TO: Chair and Members
Public Works Committee

WARD(S) AFFECTED: CITY WIDE

COMMITTEE DATE: April 4, 2011

SUBJECT/REPORT NO:
Encroachments on City Property - Policy and Procedure (PW11024) - (City Wide)

SUBMITTED BY:
Gerry Davis, CMA
General Manager
Public Works Department

PREPARED BY:
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RECOMMENDATION

(a) That the Encroachment on City Property Policy, attached to Report PW11024 as Appendix “A”, be approved;

(b) That the Encroachment on City Property Procedure, attached to Report PW11024 as Appendix “B”, be received and the General Manager of Public Works be authorized and directed to amend the procedure as required.

EXECUTIVE SUMMARY

The purpose of this report is to formalize written policies and procedures detailing steps and controls to manage processes and agreements for encroachments and outdoor boulevard cafés. Internal Audit Report 2007-08 regarding encroachment agreements and Internal Audit Report 2007-09 regarding temporary encumbrances and outdoor boulevard cafés identified areas for improvement and recommended that formal policies and procedures be developed relating to encroachment agreements and outdoor boulevard cafés.

One of the Public Works Department’s responsibilities includes the administration and care of City property including road allowances, parks, cemeteries, open spaces or any property owned or managed by the City. The Encroachment on City Property Policy as attached as Appendix A (the “Policy”) establishes terms and conditions upon which the City may entertain agreements to permit encroachments in, on, under or above City Property. The accompanying procedure (the “Procedure”) provides a more detailed
overview of the process that Public Works staff will use to consider requests for encroachment agreements (including outdoor boulevard cafés agreements) or for permits to allow temporary access over park lands. An application form and information brochure will also be developed to assist owners in following the process.

Alternatives for Consideration - See Page 4

FINANCIAL / STAFFING / LEGAL IMPLICATIONS

Financial: Owners applying for encroachment agreements and outdoor boulevard café agreements are required to pay the applicable fees as per the City of Hamilton User Fee and Charges By-law to offset the City's processing costs.

Staffing: There are no staffing implications associated with the recommendations in this report as the activities in the policy and procedure are existing job duties.

Legal: Legal Services has been consulted on the development of the Policy and Procedure and has prepared precedent agreements for use in granting encroachments (including outdoor boulevard cafés). Going forward, Legal Services will continue to be involved in the agreement process related to encroachments.

HISTORICAL BACKGROUND

An encroachment is an improvement made to City property that is located entirely or partly on, under or above City property (road allowance, park, cemeteries, open space or any other property owned or managed by the City). Some examples of encroachments include awnings, signs, out swinging doors, porches, decks and outdoor boulevard cafés. The Operations and Waste Management Division (OWMD) is responsible for the administration and issuance of encroachment agreements.

This report has been prepared in response to Internal Audit Report 2007-08 regarding date encroachment agreements and Internal Audit Report 2007-09 (collectively, the "Audit Reports") regarding temporary encumbrances and outdoor boulevard cafes. The Audit Reports identified certain areas that required improvement and provided recommendations for strengthening the system of considering requests for encroachments and outdoor boulevard cafes. One such recommendation suggested that formal written policies and procedures relating to the consideration of requests for encroachments and the management of encroachment agreements and outdoor boulevard cafés be developed and reviewed periodically.

The purpose of this report is to follow up on the audit recommendations by providing a policy and procedure for encroachments. It is recommended the encroachments the Encroachment on City Property Policy and Procedure contained in Appendix A to Report PW11024, be approved.
POLICY IMPLICATIONS

Public Works Business Plan
The Policy and Procedure supports the Public Works Business Plan goal of establishing “mutually beneficial charters with external customers” and “smart processes to match our needs”.

Municipal Act
The City is authorized to enter into encroachment agreements pursuant to Sections 8, 9 and 10 of the Municipal Act, 2001, which further authorized the City, amongst other things, to delegate its authority and to impose fees or charges on persons for services or activities providing or done by or on behalf of it.

Streets By-law No. 9329
This by-law describes encroachments on City streets and indicates that an annual fee and charge may be deemed reasonable.

