



The Municipal Corporation of the Town of Fort Erie

BY-LAW NO. 89-07

BEING A BY-LAW TO ADOPT A POLICY FOR ENCROACHMENTS ON MUNICIPAL ROAD ALLOWANCES

WHEREAS Section 8(1) of the said *Municipal Act, 2001*, as amended, provides the powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable 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 9 of the *Municipal Act, 2001*, as amended, provides that a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act, and

WHEREAS Item 1 under the Table to Section 11 of the said *Municipal Act, 2001*, as amended, provides a lower tier municipality and an upper tier municipality may pass by-laws respecting matters within the sphere of jurisdiction for highways, and

WHEREAS a municipality can within its general "highway" powers permit buildings and other structures to wholly or partly occupy or encroach on highways, permit the use of highways for general purposes, and pass such additional measures relating to the highways as Council deems necessary, and

WHEREAS Section 391 of the *Municipal Act, 2001*, as amended, authorizes the Council of a local municipality to pass by-laws imposing fees or charges on persons for services or activities provided or done by or on behalf of the municipality, and for the use of its property including property under its control, and

WHEREAS Section 446(1) of the *Municipal Act, 2001*, as amended, provides that if a municipality has the authority under this or any other Act or under a by-law under this or any other Act to direct or require a person to do a matter or thing, the municipality may also provide that, 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, 2001*, as amended, provides that for the purposes of subsection (1), the municipality may enter upon land at any reasonable time, and

WHEREAS Section 446(3) of the *Municipal Act, 2001*, as amended, provides that the municipality may recover the costs of doing a matter or thing under subsection (1) from the person directed or required to do it by action or by adding the costs to the tax roll and collecting them in the same manner as property taxes, and

WHEREAS Section 446(5) of the *Municipal Act, 2001*, as amended, provides the costs include interest calculated at a rate of 15 percent or such lesser rate as may be determined by the municipality, calculated for the period commencing on the day the municipality incurs the costs and ending on the day the costs, including the interest, are paid in full, and

WHEREAS Section 446(6) of the *Municipal Act, 2001*, as amended, provides the amount of the costs, including interest, constitutes a lien on the land upon the registration in the proper land registry office of a notice of lien, and

WHEREAS the municipality has encountered encroachments appurtenant to abutting properties on municipal road allowances, and

WHEREAS Report No. CS-15-07, as amended, was approved by the Municipal Council of the Town of Fort Erie at the Council-in-Committee on June 11th, 2007 to adopt a policy for encroachments on municipal road allowances, and


WHEREAS the Municipal Council of the Town of Fort Erie has deemed it desirable to adopt a policy for encroachments on municipal road allowances, including the setting of administrative fees for requests for permission to encroach and annual fees relating to Encroachment Agreements, and provisions for removal of encroachments;

NOW THEREFORE the Municipal Council of the Corporation of the Town of Fort Erie hereby enacts as follows:


1. **THAT** the Policy for Encroachments on Municipal Road Allowances be and it is hereby authorized, approved and adopted in the form of Schedule "A" annexed hereto which forms part of this by-law.
2. **THAT** no person shall place or permit to be placed, any fence, tree, shrub, hedge, landscape-berm, vegetative plantings, or other structure or object within a municipal road allowance, except with permission granted in accordance with The Municipal Road Allowance Encroachment Policy adopted as Schedule "A" annexed herto.
3. **THAT** the administration fees and annual fees for encroachment agreements be and they are hereby authorized, approved and adopted in the amounts as set out in Appendix "1" to Schedule "A" annexed hereto which forms part of this by-law.
4. **THAT** the short title of this by-law will be "The Municipal Road Allowance Encroachment Policy".

5. THAT pursuant to the provisions of Sections 23.1 to 23.5 inclusive of the Municipal Act, 2001, as amended, the Clerk of the Town of Fort Erie is hereby authorized to effect any minor modifications or corrections solely of an administrative, numerical, grammatical, semantical or descriptive nature or kind to this by-law or its schedules as such may be determined to be necessary after the passage of this by-law.

READ A FIRST, SECOND AND THIRD TIME AND FINALLY PASSED THIS 18th DAY OF JUNE, 2007.



MAYOR



CLERK

I, Carolyn J. Kett, the Clerk, of The Corporation of the Town of Fort Erie hereby certifies the foregoing to be a true certified copy of By-law No. 89-07 of the said Town. Given under my hand and the seal of the said Corporation this day of _____, 200 .

