

**209 Dawlish Avenue - Response to Legal Questions
Raised by Deputants - Encroachment Agreement
Request**

Date:	July 28, 2010
To:	North York Community Council
From:	City Solicitor
Wards:	Ward 25 – Don Valley West
Reference Number:	IBMS – No. 10-131026

SUMMARY

Item No. NY35.5, amended by North York Community Council at its meeting on June 22, 2010, referred the Encroachment Agreement Request Report dated June 3, 2010, from the Director, Municipal Licensing & Standards, North York District, to the City Solicitor to report to the North York Community Council meeting on August 17, 2010, on the legal questions raised by the deputants and correspondents.

FINANCIAL IMPACT

This report has no financial impact beyond what has already been approved in the current year's budget.

DECISION HISTORY

On February 24, 2005, the Committee of Adjustment refused an application for a consent to sever the property at 207 Dawlish Avenue into two lots. The owner of 207 Dawlish Avenue appealed the Committee of Adjustment's decision to the Ontario Municipal Board (the "OMB"). City Council at its meeting on May 17, 18 and 19, 2005, adopted Clause 30 of North York Community Council Report 4 instructing the City Solicitor to

attend at the OMB in opposition to the severance application. Clause 30 of Report 4 can be found at the following link:

<http://www.toronto.ca/legdocs/2005/agendas/council/cc050517/ny4rpt/cl030.pdf>

The owner of 207 Dawlish Avenue applied to the City for site plan approval and ravine permit approval to permit the construction of two new detached dwellings. Both these matters were appealed to the OMB and consolidated with the appeal of the severance refusal. On January 26, 2006, the OMB approved all applications. Subsequently the City and the owner entered into a Site Plan Agreement that was registered on title. The property known municipally as 209 Dawlish Avenue was created by the severance.

In 2007 the owner of 207 and 209 Dawlish Avenue applied for site plan approval for a revised proposal for two new single detached dwellings. On February 8, 2008 the City approved the application. The Site Plan Agreement previously registered on title was amended to reflect the revised approved plans. Building permits were issued for the construction of detached dwellings on the two lots based on the 2008 approved site plan drawings.

In March 2010 an application for an encroachment agreement to permit a retaining wall in the Dawlish Avenue right-of-way was submitted to the City. The retaining wall is required to support the proposed level driveway for 209 Dawlish Avenue. A Report dated June 3, 2010 from the District Manager, Municipal Licensing and Standards, North York District, recommending approval of the encroachment application was referred to the City Solicitor to Report to the August 17, 2010 meeting of North York Community Council on legal questions raised.

ISSUE BACKGROUND

Correspondents and Deputants at the June 22, 2010 meeting of North York Community Council have raised a several legal issues relating to the proposed encroachment of the retaining wall. These will be addressed in the Comments section of this report.

COMMENTS

Provided below are the individual issues raised by correspondents and deputants and comments on each of the issues:

Revised Site Plan

The Ontario Municipal Board approved a site plan for the properties at 207 and 209 Dawlish Avenue in 2006. As noted above, the owner applied for an amended site plan in 2007. The amended site plan was approved by the Director of Community Planning, North York District on February 8, 2008.

It has been suggested that, because the OMB had granted an approval in 2006, the Director did not have the authority to approve the amended site plan in 2008. I do not agree.

Under s. 114 of the *City of Toronto Act, 2006*, an owner of land can apply for approval of a site plan, and the City is obliged to consider and make a decision on that application. The owner is not prevented from applying for, nor is the City relieved of the obligation to evaluate and make a decision respecting, approval of a site plan on the basis that a previous site plan has been approved by the OMB.

I would add that there is no obligation under s. 114 of the Act that the application be circulated to neighbouring land owners.

Building Permit Issued in Error

As noted above, the amended site plan was approved in 2008. I am advised the building permit for the house at 209 Dawlish Avenue is in accordance with that approved site plan.

It has been suggested a building permit is required for the retaining wall. I am advised by the Deputy Chief Building Official, North York District, who interprets and applies the *Building Code Act*, that no permit is required for the retaining wall.

I am not aware of any other issue relating to the building permit.

Access to Dawlish Avenue

The site plan originally approved by the OMB and the more recently approved site plan provide for access by driveways from 207 and 209 to Dawlish Avenue. I am advised that the driveway for 209 has been relocated to a minor degree and that the Director of Community Planning has determined it is substantially in accordance with the approved plan. This is in keeping with the general common law principle that a property that abuts a public street should be granted access to that street unless there are compelling reasons not to grant access. There is nothing inherent in the closing of a portion of Dawlish Avenue that would prevent access to the part of Dawlish Avenue remaining open where the locations and dimensions of the lots and their respective driveways would physically permit access.

Streets By-law Prohibition

It has been suggested s. 7 (1) of Streets By-law No. 21621 of the former City of North York prohibits the encroachment of the retaining wall because the by-law prohibits placing "building material" on a road allowance. As is often the case, it is necessary to review the whole of the subsection, and not just two selected words.

The prohibition is against placing, throwing or depositing on a road allowance "building material, snow, dirt, filth, glass, handbills, paper, or other rubbish, refuse or garbage or the carcass of any animal". Clearly, the prohibition is against littering and dumping, not against permitting an encroachment by an object made of building materials. This is consistent with the practice of all four community councils under the delegation provisions of the Procedural By-law to consider and decide upon applications for permission to encroach as delegated by City Council.

Consideration of Application to Encroach

The owner has a right to apply for permission for the retaining wall to encroach on the street allowance and North York Community Council has a duty to consider and evaluate the application on its merits. The decision must be made in good faith, and with consideration of all relevant factors. The fact that the retaining wall has been constructed beforehand and without permission is not determinative.

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SIGNATURE

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