Delegation of Authority to Staff for Routine Real Estate Matters
In accordance with Item 21, Committee of the Whole Report 01-029, adopted by Council on September 18, 2001, as amended by Item 9, Corporate Administration Committee Report 05-011, adopted by Council on June 29, 2005, City Council approved the Delegation of Authority to staff for routine real estate matters. That approval includes delegating the authority to approve agreements with abutting landowners and associated discharges, including but not limited to encroachments provided that the nature of the agreement is minor as determined by the affected departments and agencies, the form of the agreement is satisfactory to the City Solicitor and all fees as may be required are paid by the applicant.

By-law 01-219 To Manage and Regulate Municipal Parks
Section 12 of this By-law states that no person shall encroach upon or take possession of any park, or any part or area within a park, unless expressly authorized to do so. Where the Director determines that such an encroachment is reasonable in the circumstances and will not be detrimental to the interests of the City, an encroachment agreement may be authorized on such terms and conditions as are appropriate. It also provides for enforcement rights with respect to removing unauthorized encroachments and the collection of costs incurred by the City in respect thereof.

RELEVANT CONSULTATION
The following City staff were consulted on the development of the Policy and the Procedure:

- City Manager’s Office: Legal Services Division
- Corporate Services Department: Treasury Services (Risk Management Section)
- Hamilton Police Services
ANALYSIS / RATIONALE FOR RECOMMENDATION

The Public Works Department, through the OWMD, is responsible for the care and administration of City property including the consideration of requests for encroachment agreements and outdoor boulevard café agreements. Currently, the OWMD considers an average of 35 requests for encroachment agreements (including outdoor boulevard café agreements) per year. This has historically occurred without written formalized policies and procedures and relies primarily on the Delegation of Authority for routine real estate matters to enter into agreements where the nature of the encroachment is minor as determined by all affected departments and agencies.

The Audit Reports recognized the need for formal policies and procedures and recommended that staff undertake this activity. In response to this recommendation, staff developed this Policy and Procedure.

This Policy generally discourages encroachments on City property unless applicants are able to prove that the need for the encroachment is reasonable, feasible and no alternative options exist. In addition, encroachments must not jeopardize the health or safety of the public and must be in the public’s best interest and must be minor in nature.

The guideline section of the Policy is used to facilitate the consideration of requests for encroachment agreements and summarize the instances in which the City may enter into an encroachment agreement and the instances in which the City generally will not enter into an agreement. In addition, to ascertain whether or not the encroachment should be allowed, a circulation process is employed to obtain comments from internal and external departments, divisions and agencies. Types of encroachments that are generally permitted include but are not limited to such instances as: awnings, porches, decks, signs, steps, wheelchair ramps and other accessibility features.

In the event that an encroachment or outdoor boulevard café exists but is unauthorized or without a formal agreement, OWMD staff will engage Municipal Law Enforcement to determine the most appropriate action.

ALTERNATIVES FOR CONSIDERATION

An alternative to the recommendation would be to operate status quo - issue encroachment and outdoor boulevard café agreements without formal policies/procedures. However, the internal audit recommended that there is a need for
a formalized policy and procedures. In addition, written policy and procedures provide for the continuum of application processing should there be staff changes.

**CORPORATE STRATEGIC PLAN**


**Financial Sustainability**

- Delivery of municipal services and management capital assets/liabilities in a sustainable, innovative and cost effective manner

**Healthy Community**

- Plan and manage the built environment

**APPENDICES / SCHEDULES**

Appendix “A” - Encroachments on City Property Policy
Appendix “B” - Encroachments on City Property Procedure
1. **Introduction**

The purpose of this policy is to establish a written process for the consideration of requests for encroachments in, on, above or under City Property and subsequent approval and management of encroachment agreements (“Encroachment Agreements”) approved under the Policy.

2. **Definitions**

“**Areaway**” means an open subsurface space adjacent to a building used to admit light and air or as a means of access to underground storage space.

“**City**” means the City of Hamilton.

“**City Authority**” means the Public Works Department, Operations and Waste Management Division or such other City department, division, group, section, official or person(s) designated from time to time by Council to act on the City’s behalf.

“**City Property**” means a road allowance, park, cemetery, open space or any property owned or managed by the City.

