SUBJECT: Division Fences and Line Fences Act (FCS08037) (City Wide)

RECOMMENDATION:

a) That the draft By-Law Respecting the Apportioning of Costs of Division Fences in those portions of the City of Hamilton within the urban boundary, attached as Appendix “A” to report FCS08037, be forwarded to Council for approval;

b) That an advertisement be placed in the Brabant Newspapers seeking applications for fence-viewers for the City of Hamilton in accordance with the requirements of the Line Fences Act;

c) That the process for recommending the names of those individuals to be appointed by Council as fence-viewers be referred to the Selection Committee; and

d) That an appointment by-law be prepared for the selected fence-viewers and that the By-law include all fees related to the fence-viewing process.

EXECUTIVE SUMMARY:

The Line Fences Act is a provincial statute that sets out a detailed process for resolving boundary fence (also called line fences or division fences) disputes, including the requirement that the municipality appoint at least three fence-viewers to adjudicate such
disputes. Municipalities that have apportionment of costs by-laws for disputes over boundary fences can opt out of the Line Fences Act under section 26 of that Act and section 98 of the Municipal Act, 2001.

We are recommending the implementation of an apportionment of costs by–law for division fences for the urban areas of the City of Hamilton and the continuation of the Line Fences Act, which requires the appointment of fence-viewers, for the rural areas of the City of Hamilton.

**BACKGROUND:**

The former City of Hamilton passed an apportionment of costs by-law for division fences in 1979. Stoney Creek has an apportionment of costs provision in its' by-law regulating fences. All of the other former municipalities are subject to the Line Fences Act. Since amalgamation, there have been a limited number of inquiries from residents in the former municipalities about the Line Fences Act. Residents have been encouraged to resolve disputes, on their own, rather than become involved in the process under the Line Fences Act.

The Line Fences Act was originally intended for predominately rural communities and is often not the most efficient mechanism for dealing with boundary fence disputes, at least, in urban and semi-urban settings. The Act is quite complex, as demonstrated by the 65 page guide, produced by the provincial government. Recognizing this, the Line Fences Act, together with the Municipal Act, 2001, permits municipalities to opt out of the Line Fences Act if they pass an apportionment of costs by-law.

The process for resolving boundary fence disputes under the Line Fences Act stipulates, amongst other things, that the City appoint no less than three fence-viewers to adjudicate. At least three fence-viewers must attend each viewing, so it is best to have more than three. It is up to Council to decide who is appointed. There is no requirement that a fence-viewer be a resident or elector of the municipality.

Under the proposed apportionment of costs by-law, the process for property owners to follow in the event of a division fence dispute does not involve third party adjudication by the municipality. The by-law directs adjoining land owners in solving disputes themselves and can serve, if followed, as support for a property owner who decides to pursue legal action to recover unpaid costs from an adjoining property owner. It is a less complex approach and removes the municipality from direct involvement in division fence disputes.

Due to the significant rural areas within the new City of Hamilton, it was determined that input should be sought from the Agriculture and Rural Affairs Advisory Committee. On March 25, 2008, the Agriculture and Rural Affairs Advisory Committee reviewed a draft report recommending an apportionment of costs by-law for the entire City of Hamilton. The Committee concurred that in urban areas an apportionment of costs by-law was the most effective solution for division fence disputes. However, the Committee was of the opinion that, due to the nature and potential expense of fencing in rural communities,
would be better to keep a third party adjudicative process as prescribed in the Line Fences Act. It was also the Committee’s belief that applications for fence-viewers should be sought from residents who have some experience with rural fencing.

**ANALYSIS/RATIONALE:**

An apportionment of costs by-law for the whole municipality would be the simplest option to implement from an administrative point of view. However, the Agriculture and Rural Affairs Advisory Committee, which gives Council advice on matters that impact on rural communities, recommends that the Line Fences Act continue to apply in the non-urban areas of the City. This means advertising for not less than three fence-viewers to be appointed, by means of a by-law, by Council. The Selection Committee can carry out the selection process as it does for other appointments made by Council.

While the Line Fences Act would apply to rural communities, in accordance with the recommendation of the Agricultural and Rural Affairs Advisory Committee, the attached apportionment of costs by-law (Appendix “A” to report FCS08037), would apply within the urban boundary of the City as defined in the Official Plans for Hamilton.

**ALTERNATIVES FOR CONSIDERATION:**

The City could take no action and allow the Line Fences Act to apply but this would not be effective for the urban areas. It would also perpetuate the existing inconsistency between the old City of Hamilton and the former City of Stoney Creek which have apportionment of costs by-laws and the rest of the amalgamated City of Hamilton.

An apportionment of costs by-law for the entire City could be passed but this fails to recognize the need for third party adjudication in rural areas as pointed out by the Agriculture and Rural Affairs Advisory Committee.

**FINANCIAL/STAFFING/LEGAL IMPLICATIONS:**

There are no legal or significant financial implications.

The continued application of the Line Fences Act in the rural areas of the City will mean additional responsibilities for staff, as the Act is administered by the Clerk, whenever a request for fence viewers is received. Administrative costs can be recovered through a fee.