**POLICY FOR ENCROACHMENTS
ON MUNICIPAL ROAD ALLOWANCES
("The Municipal Road Allowance Encroachment Policy")**

1. **DEFINITIONS**

For the purpose of this policy:

- (a) "**Commercial Encroachments**" shall mean encroachments on a Municipal Road Allowance appurtenant to a commercial use;
- (b) "**Council**" shall mean the Municipal Council of The Corporation of the Town of Fort Erie;
- (c) "**Hinder**" shall mean keep or hold back; get in the way of or make difficult;
- (d) "**Land Committee**" shall mean the Town of Fort Erie Land Committee as established by By-law 168-91, as amended;
- (e) "**Municipal Road Allowance**" shall mean:
 - i. all highways that existed on December 31, 2002,
 - ii. all highways established by by-law on or after January 1, 2003,
 - iii. all highways transferred to the municipality under the *Public Transportation and Highway Improvement Act*,
 - iv. all road allowances made by the Crown surveyors located in the municipality,
 - v. all road allowances, highways, streets and lanes shown on a registered plan of subdivision,which have not been permanently closed by by-law pursuant to the *Municipal Act, 2001* as amended from time to time, or its predecessor legislation.
- (f) "**Other Encroachments**" shall mean encroachments on a Municipal Road Allowance other than those appurtenant to a residential or commercial use, and other than encroachments on a Waterfront Road Allowance;
- (g) "**Owner**" shall mean the registered owner of land abutting a Municipal Road Allowance;
- (h) "**Residential Encroachments**" shall mean encroachments on a Municipal Road Allowance appurtenant to a residential use, other than waterfront encroachments;
- (i) "**Town**" shall mean the Town of Fort Erie;
- (j) "**Treasurer**" shall mean the Town's Director of Corporate Services or designate;
- (k) "**Waterfront Encroachments**" shall mean encroachments on a Waterfront Road Allowance and as more particularly defined in Section 8 hereof;

- (l) "**Waterfront Road Allowance**" shall mean any Municipal Road Allowances leading to the shores of Lake Erie or the Niagara River, from the first road allowance intersecting same to the water's edge.

2. INTRODUCTION

An encroachment occurs when objects are placed on, in, or under the ground space or in the air space of a Municipal Road Allowance, either deliberately or inadvertently. Encroachments may be man-made or natural features and include, but are not limited to:

- a) "structural" ie. construction of fences, gates, decks, buildings, pools, wells, septic systems, docks, retaining walls, parking lots and appurtenances;
- b) "non-structural" ie. pool drainage, waste dumping, etc.; or
- c) "vegetative" ie. planting of floral or vegetable gardens, decorative landscaping including shrubs, trees, etc.

excluding mailboxes and newspaper boxes as further set out in Section 5.4 hereof.

Encroachments are of concern because they:

- a) may restrict or limit the use and enjoyment of Municipal Road Allowances (both open and unopened) which are for the benefit of all abutting property owners, residents, tourists and visitors;
- b) may pose a safety hazard to the public and give rise to potential liability claims from resultant injuries;
- c) may damage the natural environment and undermine the Town's stewardship role in protecting natural features;
- d) may destabilize public lands with resultant damage to adjacent private lands; and
- e) may result in ratepayers absorbing costs to restore degraded Municipal Road Allowances;
- f) may interfere with existing or future municipal infrastructure (ie. drainage, highway improvements, water and/or sewer lines).

It is understood through statute law and common law that an Owner cannot claim title to or acquire any part of a Municipal Road Allowance so encroached by virtue of adverse possession.

3. OBJECTIVES/GOALS OF POLICY

The objectives of this policy are to:

- i) implement a simple administrative process which provides for consistent application to all classes of encroachments on Municipal Road Allowances;
- ii) to provide for administration and annual fees for each class of encroachment;
- iii) to provide a mechanism for enforcement of removal of encroachments where no Encroachment Agreement exists and they are considered not to be in the public interest according to certain guidelines.

While it is generally the policy of the Town not to permit encroachments on Municipal Road Allowances, it is recognized there are occasions where consideration may be given to recognize an encroachment, having regard to the guidelines set out herein including the entry into an Encroachment Agreement.