“**Commenting Agency**” means an agency (either internal and external) that is circulated for comments on Encroachment applications. This may include but is not limited to: Bell Canada, Building, Development Engineering, Downtown and Community Renewal, Horizon Utilities, Hydro One, Municipal Law Enforcement, Planning, Police Services, Risk Management, Roads Operations, Surveys and Technical Services Section, Traffic Engineering, Union Gas, and the Ward Councillor.

“**Encroachment**” means an improvement, such as a building, structure, planted area or outdoor boulevard café, made to City Property that is located entirely or partly in, on, under or above the City’s Property authorized by an Encroachment Agreement.

“**Fence**” means:

   a) a railing, wall, line of posts, wire, gate, boards, pickets, latticework, or any combination thereof, or other similar erection for the purposes of enclosing or providing privacy; and,

   b) a hedge or grouping of shrubs used for the purposes listed in subsection (a).

“**Landscaping**” means a natural vegetation area, garden, constructed area such as a pathway, retaining wall, and decorative rock (save and except Fences and Trees).
“Owner” means the legal registered owner of property that abuts City Property.

“Refreshment Vehicle” means any vehicle from which refreshments are sold for consumption by the public and includes, without limiting the generality of the foregoing, carts, wagons, trailers, trucks, and bicycles, irrespective of the type of power employed to move the refreshment vehicle from point to point.

“Sign” means any surface, structure and other component parts, which are used or capable of being used as a visual medium or display to attract attention to a specific subject matter for identification, information or advertising purposes and includes an advertising device.

“Street Furniture” means elements and amenities installed in the public right of way for the use and convenience of the public. This may include but is not limited to a bench, waste/recycling bin, transit shelter, telephone booth, publication box, bike rack and cigarette receptacle.

“Temporary Encumbrance” means a moveable object located within the City’s road allowance. This may include but is not limited to, temporary signs, fruit and vegetable stands, planters, soft drink machines and ice machines.

3. **Background**

The City is authorized to enter into Encroachment Agreements pursuant to Sections 8, 9 and 10 of the Municipal Act, 2001 which further authorizes the City, amongst other things, to delegate its authority and to impose fees or charges on persons for services or activities provided or done by or on behalf of it.

Pursuant to Item 21 of the Committee of the Whole Report 01-029, approved by Council on September 18, 2001, as amended by Item 9 of the Corporate Administration Committee Report 05-011, adopted by Council on June 29, 2005, the City is authorized to enter into agreements with abutting owners to permit, among other things, Encroachments onto City Property. The authority to approve and to release or discharge such agreements is delegated to the department responsible for the subject City Property.

The Public Works Department is responsible for, amongst other things, administration and care of City Property. This policy establishes the terms and conditions upon which Public Works may enter into agreements to permit certain Encroachments in, on, under or above City Property. Terms and conditions of the encroachment will be set out in the Encroachment Agreement or, where temporary in nature, a permit allowing temporary access.

4. **Policy**

The City does not encourage Encroachments on City Property. Applicants must satisfy to the City that the need for an encroachment is reasonable/feasible as no other alternative exists, the health and safety of the public is not in jeopardy, it is in the public’s best interest and is minor in nature.

When satisfied, the City may, at its discretion, enter into agreements with abutting property owners for Encroachments, such as a building, structure, or outdoor boulevard café located partially or wholly on City Property, subject to the criteria set out within this policy and accompanying procedures.

4.1 **Guidelines for Considering Encroachments**

The following guidelines are used to facilitate requests for Encroachment Agreements for various situations.
1. Property owners may submit a request for an encroachment in, on, under or above City property, for consideration by the City. Requests must be made in writing and accompanied by the appropriate fee set out in the Encroachment Procedure, as amended from time to time.

2. The City may enter into an Encroachment Agreement where it has been determined that the health and safety of the public is not in jeopardy, where it is in the public’s best interest and where it is minor in nature, including but not limited to such instances as:
   i) awnings
   ii) Landscaping
   iii) outdoor boulevard café
   iv) out swinging door
   v) paving to replace Landscaping to minimize maintenance purposes only and where no vehicular movement is permitted
   vi) porch or deck
   vii) sign (where not otherwise prohibited)
   viii) steps
   ix) Street Furniture (where not otherwise authorized)
   xi) wheelchair ramps and other accessibility features

3. The City generally will not enter into an Encroachment Agreement where it has been determined that the health and safety risk of the public is in jeopardy, where it is not in the public’s best interest, where it is not minor in nature or other non-permitted instances including but not limited to such instances as:
   i) Areaway
   ii) Fences
   iii) open spaces
   iv) public unassumed alleys
   v) Refreshment Vehicle
   vi) Temporary Encumbrances

4. Applicants will be advised in writing of the City’s decision. Requests for reconsideration of a decision may be submitted in writing to the General Manager of Public Works or his/her designate and must be received within 60 days of the original decision. Such requests shall include any additional information supporting the request for reconsideration.

