

DECISION/DIRECTION NOTE – Special Meeting

Title	Repeal of the Tree Regulations
Date Prepared:	April 5, 2018
Report To:	His Worship the Mayor & Members of Council
Councillor and Role:	N/A
Ward:	N/A

Decision/Direction Required:

A decision of Council is required in respect of repealing the Tree Regulations.

Discussion – Background and Current Status:

In July 2016, Council considered a Decision Note dated May 10, 2016, (copy attached) with respect to the Tree Regulations that addresses how the City deals with existing trees. Staff's recommendation was to repeal the Tree Regulations as they were considered to be ultra vires to our governing legislation and they improperly fettered the City's operations. Council ultimately decided not to repeal the regulations and instead determined that "the City Act shall prevail whenever there is a conflict between the Tree Regulations and the City Act."

In June 2017, Council approved a recommendation of the Planning and Development Standing Committee to add a requirement for private trees to the general landscape requirements of new construction and to take an overall deposit from the permit holder for the lot. Once all the landscaping, including the tree planting, is completed, the deposit will be returned. In order to enact this recommendation, the City's Building By-Law will have to be amended

The amendments to the Building By-Law have been made and are being brought to Council for formal approval.

Key Considerations/Implications:

1. Budget/Financial Implications:
 - N/A
2. Partners or Other Stakeholders:
 - N/A
3. Alignment with Strategic Directions/Adopted Plans:
 - Neighbourhoods Build Our City
 - Responsive and Progressive



4. Legal or Policy Implications:
 - The Tree Regulations should be repealed as they are beyond the scope of the City's authority.
5. Engagement and Communications Considerations:
 - N/A
6. Human Resource Implications:
 - N/A
7. Procurement Implications:
 - N/A
8. Information Technology Implications:
 - N/A
9. Other Implications:
 - N/A
 -

Recommendation:

It is recommended that the Tree Regulations be repealed.

Prepared by/Signature:

Cheryl L. Mullett
City Solicitor

Approved by/Date/Signature:

Cheryl L. Mullett
City Solicitor

April 5, 2018

Attachments:

Decision Note dated May 10, 2016
Council Directive #S2016-07-12/5

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DECISION/DIRECTION NOTE – Special Meeting

Date Prepared: May 10, 2016
Report to: Council
Councillor and Role: His Worship the Mayor & Members of Council
Title: Interpretation Issue – Tree Regulations
CD #S2015-05-19/1
Ward: n/a

Decision/Direction Required:

- To determine whether the Tree Regulations should be repealed or amended.

Discussion – Background and Current Status:

- The Legal Department has been asked to review the Tree Regulation with an eye to revising same and with respect to what constitutes a “public tree”.

The City's authority with respect to the regulation of trees is largely found in the City of St. John's Act, sections 155-158, with some limited authority in the Urban and Rural Planning Act, 2000.

The City of St. John's Act does not define a “public tree” but sections dealing with same make reference to such trees being on a “street” or public land. The Act provides for the planning and maintenance of “public trees” by the City and makes it an offence for any persons, other than Council or City employees, to trim or cut down “trees on a street”. These provisions are also consistent with the common law.

I have been unable to determine who wrote the current Tree Regulation, however, anecdotally, I have been advised that it was written largely by the then Tree Committee. As a general comment on the Tree Regulation, I note that same far exceeds the legislative authority of the City and therefore is largely ultra vires. I am not aware of any prosecution, or other enforcement efforts, being initiated in respect of the Tree Regulation during my tenure with the City.

As noted above, tree provisions of the City Act are clear with respect to trees wholly on public lands. The Act is also clear that parts of a tree on private property which overhang a street may be trimmed to the vertical line of the street. This provision is also consistent with the common law which allows an abutter to trim overhanging branches or remove encroaching roots.

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The question remaining is if the trunk of a tree is partially on public land and partially on private land, is it a public tree or is it jointly owned?

In *Anderson and Gordon v. Skender and Skender*, a 1991 decision of the BCSC, the Court considered the question of ownership as between two private property owners where tree trunks were on the boundary and grew out over the boundary. The BCSC considered a dissenting judgment in a 1921 BC case which in turn considered the 1841 case of *Griffin v. Bixby* in which the court held:

"We are of the opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will be if one cuts and destroys it without the consent of the other."

The BCSC went on to hold that the law as stated in *Griffin v. Bixby* was the applicable law in British Columbia. The BCSC did not give any consideration to where a "trunk" should be measured from and appears to have simply taken the view that the trunk runs from the soil to the point where the tree branches out.

The Ontario Superior Court considered the ownership of a tree which "straddles the property line" in 2013 in *Hartley v. Cunningham*. It is important to note that the applicable legislation in Ontario is the Forestry Act which is "silent on any definition of what a tree trunk is but which provides that every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands."