4. REQUESTS TO PERMIT ENCROACHMENTS

Upon receipt of a request to permit an encroachment, the request shall be referred to the Land Committee for consideration. Notwithstanding the foregoing, in order to facilitate the completion of real estate transaction closing dates or Planning Act Application deadlines where time is of the essence, members of the Land Committee shall be consulted and shall consider the request pursuant to Section 4.1, without the calling of a formal meeting.

4.1 The Land Committee shall consider the following in its deliberations:

- i) status of the Municipal Road Allowance;
- ii) whether the encroachment is specifically prohibited, and if not, generally meets the general and specific guidelines applicable to the class of encroachment, as set out herein.

4.2 The Land Committee shall submit recommendation(s) to Council as to whether the encroachment(s) should be permitted to continue and whether an Encroachment Agreement is required. The Owner shall be notified in advance of the meeting at which Council will consider the recommendation(s) and shall be given an opportunity to address Council prior to Council's consideration of same.

4.3 Council, at its sole option, may exercise its right to demand the removal of an encroachment on a Municipal Road Allowance, or approve any request for an encroachment, and in extraordinary circumstances (proof of which is upon the Applicant) waive and/or vary, as the case may be, any part or parts of this policy, including any or all of the requirements relating to the entering into of an Encroachment Agreement. Council's decision shall prevail over any provisions contained herein.

4.4 In the event Council requires the removal of an encroachment, Council shall pass a resolution requiring same and directing staff to take all steps necessary to effect the removal of the encroachment.

4.5 Encroachments specifically prohibited in Section 8 of this policy shall not require a resolution of Council directing staff to take all steps necessary to effect the removal of the encroachment, unless the Owner has requested relief from the policy and Council has, in its sole discretion, denied such relief.

4.6 In the event Council permits the encroachment and an Encroachment Agreement is required, a by-law shall be passed by Council to authorize the entry into the Encroachment Agreement and registration of same on title, if so approved.

5. GENERAL GUIDELINES FOR CONSIDERING ENCROACHMENTS

The following general guidelines shall be applied when considering encroachments on all Municipal Road Allowances:

5.1 Determine whether that part of the Municipal Road Allowance so encroached upon is required for municipal purposes.

5.2 Determine whether the encroachment:

- i) has been constructed inadvertently;
- ii) has existed for a long period of time;
- iii) is maintained in good repair, used or abandoned;
- iv) poses a safety hazard to the public and gives rise to potential liability claims from resultant injuries;
- v) destabilizes public lands with resultant damage to adjacent private lands;
- vi) damages the natural environment and undermines the Town's stewardship role in protecting natural features;
- vii) is a natural feature which should be preserved or protected – ie. mature trees and sensitive flora or fauna;
- viii) conflicts with the Town's Official Plan Policies or other applicable by-laws;
- ix) interferes with any existing, planned, proposed or possible future municipal improvements;
- x) compromises drainage or interferes with existing or proposed drainage works;
- xi) is minor in nature;
- xii) takes into consideration the surrounding neighbourhood.

5.3 In the case of a structure, determine also whether the encroachment:

- i) is constructed on a permanent foundation;
- ii) is being maintained in good condition.

5.4 Notwithstanding anything contained in this policy to the contrary:

- (a) mailboxes and newspaper boxes for the purpose of facilitating delivery, shall be deemed permitted encroachments, provided that should a concern be identified as to their location, then such mailboxes and newspaper boxes shall be located in a manner and location approved by the Director of Infrastructure Services, in his sole discretion; and
- (b) mature trees, which do not hinder or discourage public access to or on a Municipal Road Allowance, shall be deemed permitted encroachments. Encroachment Agreements shall not be required for such mature trees.
- (c) Notwithstanding Subsection 5.4 (b) above, Council may, in its sole discretion, require the removal of such mature trees in order to facilitate the completion of present or future municipal works or improvements on or to a Municipal Road Allowance.

5.5 The guidelines set out above are not exhaustive. The intent of this policy is to consider each encroachment on a case-by-case basis, while having regard to the guidelines set out herein and the unique features of particular encroachments.

5.6 Notwithstanding the foregoing, additional guidelines shall be considered for Waterfront Road Allowances, as set out in Section 8 hereunder.

6. RESIDENTIAL ENCROACHMENTS

6.1 Background

Typical residential encroachments are structural, non-structural and/or vegetative, appurtenant to a residential use and often inadvertently erected/constructed without the benefit of a survey. These encroachments usually come to the attention of the Town through surveys obtained by proposed purchasers in real estate transactions, or minor variance and consent applications to the Committee of Adjustment.

