

From: [Justine Reyes](#)
To: [Mayor Tory](#)
Cc: [Planning and Housing](#); kcooper@toronto.ca; [Nina-Marie Lister](#); ljohnson051116@gmail.com; [David Donnelly](#); [Denisa Mertiri](#)
Subject: Municipal Code, Chapter 489 "Grass and Weeds"
Date: May 19, 2021 10:54:31 AM
Attachments: [image001.png](#)
[2021 05 19 Letter to Mayor Tory & Committee Turfgrass.pdf](#)

Dear Mayor Tory,

Please find enclosed a letter from Mr. Donnelly, regarding the proposed amendments to the City of Toronto Municipal Code, Chapter 489 "Grass and Weeds".

By way of this email, we are also submitting this correspondence to the Planning and Housing Committee to be considered at its meeting on Thursday, May 20, 2021.

Sincerely,

Justine Reyes

Articling Student

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Please note: In response to COVID-19 recommendations made by Toronto Public Health on March 16 our office will continue to work remotely at this time. Effective March 18, all in-person meetings have been cancelled. As our staff has limited access to phone messages, we request that you utilize e-mail correspondence as your primary contact method with our office at this time.



David R. Donnelly, MES LLB
david@donnellylaw.ca

May 19, 2021

John Tory
Mayor of Toronto
Toronto City Hall
100 Queen St W, 2nd Fl
Toronto, ON M5H 2N2

**Re: Reforming Municipal Code Chapter 489, Grass and Weeds
Toronto - Stop Prosecuting Nature**

Dear Mayor Tory,

As you may recall, Donnelly Law represents Prof. Nina-Marie Lister and Mr. Jeremy Guth, owners of a residence at 66 Hillcrest Avenue, City of Toronto, which contains a carefully constructed and tended natural garden.

Last year, Toronto By-law Enforcement advised our clients that their natural garden was in violation of *Municipal Code Chapter 489, Grass and Weeds* (the "By-law") for containing grasses and flowers and other plants above 20cm in height. Our clients were threatened with conviction, forced mowing of their natural garden and fines of up to \$5,000.

Our clients very much appreciate your visit to their garden last October and your thoughtful comments. The enforcement action against them has disappeared into the ether.

We write to you and the Planning and Housing Committee today to provide our review of the proposed amendments to the City of Toronto *Municipal Code, Chapter 489 "Grass and Weeds"*, the source of our clients' original complaint.

City of Toronto must stop Prosecuting Nature

We appreciate that the City has been responsive in undertaking a review of the By-law and has proposed a revised version to come before the Planning and Housing Committee this week on Thursday, May 20th. Respectfully, while a

number of positive reforms have occurred, including the removal of the natural garden exemption, the proposed by-law contains a number of concerning clauses and notably, as written, still allows the prosecution of environmental and aesthetic choices on private property, which is unconstitutional.

Vague Definition of "Turfgrass"

On May 13, 2020, Staff recommended that:

1. City Council amend City of Toronto Municipal Code, Chapter 489, Grass and Weeds, as follows:

Maximum height of turfgrass

1. Add the following definition for turfgrass to section 489-1:

TURFGRASS: Ground cover of various perennial grasses grown for lawns, of a type that forms a dense, uniform turf if mown.

With respect, that definition of "turfgrass" is vague and can be used to prosecute anyone that allows grass, flowers, forbs, etc. to grow more than 20 cm. Further, the definition of turfgrass will inadvertently exclude Eco-Lawn and other biodiverse native grass mixtures that support the City's own policies to encourage biodiversity and pollinator-friendly landscapes. We urge your Staff to eliminate any reference to maximum height or mowing in the By-law.

Problematic Prohibited Plants List

Further, the proposed prohibited plants list is problematic and requires broader and further consultation, specifically with Indigenous knowledge keepers, elders and community members as well as invasive species experts. Currently the proposed prohibited species list is confusing. Although it includes some plants that are listed in the *Ontario Weeds Act* and/or by the Ontario Invasive Plants Council, it also includes plants that are edible or that have medicinal or cultural benefits as well as plants that may be non-invasive in native landscapes.

Further, many species on the proposed prohibited plants list are common on City-owned properties. Invasive weeds growing on these properties are a significant seed-source for nearby properties whose owners will now be liable (with substantially increased fines) for their removal under the proposed By-law.

It is the City's responsibility to ensure wide consultation and consensus on any list of prohibited plants. This list must include only the most invasive plants that pose

specific threats to ecological and human health and safety. In Toronto, this list is remarkably short; it's nature we're talking about, not some enemy.

Further, the enforcement process must further the aims of the By-law. Enforcement officers must be trained in specific plant identification, including on all of the species on the proposed list and on any turfgrasses. Such training is necessary as experts agree that even trained botanists find invasive species difficult to identify.

Additionally, the sight-line clearance that residents are required to maintain for safety must be clearly specified in the By-law. This must include specific and standardized sight-line triangle measurements to allow residents access to the rules they are required to follow in order to remain in compliance, and to avoid arbitrary and vague enforcement. Last year, our firm represented a resident whose yew trees stuck out a few centimetres onto the sidewalk. A Notice of Violation was sent to her for keeping "dangerous" trees. Within 140 metres of her property, there were at least 5 more "serious" Code violations with no enforcement action. The City of Toronto needs to stop prosecuting nature.

