

Background: Yard and Lot Maintenance By-law PH-9

Prepared by Brendon Samuels, Chair of ESACAC, July 5, 2023

The purpose of this note is to provide background information related to the Yard and Lot-Maintenance By-law PH-9 and to clarify the intent behind requesting a review of the by-law and its enforcement. I will describe potential legal risks to the City associated with the by-law's enforcement. While it is generally not feasible to sue a government for a by-law or policy, governments can be sued for their operation of a law, such as through enforcement of a municipal by-law. Inconsistent or unjust enforcement of a by-law can expose a municipality to liability. In its current form, London's Yard and Lot Maintenance By-law poses numerous plausible liability scenarios.

The by-law and the Naturalized Areas and Wildflower Meadows policy it references contain language that is vague and inappropriately prescriptive. The resulting uncertainty may lead staff to rely upon subjective interpretations of the by-law, to use varying discretion when following up on enforcement complaints and assessing compliance, or to follow procedures outside of what is written in the by-law itself. For example, the by-law defines "*domestic waste*" as including "*leaves and garden refuse*". Sections 4.6 and 4.7 indicate perennial gardens and wildflower meadows may be exempted from enforcement of the by-law, especially section 2.5 "*Land – clean- cleared – free of refuse: Every owner shall keep his land clean, cleared and free of refuse*", if only "*provided that there is no waste*". If the by-law is to be read literally, then leaves that have naturally fallen on the ground could technically be considered "waste" and must therefore be cleared for an exemption outlined in sections 4.6 or 4.7 to apply.

The by-law's definition of "*cleared*" includes "*removal of stock piles of soil or other aggregate material not required to complete the grading of the lot on which the stock pile is located*". The by-law defines "*border*" as "*the cleared land between the side and/or rear property line and a naturalized area or wildflower meadow*" and it defines "*buffer strip*" as "*a border of a minimum of 0.9 m wide that delineates a wild flower meadow or naturalized area.*" Section 3.7, Private property, clear buffer strip, states: "*No person shall fail to clear a buffer strip.* Based on the by-law's definition of "*cleared*", how much soil, compost or other material is considered a "stock pile" that must be removed from a buffer strip? Could leaves that fall from trees and are allowed to decompose, or exposed sand or soil maintained as habitat for solitary bees, be considered a "stock pile" by a complainant or enforcement officer?

Suppose that municipal compliance staff decide they are not going to enforce a certain part of the by-law, or they are going to carry out enforcement in ways that are not directly prescribed in the by-law. For example, last month I personally received a by-law notice that instructed me to "*clear all grass/weeds exceeding 8 inches in height*", even though my yard clearly includes a naturalized area that qualifies as exempt under the by-law. "*Grass*" and "*weeds*", as they appeared in my notice and in the by-law itself (but are never defined) are not legally valid terms because they describe broad categories that encompass many species, and are therefore too vague for the law to be reproducible (Bell v. City of Toronto, 1996). What does by-law enforcement consider to be "*weeds*"? Only a subset of species that are subject to complaints are listed as noxious weeds under the provincial Weed Control Act, and by-law enforcement staff do not seem to have the capability to identify specific plants to determine their status.

When I corresponded with City staff about the notice I received for my yard, I was told that the primary scope of enforcement of the grass/weeds part of the by-law is where there is a right-of-way (e.g., sidewalk, boulevard) and a buffer strip has not been cleared, potentially blocking lines of sight or impacting pedestrian safety. Unlike by-laws in other municipalities like Toronto or Ottawa, London's Yard and Lot Maintenance By-law does not reference right-of-way or site lines, and instead prescribes a cleared border between the side and/or rear property line. So, following the instructions given in the notice I received to "*clear all grass/weeds exceeding 8 inches in height*", then the by-law appears to indicate that I must remove weeds and grass growing within the border between the side

and/or rear property line, including in my naturalized backyard. This reading of the by-law differs from what was explained to me by City staff. The complaint brought against my yard did not lead to enforcement.

If enforcement of the by-law in cases such as my yard, or the [infamous pollinator garden with Common Milkweed](#) (not a noxious weed) that was destroyed last year, lead to harms, including destruction of property or violation of section 2(b) of the Canadian Charter of Rights and Freedoms which guarantees freedom of expression, then there is a significant risk that enforcement of London's by-law could be challenged in court. The Ontario Superior Court of Justice has repeatedly ruled that the guarantee of freedom of expression provided in the Charter applies to yards, in cases where other comparable municipal by-laws were found to be unconstitutional.

