Encroachment affecting Public Lands.
26. The holder(s) of an Encroachment Agreement shall be jointly and severally responsible to indemnify, defend and save the City 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.
27. An Owner who holds an Encroachment Agreement shall file annually with the City a certificate of insurance for the property to which the Encroachment is appurtenant, in a form satisfactory to the City's Risk and Asset Management Coordinator, or designate, and which names the City as an additional insured.

Part IX. Registration of Agreement

28. Encroachment Agreements shall be registered against title to the Applicant's property and/or the City's property in the land registry office and all Expenses in doing so shall be included in the Encroachment Agreement Fee payable by the Applicant in advance.

Part X. No Vested Rights

29. 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.

Part XI. Access to Encroachments

30. No Person shall obstruct, hinder or interfere with the free access to any Encroachment by an employee, officer or agent of the City.

Part XII. Emergency Situations

31. If a By-law Enforcement Officer 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 By-law Enforcement Officer may:
- a. 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 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 By-law Enforcement Officer, and/or
 - b. Take such measures on behalf of the Owner, without notice to the Owner, as the By-law Enforcement Officer may deem necessary to remove the danger or potential danger created by the Encroachment.
32. Where the Notice in section 31(a) of this by-law is not complied with within ninety-six (96) hours of the date of the Notice, a By-law Enforcement Officer may, on behalf of the Owner, remove, fill in or close up the Encroachment and restore the site of the Encroachment at the Expense of the Owner, such Expense to be recovered in full in the manner provided for in the by-law.
33. Where the By-law Enforcement Officer elects to take any action under Section 31(b) of this by-law, the Expenses incurred by the City in so doing shall be recovered in full in the manner provided for in this by-law.

Part XIII. Unauthorized Encroachments

34. Where the City becomes aware of an Unauthorized Encroachment, the City may:
- a. Advise the Owner of the Premises to which the Unauthorized Encroachment is appurtenant that they must make application to the City for an Encroachment Agreement; or
 - b. Give Notice in writing to the Owner of the Premises to which the Unauthorized Encroachment is appurtenant to forthwith remove, fill in or close up the Encroachment and restore the Public Lands to their former condition at the Expense of the Owner.
35. Where the Notice in subsection 34(b) is not complied with within thirty (30) days of the date of the Notice, the City may, on behalf of the Owner, remove, fill in or close up the Unauthorized Encroachment and restore the site of the Encroachment at the Expense of the Owner, such Expense to be recovered in full in the manner provided for in this by-law.
36. Any materials or structures forming part of or attached to the Encroachment and removed by the City may, at the discretion of the City, either be deposited at the Owner's Premises or be stored for thirty (30) days at the Owner's Expense, such Expense to be recovered in full in the manner provided for in this by-law. Any item so stored and not claimed by the Owner within the said thirty (30) day period shall be disposed of by the City in such manner as it deems appropriate.

Part XIV. Recovery of Expenses

37. All Expenses incurred by the City in connection with the enforcement of this by-law shall be paid within thirty (30) days of their billing date, and in the event of failure to pay the entire amount due within the said thirty (30) days, at the discretion of the City, the outstanding balance of the invoice may thereafter be added to the tax roll as of the year in which the Expenses were billed.

38. The City may also recover all Expenses owing under this by-law by a court action as a debt due to the City.

Part XV. Infractions and Penalties

39. 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, exclusive of costs, as provided for in the *Provincial Offences Act*, R.S.O. 1990, c. P.33.

Part XVI. Prohibition Order

40. When a Person has been convicted of an offence under this by-law,
- a. The Superior Court of Justice, or
 - b. Any other Court of competent jurisdiction,
- 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 directed toward the continuation or repetition of the offence.

Part XVII. Enforcement

41. A By-law Enforcement Officer shall be responsible for the enforcement of this by-law.
42. No person shall hinder or obstruct, or attempt to hinder or obstruct, any officer, employee or agent of the City while exercising any power or performing any duty under this by-law.

Part XVIII. Exceptions and Grandfathering

43. Notwithstanding section 8 of this by-law, any Encroachment authorized under an Encroachment Agreement determined by the Clerk to be valid and binding at the date of enactment of this by-law, shall not require further authorization pursuant to this by-law until the Encroachment Agreement has expired or is terminated.
44. Subject to section 40 of this by-law, this by-law shall apply to all Encroachments which existed or were created before this by-law was enacted and passed.

Part XIX. Conflict and Transition

Conflict

45. In the event the provisions of this by-law are inconsistent with the provisions of the Act or any other act and the regulations thereunder, the provisions of the act or regulation shall prevail.
46. If there is a conflict between a provision in this by-law and a provision of any other municipal by-law, the provision that establishes the highest standard to protect the health, safety and welfare of the general public shall apply.

Terms Severable

47. The terms and provisions of this by-law shall be severable and should any term or provision be found by a court of competent jurisdiction to be legally unenforceable, inoperative or invalid, the remainder of the by-law shall continue to be in full force and effect.

Enactment

48. This by-law shall come into full force and effect on the date it is passed, at which time Policy CrS-C33 is repealed and all by-laws, policies and resolutions that are inconsistent with the provisions of this by-law are hereby amended or repealed insofar as it is necessary to give effect to the provisions of this by-law.

FINALLY PASSED AND ENACTED this 14th day of September, 2020.

Mayor Ian C. Boddy

Briana M. Bloomfield, City Clerk