donnelly law
BARRISTERS & SOLICITORS
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October 5, 2020

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

Re: *Toronto Municipal Code Chapter 489, Grass and Weeds*
Advisory Notice of Violation for [redacted]

Dear Mayor Tory,

Donnelly Law represents Prof. Nina-Marie Lister and Mr. Jeremy Guth, owners of a residence at [redacted], City of Toronto, which contains a carefully constructed and tended natural garden. By-law Enforcement advised our Client their natural garden was in violation of *Municipal Code Chapter 489, Grass and Weeds* (the "By-law") for carefully growing a natural garden. A conviction includes forced mowing (at the landowner's cost) and fines up to $5,000.

The actions taken by City By-law Enforcement against our Clients are unconstitutional, a form of harassment and hypocritical, given the City's concomitant encouragement of native plant species and pollinator habitat in residential gardens. The By-law is in fact illegal.

We write to further advise you that Prof. Lister rejects the exemption offer under section 3 E of the *Municipal Code Chapter 489, Grass and Weeds*, provided to her by Property Standards Officer Ms Christine Muccilli. The exemption was subsequently and mysteriously granted, even though neither Prof. Lister nor Mr. Guth complied with section E 1 and E 4(c) of the By-law.

Prof. Lister has given us instructions to collaborate with your Office in their challenge of the by-law for being unconstitutional, perverse, and contrary to the protection of the environment. If ever there was a by-law that sows the seeds of

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confusion and perverse municipal enforcement, this is it, and it must be amended.

Background

On August 20, 2020, Officer Muccilli attended [redacted] Toronto to advise that there had been "numerous complaints" about the garden and that the "grass and weeds were too long and had to be cut." In a phone call to Prof. Lister on August 26th, Officer Muccilli stated unequivocally that Prof. Lister had been served with an Advisory Notice of Violation for the natural, pollinator-friendly garden [redacted]. Upon follow-up with the City, Prof. Lister discovered that her garden was found to be in violation of *Municipal Code Chapter 489, Grass and Weeds,* causing her and her husband great distress after investing countless hours in planning and tending to the garden. Prof. Lister asked for a copy of the Advisory Notice for her records on August 27, 2020.

It was not until September 15, 2020 that Prof. Lister received a response from Ms Christine Muccilli, which read:

> Good afternoon Nina, [m]y apologies for the delay in responding. After further review of your file, an advisory letter was not sent to you. [emphasis added]

Ms Muccilli further advised Prof. Lister that she had been granted an exemption from the By-law which she neither sought, nor wants.

Prof. Lister is a landscape ecologist, urban planner, and Director of the Ecological Design Lab at Ryerson University where she is Graduate Program Director of Urban Planning. She was shocked to receive the Notice, as she is committed to her work, leading by example and having ecologically-designed and planted a natural garden, thereby maximizing her property to provide as much habitat as possible for Toronto's pollinators and other wildlife. In fact, Prof. Lister and Mr. Guth have made a significant financial investment in their garden, which includes a green roof, terraced planting beds and front yard natural meadow – all of which are maintained in collaboration with a local natural landscaping service, EcoMan (www.ecoman.ca) at an annual cost in excess of $5,000. The list of plants in their carefully designed and maintained garden include:

> Bluebell, Black-eyed Susan, Bee balm, (swamp and common) milkweed, boneset, New England aster, Queen Anne's Lace, purple coneflower, coreopsis, (annual) sunflower, 2 Bull thistle plants that are cut regularly and not allowed to seed, Foxtail, purslane, red and white clover, Canada wild rye, switch grass, little bluestem, lambsquarters, goldenrod, joe pye-weed, buttercup, forget-me-nots, violets, columbine, pinks, daylillies, Dutchman's breeches, peonies, Hellebores, hollyhocks, oregano, creeping thyme, English lavender, Lily of the valley, astilbe, allium and sedum (which has self-sown from the green roof).

What kind of barbarian would mow buttercups, forget-me-nots and lambsquarters? This garden actively provides habitat for at-risk monarch butterflies, nesting bees (including Toronto's official bee, the green metallic sweat bee), various nesting birds, and urban mammals such as rabbits, chipmunks, and squirrels.

Municipal Code Chapter 489 is Obviously Unconstitutional

One of the earliest cases involving the challenge of a "weed and grass" by-law is that of *Bell v Toronto (City)*. Ms. Bell was an enthusiastic environmentalist who grew a small natural garden on her Toronto property. Ms. Bell 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 present Chapter 489 By-law, with the exception of the natural garden exemption.