6.2 Existing encroachments and replacement of existing encroachments **may** be permitted, at the sole discretion of Council.

6.3 New encroachments **shall not** be permitted. No person shall be permitted to build to encroach.

7. COMMERCIAL ENCROACHMENTS– CONSIDERATIONS

7.1 Background

Typical commercial encroachments include parking lots, buildings, roof projections, awnings, signs, and steps appurtenant to a commercial use and often inadvertently erected without the benefit of a survey. An Owner occasionally approaches the Town for permission to build to encroach ie. parking lot.

7.2 It is recognized that commercial encroachments benefit a commercial corporate enterprise. Accordingly, the annual fee for an Encroachment Agreement shall reflect a lease/rental arrangement based upon the area of the encroachment multiplied by the annual taxes for the Owner's property (per square foot cost).

7.3 Existing encroachments and replacement of existing encroachments **may** be permitted, at the sole discretion of Council.

7.4 New encroachments (permission to build to encroach) **may** be permitted, at the sole discretion of Council.

8. WATERFRONT ENCROACHMENTS – ADDITIONAL GUIDELINES

8.1 Background

Generally, encroachments on Waterfront Road Allowances shall only be granted in exceptional circumstances.

It is recognized that removal of some encroachments is necessary in order to carry out improvements within the Municipal Road Allowance or to improve public access to the waterfront.

It is further recognized that wherever practicable, the boundary line between public and private property will be delineated with markers.

- 8.2 Any and all encroachments on Waterfront Road Allowances, including fences and hedgerows, shall be strictly prohibited, save and except for:
- (a) any permanent building, structure or shoreline protective works or any part thereof that are permitted under an Encroachment Agreement at the sole discretion of Council, and
 - (b) mature trees, which do not hinder or discourage public access to the waterfront. Encroachment Agreements shall not be required for such mature trees.
- 8.3 Notwithstanding Subsection 8.2(b) above, Council may, in its sole discretion, require the removal of such mature trees in order to facilitate the completion of present or future municipal works or improvements on or to a Waterfront Road Allowance.
- 8.4 New encroachments **shall not** be permitted. No person shall be permitted to build to encroach.
- 8.5 The Town shall attempt, where practical and if considered appropriate, to seek an exchange of land interests or other valuable consideration from the Owner for permission to continue the use of the Waterfront Road Allowance. ie. encroachment for waterfront land in kind, elimination of seasonal chain link waterfront fences, or agreement to extend public walking rights along the waterfront.

9. OTHER ENCROACHMENTS

9.1 Background

It is recognized that in addition to encroachments on a Municipal Road Allowance appurtenant to residential or commercial uses, and waterfront encroachments, there may be instances of encroachments on Municipal Road Allowances appurtenant to other types of uses ie. agricultural, industrial, institutional, and open space.

- 9.2 Existing encroachments and replacement of existing encroachments **may** be permitted, at the sole discretion of Council.
- 9.3 New encroachments (permission to build to encroach) **may** be permitted, at the sole discretion of Council.

10. ENCROACHMENT AGREEMENT

An Encroachment Agreement formally recognizes the encroachment by both the Town and Owner (and future Owners), and clearly establishes the terms and conditions specific to the permission being granted, including but not limited to the provision that permission for the encroachment is being granted until such time as it is required to be removed by the Town, in its sole discretion. A Reference Plan deposited on title clearly identifies the extent of the encroachment, and serves to assist in eliminating subsequent enlargements of the encroachment without permission. Registration of the Agreement on the Owner's property and the subject portion of the road allowance shall occur. Registration is effective notice to subsequent Owners, and provides an enforceable, clear recourse to the Town in the event of default by the Owner of any of the provisions, including provisions for removal of the encroachment.

- 10.1 In the event Council grants permission for an encroachment(s), the Owner may be required to enter into an Encroachment Agreement according to the terms and conditions contained in the Town's form of Agreement.