The Ontario Court heard argument from the parties on whether one looks at the ground level or the root ball to determine if a tree is on the boundary or not. The Court also considered the opinions of three "experts" and accepted their "conventional wisdom" that if any part of the trunk is over the boundary line, it is a boundary tree. The Court also noted that the "experts" opinion accords with a common sense reading of the word "trunk" and with its dictionary meaning as well.

Moore J. held that the law was clear and that "It includes within the ambit of the meaning of a tree trunk growing on a boundary line the entire trunk from its point of growth away from its roots up to its top where it branches out to limbs and foliage ... it is not only the arbitrary point at which the trunk emerges from the soil that governs."

Hartley v. Cunningham was apparently appealed, but I could not find same, however, the decision of Moore, J. was upheld in 2013 in *Laciak v. City of Toronto*, a case before the Ontario Superior Court. Himel, J. in this case referred to *Harley v. Cunningham* and the appeal of same and noted the Ontario Court of Appeal agreed with Judge Moore's interpretation.

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In light of the foregoing, I would submit that a public tree would include any tree of which the trunk of same, trunk being within the definition of Moore, J., crosses over the boundary of the City owned lands.

As noted above, section 157 of the City of St. John's Act sets out the offence for a person, other than a City employee, cutting, trimming or removing "trees on a street". While "public street" is not used or defined in the Act, the interpretation noted above would apply to "trees on a street" based upon the case law. Perhaps when the City of St. John's Act is revised, a definition of "public tree" can be added.

Meanwhile, section 157 also provides for a penalty for violation of the section. Therefore, any by-law to provide for an offence and penalty for disturbing a public tree would be redundant. Initially, I reviewed the Tree Regulation with an eye to ensure the definition of "public tree" reflected the current state of the law, however, a more complete review of the Regulation has led me to conclude that same should be repealed in its entirety.

In addition to defining a "public tree" (incorrectly I note) and creating a broader offence for interfering with same than is provided for in the City of St. John's Act, which would therefore be ultra vires, the Regulation goes on to provide that the City must have an arborist and sets out the powers and duties of same. This is clearly an administrative/human resources function and has no place in a regulation. The Regulation also sets out the "powers and duties" of Council in respect of trees – something which is addressed in the City of St. John's Act and the "duties" of the department of which the arborist is a staff member – a further fettering of the administrative function of the City.

Additionally, the Regulation establishes the Tree Committee and sets out its powers and terms of reference. The Tree Committee no longer exists and its "role" is now to be found in the Environmental Advisory Committee, which references the Urban Forest Master Plan.

Key Considerations/Implications:

1. Budget/Financial Implications:
 - N/A
2. Partners or Other Stakeholders:
 - Citizens and private property owners
3. Alignment with Strategic Directions/Adopted Plans:
 - N/A

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4. Legal or Policy Implications:

- The Tree Regulation should be repealed as it is both ultra vires and improperly fetters Council and the administration of the City.

5. Engagement and Communications Considerations:

- The public will need to be apprised of any changes to the Tree Regulations.

6. Human Resource Implications:

- N/A

7. Procurement Implications:

- N/A

8. Information Technology Implications:

- N/A


9. Other Implications:

- N/A

Recommendation:

- It is recommended that the Tree Regulation be repealed as it is both ultra vires and improperly fetters Council and the administration of the City.
- It is further noted that until such time as the City of St. John's Act is amended or replaced, the City's power with respect to "public trees" remains as set out in the Act, therefore negating the need for a further, or new, by-law.

Prepared by/Signature:



Linda S. Bishop, Q.C.
Senior Legal Counsel

Approved by/Date/Signature:



Cheryl L. Mullett
City Solicitor
May 10, 2016

Attachments:

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COUNCIL DIRECTIVE

SPECIAL MEETING

Date: 2016/07/12 12:00:00 AM

CD# S2016-07-12/5

To: Linda Bishop
Position: Acting City Solicitor
RE: Decision Note dated May 10, 2016 re: Interpretation Issue - Tree Regulations
CD#S2015-05-19/1
DECISION: Council considered the above noted. Though it was recommended that the Tree Regulations be repealed as it is both ultra vires and improperly fetters Council and the administration of the City, Council agreed that they not be repealed at this time. The following motion was instead put forth:

SJMC2016-07-12/160S

Moved – Councillor Breen; Seconded – Councillor Hann

That the City Act shall prevail whenever there is a conflict between the Tree Regulations and the City Act.

Action: As required
Date: 2016/07/13
Signed by: Elaine Henley
City Clerk

Status Comments:

kc

cc:

Kevin Breen/Acting City Manager/Corporate Services

Response Required: YES
Response deadline: 2016/09/26
Response Received:
Attachments:



Decision Note - Interpretation Issue - Tree Regs - May 10, 2016.pdf