In provincial court, Ms. Bell argued that as an environmentalist, her garden was an expression of her beliefs in environmentalism, and argued that her garden ought to be protected by her freedom of expression under section 2 of the *Charter*. The Court agreed.

Justice Fairgrieve stated:

> There can be no doubt that the appellant's act of growing a naturalistic garden that included tall grass and weeds had expressive content and conveyed meaning. As an environmentalist, Ms. Bell implemented a landscaping form intended to convey her sincerely held beliefs concerning the relationship between man and nature. It also implicitly conveyed a critique of the prevailing values reflected in conventional landscaping practices.[1]

[1] *Bell v Toronto (City)*, 1996 CarswellOnt 3416 (ONCJ) at para 52.

The Justice also noted:

> Moving to the second step of the test, determining whether the purpose or effect of the by-law is to restrict a person's freedom of expression, I think it is apparent that one of the purposes of the by-law, indeed its primary purpose, is to impose on all property owners the conventional landscaping practices considered by most people to be desirable, and that one of its effects is to prevent naturalized gardens which reflect other, less conventional values.[2]

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

> 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.[3]

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[4] and is, on that account, invalid and unenforceable, and that finally:

> 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*.[5] [emphasis added]

Analysis

There are six fundamental problems with the By-law and enforcement of same.

First, the "Weeds and Grass" By-law is clearly unconstitutional, as found in *Bell v. Toronto (City)*. The lack of definitions of "grass" and the complaints-driven process based on aesthetic concerns is extremely troubling. The Court in *Bell v.*

[2] *Ibid* at para 54.
[3] *Ibid* at para 26.
[4] *Ibid* at para 48.
[5] *Ibid* at para 54.

Toronto (City) found that "completely subjective and essentially arbitrary"[6] words or terms such as "excessive growth" with no prescribed standard by which to assess them leads to judgments improperly based upon "personal taste or aesthetic preference."[7] There are more than 12,000 named species of grasses (graminoids), which begs the question: which ones are the offending plants? An easy "fix" to the By-law is to restrict enforcement to the 25 species of plants identified on the Noxious Weed List, and only in circumstances where a real threat to human health and safety, or ecological health (from invasive species) is posed, as is the case with Giant Hogweed and Dog-Strangling Vine. Additionally, forced mowing is not the answer – why not "forced" planting of native species?

Second, By-law enforcement staff are neither required nor trained to identify any plants, let alone grasses or noxious plants, per the *Ontario Weed Control Act*. A new by-law should focus on the Noxious Weeds List prescribed under Ontario Regulation 1096 248/14. We note parenthetically that Prof. Lister has exactly two "weeds" (harmless Bull thistles) on her property, which are prime butterfly pollinator species and pose no risk to humans or crops whatsoever.

Third, within a 1km radius of my home in Leslieville, there are at least four municipally-owned properties that are in "violation" of the By-law. It is hypocritical for the City to be prosecuting residents while it is itself in violation of the By-law.

Fourth, the City is currently promoting its Pollinator Protection Strategy[8], which encourages residents to plant the native species found in our Client's garden. Under the Strategy's Priority #19, it states:

> 19. Inspire residents to create pollinator habitat by offering resources such as pollinator-friendly gardening tips, plant lists, seeds, and recognition signage (e.g. Pollinators Are Welcome Here!) through Community Environment Days and Live Green Toronto outreach events.

[6] *Ibid* at para 47.
[7] *Ibid* at para 43.
[8] https://www.toronto.ca/services-payments/water-environment/environmentally-friendly-city-initiatives/reports-plans-policies-research/draft-pollinator-strategy/

Fifth, the enforcement policy and exemption process strongly favours gardeners with familiarity with government processes, an out-dated and monocultural colonial garden aesthetic and most importantly, the privilege of time and disposable income to fight City Hall.

Finally, the solution to the "problem" i.e. forced mowing to under 20cm is ridiculous. Anyone who ever owned a lawn knows that mowing "weeds" a) doesn't make them go away, b) makes them spread faster, and c) increases opportunities for yet more weed species through soil disruption and contamination.

Expert Support for Pollinator Habitat

Prof. Lister was invited by City staff to serve as an expert advisor to the City of Toronto's Biodiversity Strategy[9], which contains specific opportunities and actions to improve and enhance biodiversity and habitat in the City, including on private property.

For example:

> "At a smaller scale, privately-owned backyards and green infrastructure (such as trees, storm water management systems and green roofs) can form habitat fragments…" (Page 19)
>
> and
>
> "…Voluntary "Butterflyway Rangers" find opportunities to plant pollinator patches in yards and parks and raise awareness about the importance of growing milkweeds and other wildflowers as a way to provide food and shelter for pollinators such as monarch butterflies." (Page 43)

Prof. Lister has also received a letter of support from the Steering Committee of Project Swallowtail, a joint initiative with the goal of encouraging the creation of a corridor of pollinator gardens throughout the west end of Toronto.