Where concerns are identified by City staff or commenting agencies, those concerns may be presented to Public Works Committee for direction.

COUNCIL APPROVAL: ___________________________________________________

APPROVED DATE: ______________________________________________________

REVISED DATE: _______________________________________________________
POLICY NO:  SUBJEC T:  Encroachments on City Property Procedure
ELIGIBILITY:

1. Process Overview
   An owner may apply to the Public Works Department, Operations and Waste Management Division to request an Encroachment Agreement. The applicant is required to pay the applicable fees set out in the City of Hamilton User Fees and Charges By-law.

   Upon receipt of a completed application, the Public Works Department will circulate notice of the application to relevant Commenting Agencies for their review and comment. The Public Works Department will assess the application together with the comments received to determine whether the requested Encroachment should be approved within the guidelines set out below.

   The applicant may be required to submit a Registered Plan (R-Plan) to the satisfaction of the Surveys/Technical Services Section.

   If approval is granted, the Owner will execute the Encroachment Agreement and the Mayor and City Clerk will execute the Encroachment Agreement on behalf of the City. The Encroachment Agreement is then registered on title to the Owner's property by the Owner's solicitor and is not discharged until the encroachment is removed, no longer exists or has been brought to an end, as determined by the Public Works Department, regardless of any change in ownership.

2. Encroachment Agreement Application Process

   PROCEDURE
   1. Owner to submit a complete application by mail or in person with the applicable fee.
   2. Upon receipt of a complete application and applicable fee, the appropriate staff ("Staff") will take the required steps to open the file and process the application
   3. Site visit by Staff (where deemed necessary)
   4. Memo which may include maps, drawings or photos is circulated to appropriate Commenting Agencies for comments
   5. Comments received and additional investigation undertaken, (may include the request to obtain a R-Plan)
   6. Staff recommendations made based on the evaluation process set out in following chart:
<table>
<thead>
<tr>
<th>Encroachment Application Evaluation Process</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Approve</strong></td>
<td><strong>Refuse</strong></td>
</tr>
<tr>
<td>- Conforms with Encroachment Policy</td>
<td>- The health and safety of the public is not in jeopardy</td>
</tr>
<tr>
<td>- Meets Public Works guidelines</td>
<td>- It is not in the public’s best interest</td>
</tr>
<tr>
<td>- Approval from Commenting Agencies</td>
<td>- Is not minor in nature</td>
</tr>
<tr>
<td>- Pre-approved Council direction</td>
<td>- Negative internal or external feedback that cannot be resolved</td>
</tr>
<tr>
<td>(non-routine matters)</td>
<td>- Where concerns are identified by City staff or commenting agencies, those concerns may be presented to Public Works Committee for direction.</td>
</tr>
</tbody>
</table>

7. If the application is denied:
   a) Notify applicant by letter
   b) Inform Municipal Law Enforcement for potential enforcement

8. If the application is approved:
   a) Encroachment Agreement sent to applicant and/or agent to be completed by the applicant/agent or their solicitor
   b) 3 original copies of signed agreements returned to staff with cheque for the first year annual fee
   c) Complete memo for City Clerk and have City Clerk and mayor sign the 3 originals and return to Staff
   d) Staff keeps one original for file
   e) 2 originals sent back to applicant and/or agent for solicitor to register
   f) Applicant’s solicitor registers agreement on title at Land Registry where one copy is retained and original agreement or notice of registration is sent to Staff
   g) Staff notifies Accounts Receivable of each new encroachment agreement and annual user fee to be added to the tax roll.
   h) If Encroachment is condition of approval from other City department (i.e. Building permit, site plan approval, Community Improvement Incentive Program, Committee of Adjustment) appropriate Staff are notified that the encroachment agreement is registered and condition is met
   i) Original is sent to City Clerk for official records keeping
   j) File is retained in accordance with the by-law “To Establish Retention Periods for Records”

