



Staff Report

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Report To:	General Government Committee		
Date of Meeting:	March 4, 2024	Report Number:	LGS-008-24
Submitted By:	Rob Maciver, Deputy CAO/Solicitor, Legislative Services		
Reviewed By:	Mary-Anne Dempster, CAO	Resolution#:	
Authored by:	Rob Maciver		
File Number:	L1000-61E	By-law Number:	2006-126
Report Subject:	Municipal Regulation of Encampments		

Recommendations:

1. That Report LGS-008-24, and any related delegations or communication items, be received;
2. That the By-law, included as Attachment 1 of Report LGS-008-24, to amend By-law 2006-126, a by-law to regulate public parks and open spaces in Clarington, be approved;
3. That the Legislative Services Department is directed to prepare an encampment response protocol for Municipal Law Enforcement Officers in consultation with the Region of Durham and the Durham Regional Police Services; and
4. That all interested parties listed in Report LGS-008-24, and any delegations, be advised of Council's decision.

Report Overview

This Report provides a brief overview of the current situation involving Clarington's unsheltered population, highlights the implications of several recent Court decisions related to the municipal regulation of encampments, gives a summary of existing provisions in the Parks By-law, and makes several recommendations for improvement.

1. Background

- 1.1 One of the most pressing issues facing municipal governments today is how to best respond to the needs and challenges of our unsheltered population.
- 1.2 Homelessness in Ontario is visible to many people like never before, and a variety of factors are leading many in our society to question their assumptions and attitudes about the plight of unsheltered persons.
- 1.3 These issues are also attracting increasing attention from the Ontario Courts, and there is a growing body of case law devoted to topics related to homelessness.
- 1.4 All levels of government including municipalities, Police Service Boards, and other social service providers, are discovering that old ways of coping with the unique challenges of our unsheltered population no longer work, either because they have proven to be ineffective or because they have become more widely unacceptable on social, moral, legal, and political grounds.
- 1.5 The number of individuals who have a precarious housing situation in Clarington, and elsewhere, is difficult to estimate and, no doubt, the number is constantly fluctuating. However, there is little doubt that, at any given time, there are some unsheltered individuals residing in our community. Outreach workers from Durham Region Social Services have several clients that identify Clarington as their place of residence, and these individuals are eligible to receive outreach support and community paramedical care right here in Clarington.
- 1.6 While the availability of support in Clarington is limited compared to Oshawa and other Durham lakeshore municipalities, there are indications of increasing levels of social support in our area. Durham Region has recently invested in a major expansion of its outreach capability by hiring 10+ additional outreach support workers, and St. Paul's United Church recently established an overnight winter warming centre in downtown Bowmanville.

- 1.7 A complex matrix of interrelated issues makes any attempt to provide support to our unsheltered population an imposing challenge. As with all social and regulatory issues, local government needs to understand its role in relation to other agencies and must be mindful of balancing the interests of all members of the community.
- 1.8 The content of this report, and the recommendations arising from it, are focussed on one aspect of the municipal response to the larger issue of the homelessness crisis, namely, how to regulate the existence of encampments.
- 1.9 For the purposes of this report, an encampment consists of one or more, improvised shelters (typically tents) that provide temporary living space and protection from the elements to people who would otherwise be unsheltered, either by choice or necessity.

Clarington's Park By-law

- 1.10 The Municipality of Clarington has no by-laws for the specific purpose of regulating encampments. However, provisions in the Clarington Parks By-law (the "[Parks By-law](#)") have guided the Municipality's enforcement response to encampments since the by-law was enacted in 2006.
- 1.11 The first thing to note about the Parks By-law, is that it is much broader in its application than the name may suggest. For the purposes of the Parks By-law, a "park" includes any land owned or leased by the Municipality that is used as "a woodlot, ravine, recreation area, square, garden, walkway, water or any area ... devoted to active or passive recreation". While the phrasing found in the definition could be improved, the intent is reasonably clear; any Municipally owned or controlled outdoor space that is accessible by the public falls within the scope of the Parks By-law.
- 1.12 Pursuant to section 14 of the Parks By-law, no camping is permitted. Camping is not specifically defined, and the Parks By-law does not differentiate between camping that is a recreational activity, and other circumstances which may lead someone to be inhabiting a tent or other lodging situated on Municipal property.
- 1.13 According to section 15 of the Parks By-law, "no person shall place, install, or erect any temporary or permanent structure in any park". The heading of this section is entitled, "Tents and Structures" and this section has been interpreted by Municipal Law Enforcement as their authority to evict any person who occupies a park overnight.
- 1.14 Taken together, these sections amount to an absolute prohibition on all camping activities and the placement of any tents or temporary structures on Municipal property, unless a permit has been obtained from the Municipality.