There are numerous negative environmental impacts associated with enforcement of the by-law. Many indigenous species of grass and other plants used in landscaping naturally grow to over 8 inches in height. The by-law requires that all plants must be continuously cleared within borders and buffer strips, or in yards where an exemption does not apply, even in cases where there is no apparent risk to safety and the yard is otherwise in compliance with the Weed Control Act. Clearing may affect these species' ability to reproduce (e.g., to generate flowers and seeds, or to spread rhizomatically) and reduce their ecosystem services (e.g., providing habitat, shade, limiting stormwater). Given the dearth of available public information about the by-law, complaint-driven enforcement is perceived in the London community as reinforcing antiquated cultural practices of maintaining manicured lawns that are contributing to biodiversity decline. The threat of being targeted by complaint-driven by-law enforcement and held to an ambiguous, prohibitive standard, and the risk of incurring monetary penalties from failing to comply with the by-law, may discourage Londoners from undertaking environmental stewardship projects on private property.

The Naturalized Meadows and Wildflower Policy referenced in the Yard and Lot Maintenance By-law includes the following definition: "*Wildflower Meadow means a specialized habitat within a naturalized area, which is dominated by native species of flowers and grasses. The area would require periodic mowing (once or twice per year) in order to prevent the growth and establishment of woody shrubs and trees.*" This language prescribes that in order to be considered a Wildflower Meadow, by definition an area would require mowing once or twice per year. The City does not seem to consistently enforce this requirement. Annual or biannual mowing is not recommended practice for establishing and maintaining meadows in many situations. Furthermore, mowing is not strictly necessary to prevent the growth and establishment of woody shrubs and trees, which may not occur in every meadow and may include beneficial native species. Undesired woody shrubs and trees can be managed by other means that are less harmful to surrounding vegetation.

Enforcement procedures used by municipal staff should be clearly prescribed in the by-law, so they can be standardized, transparent and reproducible, to protect the City from liability, and to protect residents from undue harassment by complainants who dislike their landscaping. The [City of Toronto's municipal code](#) can serve as a model by-law. For instance, in Toronto, any complainant who claims that a private land is in contravention of the by-law is required to identify which harmful species are present and the specific risk or harm they pose.

The proposed motion includes a clause requesting that enforcement of the Yard and Maintenance By-law, in cases where there is not an immediate safety risk, be paused while the by-law is under review. If the City undertakes a review of the by-law, the by-law will receive additional public attention and there may be an increase in the number of complaints about yards submitted to the City. Given the ambiguities and conflicts within the by-law as outlined above, the legal defensibility of its enforcement may be brought into question. Suspending enforcement of the by-law would address this concern, but if this is not possible, I recommend that the City publishes additional information online to clarify the scope of by-law enforcement to help limit the volume of complaints (i.e., sharing currently prohibited and permitted landscaping practices, compliance requirements as outlined in the by-law).

Yard and Lot Maintenance By-law PH-9 Definitions:

Domestic Waste

“domestic waste” shall mean any article, thing, matter or effluent belonging to or associated with a residence, household or dwelling unit that appears to be waste material and includes but is not limited to the following classes of waste material:

(a) grass clippings, tree cuttings, brush, leaves and garden refuse;

...

Cleared

“cleared” includes the removal of weeds or grass more than 20 centimetres (8 inches) in height and the ***removal of stock piles of soil or other aggregate material not required to complete the grading of the lot on which the stock pile is located***, and includes the draining, the treatment and/or the disposing of water on any property where there is a swimming pool which is a health or safety hazard, or is malodorous or is a breeding place for mosquitoes;

Border

“border” shall mean the cleared land between the side and/or rear property line and a naturalized area or wildflower meadow.

Buffer Strip

“buffer strip” shall mean a border of a minimum of 0.9 m wide that delineates a wild flower meadow or naturalized area.

By-law provisions:

3.7 Private property – clear buffer strip

No person shall fail to clear a buffer strip.

4.6 Perennial gardens – exemption

This by-law does not apply to perennial gardens, provided that the perennial gardens are managed in accordance with the Weed Control Act and provided that there is no waste.

4.7 Wildflower meadow – exemption

This by-law does not apply to a wildflower meadow or a naturalized area provided that those areas are managed in accordance with the Weed Control Act, provided that there is no waste, and provided that they do not encroach within the buffer strip.