3. **Encroachment Discharge Process**

**PROCEDURE**

1. Owner submits written application requesting discharge of Encroachment and provides copy of original agreement request to the Public Works Department.
2. Upon receipt of the request, staff will take the required steps to open the file and process the request.
3. Site visit by appropriate City staff to ensure Encroachment is removed
4. Staff sends discharge to applicant and/or agent to be completed by the applicant/agent or their solicitor
5. 3 original copies of signed discharge returned to staff by applicant/agent
6. Staff completes memo for City Clerk and have City Clerk and Mayor sign the 3 original and return to staff
7. Staff keeps one original discharge for file
8. 2 originals sent back to applicant /agent by staff for solicitor to register with Land Registry to remove from title
9. Applicant’s solicitor retains one copy and returns an original to staff
10. Staff notifies Accounts Receivable that the Encroachment has been removed and the user fee is to be taken off the tax roll
11. The original discharge agreement is forwarded by staff to City Clerk for official records keeping and a copy is retained in the Staff file

4. **Outdoor Boulevard Cafe Agreement Application Process**

**PROCEDURE**

1. Applicant must have an approved minor site plan from Development Planning before an application for an outdoor boulevard café will be processed
2. Owner to submit a complete application by mail or in person with the applicable fee.
3. Upon receipt of complete application and appropriate fee, Staff will take the required steps to open the file and process the application
4. Site visit by Staff
5. Memo which may include maps, drawings or photos is circulated to appropriate Commenting Agencies for comments
6. Comments received and additional investigation undertaken (may include the request to obtain a R-Plan)
7. Staff recommendations made based on the evaluation process set out in the following chart:

<table>
<thead>
<tr>
<th>Outdoor Boulevard Café Encroachment Agreement Evaluation Process</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Approve</strong></td>
</tr>
<tr>
<td>- Conforms with Encroachment Policy</td>
</tr>
<tr>
<td>- Meets Public Works guidelines</td>
</tr>
<tr>
<td>- Approval from Commenting Agencies</td>
</tr>
<tr>
<td>- Pre-approved Council direction (non-routine matters)</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

8. If the application is denied:
   a) Notify applicant with letter
   b) Inform Municipal Law Enforcement for potential enforcement
9. If the application is approved:
   a) Encroachment Agreement sent to applicant and/or agent to be completed by the
      applicant/agent or their solicitor
   b) 3 original copies of signed agreements returned to Staff
   c) Complete memo for City Clerk and have City Clerk and mayor sign the 3 originals and
      return to Staff
   d) Staff keeps one original for file
   e) 2 originals sent back to applicant and/or agent for solicitor to register
   f) Applicant’s solicitor registers agreement on title at Land Registry where one copy is
      retained and original agreement or notice of registration is sent to Staff
   g) Staff notifies Alcohol and Gaming Commission of Ontario (AGCO) where a liquor
      license is involved
   h) Staff provides applicant with a metal plaque to be fastened on the outside of the
      building authorizing use of City Property
   i) Staff notifies Accounts Receivable of each new Encroachment Agreement to be
      added to the tax roll - annual fees will be determined at such time as the moratorium
      on fees ends
   j) If encroachment is condition of approval from other City department (i.e. Building
      permit, site plan approval, Community Improvement Incentive Program, Committee of
      Adjustment) appropriate Staff are notified that the encroachment agreement is
      registered and condition is met
   k) Original is sent to City Clerk for safekeeping
   l) File is retained in accordance with the by-law “To Establish Retention Periods for
      Records”

5. Outdoor Boulevard Cafe Discharge Process

PROCEDURE

1. Same process as #3 – Encroachment Discharge Process

2. With the addition of: Staff notifies Alcohol and Gaming Commission of Ontario (AGCO)
   that the Encroachment Agreement for the Outdoor Boulevard Café has been discharged, if
   applicable

   GENERAL MANAGER APPROVAL: ____________________________

   APPROVED DATE: ____________________________

   REVISED DATE: ____________________________

Last revised March 4, 2011