

Memorandum

Date: July 7, 2020

To: Members of Council

From: Laura Hall, Acting General Manager, Corporate Services / Acting Town Clerk

Subject: Feasibility of Regulating Damage Caused by Trees to Privately Owned Fences

Background

In 2017, Council enacted a new Fence By-law to update the regulation of fences within the Town. The focus of the By-law is to ensure residents comply with required standards on their own properties. Therefore, it does not currently include regulations to resolve situations where a tree on a property is damaging a fence on a separate lot. As this could cause hardship for a fence owner, at the February 18, 2020 Town Council Meeting, members of Council directed Staff to review including a provision in the Fence By-law to address trees causing damage to fences. Therefore, the purpose of this memo is to examine the feasibility and implications of including such a regulation.

Application and Jurisdiction of the Fence By-law

The Fence By-law sets standards that residents must comply with to ensure fences on their lots remain appropriately uniform, attractive and safe. Unlike the Property Standards By-law that regulates trees, the Fence By-law specifically sets standards for fences and therefore does not have provisions that apply to trees or other objects causing damage to a fence on a neighbouring lot. Currently, if the Town were to receive such a concern the Fence By-law may apply to require the owner of the fence to repair it to a structurally sound condition. The Property Standards By-law would only apply and require removal of a tree if it was decayed or damaged and creating an unsafe condition. Adjudicating the property damage dispute between neighbours regarding the fence would not be the jurisdiction of the Town. This aspect is considered a civil matter as adjudicating property damage disputes is the jurisdiction and role of the court.

Including a regulation in the Fence By-law to intervene in disputes where a tree is suspected to have caused property damage to a neighbouring fence may go beyond its authority, encroach on the jurisdiction of the court and open the By-law to challenges. The role of the By-law is to establish and provide for enforcement of standards, not to adjudicate property damage disputes between individuals.

Review of Other Municipalities

Staff reviewed Fence By-laws from other municipalities to determine if regulations concerning trees causing damage to fences are common. It is important to note that, in addition to general Fence By-laws that regulate height and condition, similar to the Town's, many municipalities have enacted separate Division Fence By-laws. The purpose of this latter By-law is to apportion costs between neighbours for construction and maintenance of fences that mark the boundaries between their properties.

General Fence By-laws were analyzed from Richmond Hill, Waterloo, Halton Hills and Mississauga. Based on this review, regulations concerning trees damaging fences in this type of By-law are uncommon as none



contained such provisions. In contrast, Division Fence By-laws from Brampton, Mississauga and Burlington all provide that in certain circumstances where a tree damages a division fence, such as it falling, the owner of the land on which the tree stood is responsible for the costs of its removal and fence repairs. Pursuant to the *Municipal Act*, Division Fence By-laws permit residents to recover costs through Provincial Offences Court if a neighbour fails to cover such costs as required. Therefore, these By-laws make residents responsible for independently collecting evidence and bringing their case to court. Similar to property damage matters, municipalities do not become directly involved in the fence disputes or provide enforcement. Although the Town has not previously enacted a Division Fence By-law, one will be brought forward for Council's consideration in 2020.

Feasibility of Enforcement Through the Fence By-law

Staff have analyzed the feasibility of enforcement for trees causing damage to fences through the Fence By-law. For neighbour disputes, two types of trees are defined in law. First, a straddle tree occurs when a trunk is growing on a property line. The tree is jointly owned by the adjacent neighbours and cannot be removed without consent from both. Alternatively, a border tree occurs if the trunk is solely on one lot even if the canopy or roots extend onto an adjacent property. A neighbour may cut branches or roots to address a nuisance.

Disputes over these trees are private civil matters as they involve weighing and adjudicating competing property rights which is not the role of municipal enforcement. Therefore, applying enforcement tools such as Orders or laying charges is problematic. For a border tree, an Order could not be issued to the tree owner to prune roots or branches if this required them to trespass on neighbouring property. The fence owner, likely the complainant, may then be subject to an Order as they have the right to prune roots or branches on their lot to mitigate ongoing damage and would be responsible to maintain their fence in a structurally sound condition. Impartial enforcement would only be concerned with the required standards being met and not consider who is at fault. Further, by issuing an Order for a tree to be entirely removed the municipality would be weighing and adjudicating competing property rights between the owner of the fence and the owner of the tree which is not within its jurisdiction and would be open to challenge. Similarly, for a straddle tree, each of the adjacent property owners would have ownership as well as responsibility and issuing an Order for removal could infringe property rights if one party wanted the tree to remain. Adjudicating property rights between neighbours would need to be addressed through civil court.

The issue of a tree causing damage to a fence is framed as a fence issue but it is actually a tree nuisance issue for which the municipality has no role. Tree maintenance, abatement or removal would be looked to for solutions to address unmaintained fences when it's the fence that is within the scope of the municipal regulatory authority and not the tree (unless deemed to be decayed or damaged and causing an unsafe condition).

Next Steps

Based on the lack of jurisdiction for municipalities and limits to enforcement, staff believe that damage to fences caused by trees continue to remain as civil matters.

A proposed Division Fence By-law will be brought forward for Council's consideration in 2020. A Section will be included in the proposed By-law to specify that, where a tree damages a jointly owned division fence located on a property line, the owner of the land on which a tree is located will be responsible for the cost of fence repairs and tree removal if it has fallen or is damaged creating an unsafe condition. This will provide a mechanism for residents to seek compensation for damage to a fence. However, it is important to note that the public will be independently responsible for determining if the By-law will apply in their circumstances, completing an investigation and bringing a case forward to Provincial Offences Court.