**POLICIES AFFECTING PROPOSAL:**

There are no policy implications.
RELEVANT CONSULTATION:

Legal Services Division, Corporate Services Department
Municipal Law Enforcement Division, Planning & Economic Development Department
A Guide to the Line Fences Act, 2006 – Ministry of Municipal Affairs and Housing
Agriculture and Rural Affairs Advisory Committee

CITY STRATEGIC COMMITMENT:

By evaluating the “Triple Bottom Line”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Community Well-Being is enhanced. ☑ Yes ☐ No
Public services and programs are delivered in an equitable manner, coordinated, efficient, effective and easily accessible to all citizens.

Environmental Well-Being is enhanced. ☐ Yes ☑ No

Economic Well-Being is enhanced. ☐ Yes ☑ No

Does the option you are recommending create value across all three bottom lines? ☐ Yes ☑ No

Do the options you are recommending make Hamilton a City of choice for high performance public servants? ☐ Yes ☑ No
CITY OF HAMILTON

BY-LAW NO. __________

Respecting the Apportioning of Costs of Division Fences in the City of Hamilton

WHEREAS Council desires to provide for the apportioning of costs of division fences within the urban boundary of the City of Hamilton;

AND WHEREAS sections 8, 9 and 10 of the Municipal Act, 2001, S.O. 2001, c. 25, authorize the City of Hamilton to pass by-laws necessary or desirable for municipal purposes, and in particular paragraph 10 of subsection 10(2) authorizes by-laws respecting fences;

AND WHEREAS subsection 98(1) of the Municipal Act, 2001, S.O. 2001, c. 25, authorizes the City of Hamilton to provide that the Line Fences Act, R.S.O. 1990, c. L.17, with the exception of section 20, does not apply to all or any part of the municipality;

AND WHEREAS section 26 of the Line Fences Act, R.S.O. 1990, c. L.17, provides that Act, with the exception of section 20, does not apply to land subject to a by-law for apportioning the costs of division fences passed under the Municipal Act, 2001, S.O. 2001, c. 25;

AND WHEREAS the City of Hamilton Act, 1999, S.O. 1999, c. 14, Sched. C, did incorporate, as of January 1st, 2001, the municipality “City of Hamilton”;

AND WHEREAS the City of Hamilton is successor to the following former area municipalities: The Corporation of the Town of Ancaster, The Corporation of the Town of Dundas, The Corporation of the Town of Flamborough, The Corporation of the Township of Glanbrook, The Corporation of the City of Hamilton and The Corporation of the City of Stoney Creek; and the successor to the former Regional Municipality of Hamilton Wentworth;

AND WHEREAS the City of Hamilton Act, 1999, S.O. 1999, c. 14, Sched. C, provides that the by-laws of the former area municipalities and the former Regional Municipality of Hamilton Wentworth continue in force in the City of Hamilton until subsequently amended or repealed by the Council of the City of Hamilton;
NOW THEREFORE the Council of the City of Hamilton enacts as follows:

Definitions

1. In this By-law:

(a) “actual cost” means the total cost of constructing a new division fence or replacing an existing division fence with a new division fence and includes the value of the material used plus applicable taxes and the value of the labour performed to complete the work plus applicable taxes;

(b) “adjoining owner” means an owner whose parcel of land abuts a parcel of land whose owner is seeking to construct, replace, maintain or repair a division fence, but does not include the City of Hamilton or any other public authority;

(c) “basic cost” means the cost of constructing a new division fence or replacing an existing division fence with a new division fence that is a chain-link fence:

   (i) 122 centimetres high;

   (ii) made of not less than No. 12 gauge galvanized steel mesh which is not greater than 5.7 centimetres in size;

   (iii) supported by not less than 6 centimetre diameter galvanized steel terminal posts and 3.8 centimetre diameter galvanized steel line posts set in concrete footings that are below the frost line and spaced not more than 304 centimetres apart; and

   (iv) provided with not less than 3.4 centimetre diameter top galvanized steel top rails and No. 9 gauge galvanized steel bottom wires.

and includes the value of the material used plus applicable taxes but does not include the value of the labour performed to complete the work plus applicable taxes;

(d) “City” means the municipality of the City of Hamilton or the geographic area of the City of Hamilton, as the context requires;
(e) “division fence” means a fence marking the boundary between adjoining parcels of land; and

(f) “owner” means:

(i) a registered owner of land; or

(ii) a person managing or receiving rent for land

and where more than one person is an owner, they shall be considered to be a single owner for the purposes of this By-law.

Application

2. From and after the date this By-law comes into force:

   (a) the Line Fences Act, except for section 20 of that Act, shall not apply to land located within the urban boundary of the City as defined in its Official Plans; and

   (b) this By-law shall apply to land located with the urban boundary of the City as defined in its Official Plans.

3. This By-law does not apply to any lands that constitute a public highway, including lands abutting a public highway that are held in reserve by the City or any other public authority to separate lands abutting the reserve from the public highway.