The Steering Committee notes in their letter that the current regime under Municipal Code Chapter 489 disincentivizes the planting of natural gardens, as individuals are required to actively apply for an exemption from the By-law each and every time a complaint is made. Furthermore, all property addresses with

[9] https://www.toronto.ca/legdocs/mmis/2019/ie/bgrd/backgroundfile-136906.pdf

natural gardens exemptions are made public, which increases the ease of and likelihood of more complaints!

Additionally, the Steering Committee notes a number of difficulties related to the By-law, including:

1. No definition of "grass," which must be kept below 20cm;
2. The failure of by-law officers to be able to accurately identify "noxious weeds" as opposed to non-harmful, natural garden plants;
3. The frequent complaints under the By-law which have no basis, and are purely "aesthetic" in nature; and
4. The prohibition against "noxious weeds" within an urban environment, that are only prohibited because of their risk to crops of livestock.

The Steering Committee also provides a list of potential improvements to the By-law, such as:

1. Limiting the By-law to only those plants and properties which threaten health and safety of residents, or that are invasive and threaten natural areas;
2. Require complainants under the By-law to specify how a garden is out of compliance; and
3. Remove language from the By-law and explanatory materials on the City's website that is subjective or based upon aesthetic interpretation.

In addition, a separate letter of support for our Client has been sent to the City signed by 79 leading academics, ecologists and plant experts, including Ms Lorraine Johnson, considered the 'queen bee' of Ontario's native plant gardening movement, and Mr. Mark Cullen, garden writer, gardening columnist for the *Toronto Star*.

Helpfully, the letter describes the legal perversity of using "exemptions" to exonerate some garden growers, but not others:

> The exemption process was initiated when natural gardens were rare and unusual. Now that natural gardens have increased steadily as a cultural practice, the requirement for an exemption places a reverse and unfair burden on natural gardeners to defend and justify their plantings in a

process that is intrusive, onerous, costly, disincentivizing, and arbitrary. Yet those who complain to the Bylaw Department (which triggers an investigation) aren't required to identify any problematic species or health/safety issues on which their complaint is based, nor are the bylaw enforcement officers required to name or capable of identifying the problem species. The entire process is intrinsically adversarial: Advisory Notices assert a violation which the natural gardener is then required to disprove.

To repeat, an easy fix is to prosecute only landowners who are harbouring Noxious Weeds, per the *Ontario Weed Control Act*, and only when these species actually pose a threat to human health or to the ecological health of natural areas.

Conclusion

The problem of City of Toronto harassment of natural garden growers and the destruction of pollinator habitat is widespread, and appears endemic throughout many municipalities in Ontario. Many municipalities have the same or similar property standard by-laws as City of Toronto's unconstitutional *Municipal Code Chapter 489*.

Prof. Lister, with the assistance of our firm, is in the process of drafting a model by-law which we will be presenting to you the Mayor and the City as an alternative to the current enforcement regime. The amendment would permit the planting and growing of native species to their natural height, and would only permit prosecution in the case of threats to human health or ecological health.

An amended or new by-law and enhanced staff training is actually an unfulfilled promise made by the City in the Biodiversity Strategy. For example:

> Action 8. Review policies and bylaws for opportunities to support biodiversity. Undertake reviews of: Zoning Bylaw soft landscaping requirements for properties adjacent to ravines; and Property Standards and Grass and Weeds Bylaws for additional opportunities to support biodiversity [emphasis added]. (page 48)
>
> Action 12. Continue and expand training for City operations and maintenance staff on biodiversity best practices. Building on the pilot

Biodiversity training course and Pollinator Protection Practices for City staff, increase awareness of biodiversity and identify best practices to protect and enhance habitat and the planting of invasive species. (page 49)

In the alternative, if the City unwisely keeps to its present course, Prof. Lister has instructed our firm to take the City to Court, with the encouragement of a number of residents who have contacted us to complain of similar mistreatment.

Finally, in order to convince you of the misguided nature of this episode, my Client extends an invitation to you to have tea in their garden, with a curated tour to explain how and why they planted the species that they did, and to educate you and the City of Toronto by-law enforcement regarding the need to encourage, not prosecute, an expanding portfolio of pollinator habitat gardens.

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

Yours Truly,

David R. Donnelly

cc. Client
City of Toronto Councillors