- 1.15 Other provisions contained in the Parks By-law include prohibitions on litter, dumping, alcohol consumption, and campfires, as well as a limitation on various forms of nuisance.
- 1.16 The Parks By-law is very typical of similar by-laws in municipalities around the Province. It is this type of by-law that has become the subject of several recent Court rulings as they pertain to the issue of encampments.

2. Recent Legal Rulings

Waterloo (Regional Municipality) v. Persons Unknown

- 2.1 The issue in this case was whether it was lawful for the Region of Waterloo to enforce a by-law prohibition against erecting any type of structure, including a tent, on a vacant lot in downtown Kitchener that was owned by the Region. The decision was released on January 27, 2023.
- 2.2 The property is approximately one-half acre in area and is intended to function as a gravel parking lot to support a new train/bus station which is situated near the property. Also near the property is a soup kitchen operated by a local church.
- 2.3 Due to the vacant state of the property, together with its proximity to public transportation, the soup kitchen, and other features of downtown Kitchener, the location proved to be a convenient choice for some of the Region's unsheltered population to establish an encampment. Tents began to appear in December 2021, and by July 27, 2022, it was estimated that 53 persons were living in the encampment.
- 2.4 During that interval, the Region's response to issues of security and sanitation associated with the property gradually escalated to the point that as of July 2022 the Region's monthly expenditure was approximately \$80,000.
- 2.5 Upon completion of a risk assessment of the property in May 2022, the Region determined that the conditions at the encampment posed a risk to the health and safety of the encampment residents as well as to the public. As such, the Region sought a declaration that the persons encamped on the property were in breach of the by-law, which would set the stage for the removal of the encampment from the property.
- 2.6 Submissions filed by representatives of some of the occupants of the encampment asserted that the by-law was a violation of the Canadian Charter of Rights and Freedoms (the "Charter").
- 2.7 In evaluating the evidence, the Court held that the risk assessment was insufficient to justify the clearing of the encampment.

- 2.8 The Court further held that it was not satisfied that adequate shelter spaces were available in the Region, and in the absence of adequate shelter spaces the by-law was held to be in violation of the Charter. To cite paragraph 149 of the decision, “the homeless of the Region have no place to live, rest and sleep without severe risk to their health caused, in part, by the by-law’s prohibition to erecting any form of shelter on the Region’s land”.
- 2.9 A further factor in the decision was the Court’s finding that the Region had failed to meet the standard of outreach and support to the encampment occupants that was set out in its own Encampment Policy.
- 2.10 In the disposition of the case, the Court declared that the by-law was in violation of the Charter in that it deprived the occupants of the encampment of life, liberty and security of the person, and that the by-law is inoperative insofar as it would prevent the residents of the encampment “from living on and erecting temporary shelters ... when the number of homeless persons exceeds the number of available shelter beds in the Region”.
- 2.11 Interestingly, the decision also held that it was open for the Region to apply to have the finding reversed in the future upon the Region satisfying the Court that the by-law no longer violates the Charter. Presumably, this means that the by-law would again be valid and enforceable if the Region can come back and demonstrate it has attained the adequate number of available and accessible shelter spaces.

City of Kingston v. Doe

- 2.12 In another recent case, the City of Kingston made a similar application to the Ontario Superior Court to seek enforcement of its Parks By-law to dismantle an encampment that has become a persistent source of a variety of problems for the City.
- 2.13 The location in question was within a large urban park. Uncoincidentally, the location was also near the offices of several homelessness and poverty reduction services, including the City’s Integrated Care Hub, a city-funded service provider offering consumption services, drop-in health care, and short-term shelter.
- 2.14 At the time of the City’s application, the encampment consisted of approximately 27 tents or other makeshift structures, and 35 occupants, and was situated in the middle of an emergency route called Belle Park Drive.
- 2.15 As in the Waterloo decision, the Court expressed concern that the by-law provisions did not properly balance the City’s objectives with the rights of unsheltered individuals to avoid serious risk of injury or death by erecting shelter overnight when they have no other alternatives.