Construction or Replacement

4. Where an owner seeking to construct or replace a division fence and an adjoining owner agree on the construction or replacement, then the construction or replacement of the division fence, including the apportionment of the cost, may take place as agreed on notwithstanding any provision to the contrary in this By-law.

5. Where an owner seeking to construct or replace a division fence and an adjoining owner cannot agree on the construction or replacement, then the owner may construct or replace the division fence provided that they deliver a notice to the adjoining owner by registered mail advising them of the owner’s intent to construct or replace the division fence. The notice shall include:

   (a) a copy of at least three written quotes from reputable fencing businesses for the actual cost and the basic cost of the division fence;
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(b) a statement of a date, not earlier than twenty-one days after the date of mailing the notice, that the construction or replacement of the division fence will commence;

(c) a statement that the owner may seek a percentage of the costs for the construction or replacement of the division fence from the adjoining owner in accordance with the Hamilton Division Fences By-law;

(d) a statement that the adjoining owner may obtain additional quotes from reputable fencing businesses for the actual cost or the basic cost of the division fence for delivery to the owner no later than fourteen days after the date of mailing of the notice; and

(e) a copy of the Hamilton Division Fences By-law.

6. Where an owner seeking to construct or replace a division fence has delivered a notice to the adjoining owner under section 5, the cost of the construction or replacement, having regard to all of the quotes exchanged under section 5, shall be apportioned as follows:

(a) where the owner and adjoining owner agree to the apportionment of the cost, each owner shall pay in accordance with that agreement; or

(b) where the owner and the adjoining owner do not agree to the apportionment of costs:

(i) the adjoining owner shall pay fifty percent of the basic cost or fifty percent of the actual cost, whichever is less; and

(ii) the owner shall pay the actual cost less the amount paid by the adjoining owner under paragraph (i).

Maintenance or Repair

7. Where an owner seeking to maintain or repair a division fence and an adjoining owner agree on the maintenance or repair, then the maintenance or repair of the division fence, including the apportionment of the cost, may take place as agreed on notwithstanding any provision to the contrary in this By-law.

8. Where an owner seeking to maintain or repair a division fence and an adjoining owner cannot agree on the maintenance or repair, then the owner may maintain or repair the division fence provided that they deliver a notice to the adjoining owner by registered
mail advising them of the owner’s intent to maintain or repair the division fence. The notice shall include:

(a) a copy of at least three written quotes from reputable fencing businesses for the cost of maintaining or repairing the division fence;

(b) a statement of a date, not earlier than twenty-one days after the date of mailing the notice, that the maintenance or repair of the division fence will commence;

(c) a statement that the owner may seek all or a percentage of the costs for the maintenance or repair of the division fence from the adjoining owner in accordance with the Hamilton Division Fences By-law;

(d) a statement that the adjoining owner may obtain additional quotes from reputable fencing businesses for the cost of maintaining or repairing the division fence for delivery to the owner no later than fourteen days after the date of mailing of the notice; and

(e) a copy of the Hamilton Division Fences By-law.

9. Where an owner seeking to maintain or repair a division fence has delivered a notice to the adjoining owner under section 8, the cost of the maintenance or repair, having considered all of the quotes exchanged under section 8, shall be apportioned as follows:

(a) where the owner and adjoining owner agree to the apportionment of the cost, each owner shall pay in accordance with that agreement; or

(b) where the owner and the adjoining owner do not agree to the apportionment of costs and:

(i) where the owner, their invitees or a tree or structure on the owner’s land caused the damage necessitating the repair, the owner shall pay the entire cost of the repair;

(ii) where the adjoining owner, their invitees or a tree or structure on the adjoining owner’s land caused the damage necessitating the repair, the adjoining owner shall pay the entire cost of the repair; or

(iii) where neither paragraphs (i) nor (ii) apply, the owner and the adjoining owner shall each pay fifty percent of the cost of the maintenance or repair.
General Provisions

10. Where an owner seeking to construct, replace, maintain or repair a division fence or an adjoining owner fails to pay a cost in accordance with the provisions of this By-law, then the cost may be recovered by means of a legal proceeding.

11. Compliance with the provisions of this By-law does not exempt any owner seeking to construct, replace, maintain or repair a division fence or any adjoining owner from compliance with any applicable law, including any other statute, regulation or by-law.

12. Notwithstanding any of the provisions of this By-law, where an owner is required to construct, replace, maintain or repair a fence under any other applicable law, including any other statute, regulation or by-law, they shall pay the entire cost of the construction, replacement, maintenance or repair.

Administration

13. This By-law may be cited as the “Hamilton Division Fences By-law”.

14. If a court declares any provision of this By-law invalid, it is the intention of Council that the remainder of the By-law shall continue to be in force.

Repeals and Enactment

15. (1) The Corporation of the City of Hamilton By-law No. 79-175, as amended, is repealed.

(2) The Corporation of the Town of Stoney Creek By-law No. 4054-94, as amended, is amended by deleting the third recital, subsections 1(a), (b), (e) and (x) and sections 15 and 19.

16. This By-law comes into force on the day it is passed and enacted.

PASSED and ENACTED this day of , 200 .

MAYOR

CLERK