Finally, it is unclear whether the aim of enforcement is the *eradication* of prohibited species or simply their *control*. Plants experts will attest that a standard of eradication is impossible to achieve for many of the proposed prohibited species. This clarification must be made in the By-law's enforcement provisions, with specific reference to the list of prohibited species.

In our opinion, the first Violation Notice issued under the revised By-law will be liable to a successful legal challenge.

Enforcement Issues

Excessive Fines

Regarding enforcement, the By-law also has several odd provisions, which further reinforce the likelihood of legal challenge. For example:

6. Update the notice, failure to comply and offence provisions to enable the City to conduct inspections, issue orders for compliance, take remedial action and take any other enforcement activities consistent with the authorities in the City of Toronto Act, 2006, including:

- a. Increasing the maximum fine to \$100,000;
- b. Adding a special fine in an amount equal to any economic gain obtained from non-compliance; [emphasis added]

Maximum fines of this nature may be appropriate for corporations committing serious offences, but they are way out of scale for homeowners, even neglectful ones. In addition, the so-called special fine for economic gain is not explained and is hard to understand in the context of this By-law. What does it mean?

No Violation Minimum Requirement

For enforcement to be effective in upholding the intention of the By-law (which is now focused on supporting native biodiversity and managing invasive species rather than grass-cutting), the revised by-law must include enforcement changes. Chief among these is the need for a minimum requirement for complainants to specifically identify the nature of the infraction before an Advisory Notice is sent and investigation or enforcement triggered. Complainants should be required to identify specific health and safety issues and/or the prohibited plant that is the source of the problem.

Complaints that make any reference to appearances or aesthetics should be ignored on the basis that the City cannot legally investigate or enforce aesthetics or expression, as articulated by the courts. If the City continues to investigate complaints based on subjective appearance standards, and devote resources to their enforcement, the By-law will continue to undermine private property owners' efforts to support biodiversity and put the City at risk of a legal action given that the proposed by-law does not protect citizens' constitutional rights to a natural landscape without the natural garden exemption.

This matter has already been litigated. *Bell v Toronto (City)* was one of the earliest cases involving the challenge of a "weed and grass" by-law. Ms. Bell was an enthusiastic environmentalist who grew a small natural garden on her property. She was given a City Inspector's order to cut the weeds and grass in her yard, which were alleged to be "excessive" under a by-law similar to the Chapter 489 By-law, with the exception of the natural garden exemption.

In the decision, the Court adopted the evidence of an expert, Mr. James Hodgins, an expert in naturalistic landscaping:

[26] Mr. Hodgins pointing to a half dozen species of grasses, all of which are over a metre in height, which grow in the flower beds outside the Toronto City Hall. According to his evidence, the effect of a 20-cm. height restriction (which he described as "bizarre, incomprehensible and arbitrary") would be to "sterilize" and "devastate" naturalized gardens, both aesthetically and ecologically.

Mr. Hodgins testified that about 90 per cent of native plant species grow higher than 30 cm.

In conclusion, Justice Fairgrieve found that the section of the by-law dealing with excessive growth of weeds was void for vagueness and is, on that account, invalid and unenforceable, and that finally:

[54] ...The by-law has a direct effect on the appellant's freedom of expression and, in my view, clearly violates s. 2(b) of the Charter.
[emphasis added]

The revised By-law as currently drafted is once again sending us down the same, avoidable path.

No Appeals Process

Additionally, we note that there is no appeals process in the By-law. If By-law officers (even with the addition of plant-identification training) misidentify plant species and order them removed, residents have no recourse to appeal the order, except to court. Many of the plants on the proposed prohibition list have multiple “look-alike” plants and grasses. They are notoriously difficult to correctly identify—even for trained botanists.

Conclusion

There are several positive attributes to the revised By-law worth celebrating. These include narrowing the prohibited species list to only truly noxious invasive plants. This gain will be off-set, however, by the potential for over-zealous enforcement of the new “turfgrass” section of the By-law, an invented term that has no standing in ecology or botany. Gaping loopholes in definitions will continue to facilitate vague enforcement based on aesthetics, and worse, hold private homeowners liable for weeds propagated on City-owned lands blowing seeds onto their yards.

We urge you to invest the time and engage in the consultation needed to correct these deficiencies in the revised By-law. Toronto has led with excellent public policy on biodiversity, including the encouragement of natural gardens. It now needs to do the same for all citizens in their own yards and gardens. In the meantime, we reiterate our request made to you in person last October: please enforce a moratorium on enforcement until the new by-law is approved.

During the ongoing pandemic, the City's resources are stretched and urgently needed to help communities build back better, not wasted mowing down buttercups and butterflies.

Please do not hesitate to contact me at 416-572-0464, or by email to david@donnellylaw.ca, cc'ing denisa@donnellylaw.ca and justine@donnellylaw.ca should you have any questions or concerns.

Yours Truly,

A handwritten signature in blue ink, appearing to read "D. Donnelly", with a long horizontal flourish extending to the right.

David R. Donnelly

cc. Client
Planning and Housing Committee