11. REMOVAL OF ENCROACHMENTS

- 11.1 If an Owner is required by the Town to remove an encroachment, the Owner shall do so at the Owner's sole expense.
- 11.2 The Town shall provide the Owner with written notice to remove the encroachment by a specified date and failing which the Town will be at liberty to enter upon the Owner's lands, where necessary, to undertake the removal of the encroachment in accordance with the *Municipal Act, 2001*, as amended from time to time. Such date shall be a minimum of thirty (days) notice from the date of mailing of the notice, and may be for such longer period as deemed appropriate based upon weather conditions, the scope of the work to be undertaken, and whether the Owner is a seasonal resident.
- 11.3 Where removal of an encroachment is required and it is not removed within the specified time, in addition to any other remedies available to it by law, the Town may, upon reasonable notice to the Owner, enter upon the Owner's lands where necessary, and through its agents, employees, contractors or otherwise, remove the encroachment without any liability and add the costs of so doing to the municipal tax roll of the Owner and collect the same in the same manner and with the same priorities as municipal taxes. The Owner shall not be entitled to any compensation of any kind for removal of the encroachment.
- 11.4 In addition to the collection of costs by adding the same to the municipal tax roll, the Town may also register a notice of lien in the land registry office on the Owner's land for such costs. Upon receiving payment of all costs payable plus interest accrued to the date of payment, the Town shall register a discharge of the lien in the land registry office.
- 11.5 Notwithstanding the foregoing, the provisions of the *Municipal Act, 2001*, as amended from time to time, shall at all times govern.

12. ADMINISTRATION FEES, ANNUAL FEES AND ASSOCIATED COSTS

12.1 Background

Administration fees are based on cost recovery and include administrative time reviewing surveys, visiting sites, formulating recommendations, preparing the Encroachment Agreement, facilitating and registering the Agreement. Applying fees eliminates the benefit to the Owner at the expense of taxpayers generally.

Annual fees are charged for the use of municipal land in a similar manner as a lease/rental arrangement.

- 12.2 Administration fees and annual fees for permission to encroach in the amounts as set out in Appendix "1" annexed hereto be and they are hereby approved.

- 12.3 Where Council authorizes the entry into an Encroachment Agreement, the Owner shall be responsible for all associated costs, including but not limited to:
- i) The cost of a Reference Plan prepared and deposited on title by an Ontario Land Surveyor;
 - ii) All title search costs;
 - iii) All fees payable for the registration of the Encroachment Agreement on the registered title of the Owner's property and the Municipal Road Allowance;
 - iv) Advertising costs;
 - v) Additional conveyancer and/or legal fees and disbursements, if applicable;
 - vi) Any other fees, costs, charges which the Town may incur relating to the processing of the Encroachment Agreement;
- all of which shall be in addition to the administration fee and annual fee payable as set out in Appendix "1" annexed hereto.
- 12.4 The full amount of the applicable administration fee shall be payable and collected with the Owner's request to permit an encroachment, and is non-refundable regardless of whether Council approves the request.
- 12.5 Goods and Services Tax (g.s.t.) shall be charged and collected, where applicable, by the Treasurer on all Annual Fees.
- 12.6 The annual fee, plus g.s.t. where applicable, shall be prorated for the year in which the Encroachment Agreement is entered into or permission to encroach is given, and such prorated amount shall be payable and collected prior to registration of the Encroachment Agreement or immediately following the granting of permission if an Encroachment Agreement is not required.
- 12.7 The annual fee shall be increased annually in accordance with the Consumer Price Index (C.P.I.) as determined by the Treasurer.
- 12.8 The annual fee and C.P.I. increase (plus g.s.t. where applicable) for each subsequent year shall be added to the municipal tax roll of the Owner and collected in the same manner and with the same priorities as municipal taxes.
- 12.9 The annual fee received for encroachments on Waterfront Road Allowances shall be credited to the "Waterfront and Tourism Development Reserve Fund" for future improvements to the waterfront.

APPENDIX "1" TO SCHEDULE "A" OF BY-LAW NO. 89-07

TABLE OF ADMINISTRATION AND ANNUAL FEES

CLASS OF ENCROACHMENT	ADMINISTRATION FEE	ANNUAL FEE
RESIDENTIAL	\$300.00	\$150.00 plus g.s.t. and C.P.I.* increase annually
COMMERCIAL AND OTHER (ie. Industrial, Agricultural, Institutional and Open Space)	\$300.00	Calculated based on area of encroachment multiplied by the Owner's annual taxes (first year) for per square foot cost, or \$150.00, whichever is greater, plus g.s.t. and C.P.I.* increase annually
WATERFRONT	\$500.00	\$150.00 plus g.s.t. and C.P.I.* increase annually

* "C.P.I." means Consumer Price Index