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- 2.16 The Court was again persuaded that the municipal by-law was in breach of the Charter to the extent that it prohibits homeless persons from erecting a temporary overnight shelter in public parks when the number of unsheltered individuals exceed the number of accessible shelter spaces.
- 2.17 Particularly helpful in the decision was the Court's clarification in paragraph 102 that there is no right to a permanent encampment in any specific area of the municipality; it was only the absolute prohibition was held to be unconstitutional. Also helpful was the comment in the same paragraph expressing the view that if there were sufficient beds to house the unsheltered population in the municipality, the by-law would no longer be in breach of the Charter, and the municipality would be entitled to enforce its prohibition.
- 2.18 The case also helps to highlight several pitfalls that can potentially be avoided in crafting municipal by-laws to regulate encampments. For example, the Court was critical of the lack of a clear definition of "camping" within the Kingston by-law. As well, the Court took issue with the absence of an express provision of the purpose and objective of the Kingston by-law and the judge took it upon himself to assign a legislative objective as he saw fit. Other municipalities seeking to regulate encampments would be well advised to avoid these same mistakes.
- 2.19 While the decision provides clarification in some areas, in other areas it introduces further uncertainty.
- 2.20 For instance, the issue of overnight versus daytime shelter is discussed at some length, but ultimately no guidance is provided on whether the effect of the Charter ruling extends to all hours of the day or is only limited to the overnight period. However, the Court declined to limit its declaration of unconstitutionality to only the overnight period, thus leaving the door open to future rulings. If social and judicial trends continue, it may only be a matter of time before daytime sheltering is also brought under the protection of the Charter.

Court Cases from British Columbia

- 2.21 Until recently, issues related to the regulation of encampments have been more pronounced in the Province of British Columbia, where the Courts have issued several rulings that have come to be known as the "right to shelter" cases. The recent Ontario decisions reflect many of the same principles found in the BC decisions.
- 2.22 The essence of the BC decisions is the establishment of a constitutional right to shelter oneself when the number of homeless persons exceeds the number of available and accessible indoor shelter spaces within a given jurisdiction.

- 2.23 There is some indication that by-law provisions to prohibit encampments may be valid where it can be demonstrated that there are adequate shelter spaces available. At least two Ontario decisions have followed this reasoning (*Black v. Toronto*, and *Poff v. City of Hamilton*). However, these decisions date back to 2020 and 2021, and time will tell whether the more recent Ontario decisions have introduced a higher standard for municipalities that seek to displace encampment occupants.
- 2.24 The BC rulings also suggest that by-law provisions to prohibit encampments from certain locations may well be valid if provision is also made for appropriate alternative designated areas.

3. Analysis

- 3.1 With the combined rulings in the Waterloo and Kingston cases, it is now reasonably well established that municipal-wide enforcement of an absolute prohibition on erecting temporary overnight shelter in municipal parks would violate s. 7 of the Charter.
- 3.2 Many municipalities in the Province have by-law provisions similar to those that have been found to be in violation of the Charter, and it is increasingly obvious that these provisions will not withstand a legal challenge.
- 3.3 To avoid judicial censure, by-laws to regulate encampment will need to avoid provisions of arbitrariness, overbreadth, and gross disproportionality. Special care will be needed to draft by-law amendments to be more sensitive to the changing social and legal landscape.
- 3.4 This is an emerging issue, and outcomes are not entirely foreseeable at this stage, but there is now enough guidance available in the Court decisions to identify some by-law changes that are clearly needed.
- 3.5 The Parks By-law should be amended to clearly articulate a purpose/objective. That objective should be to protect and preserve outdoor municipal spaces for their intended use as active and passive recreation. However, the current absolute prohibition on all overnight emergency shelters is not needed to achieve that purpose.
- 3.6 Definitions of “camping” and “temporary emergency shelter” should be added to the Parks By-law to differentiate voluntary recreational activity from potentially live-saving protection from the elements.
- 3.7 The definition of “park” should be modified to eliminate archaic language and to emphasize the intended scope of applicability.

- 3.8 While the use of temporary emergency shelters would no longer be absolutely prohibited, there should continue to be an emphasis on avoiding encampments in locations that are unsafe, interfere with other important activities, or represent an unreasonable public nuisance. Draft regulations have been proposed that would direct encampments away from these areas. The draft regulations also stipulate some minimum health and safety requirements. Although the author is not an expert in the fields of public health or medicine, it is submitted that the regulations have been carefully considered and they represent a reasonable balance of the competing interests involved.
- 3.9 A recurrent theme of the Court decisions is the principle that prohibitions on emergency overnight shelters will be at risk of a Charter violation in circumstances where there is a lack of suitable alternative accommodation. Therefore, the key to any enforcement may be to demonstrate that the Region has an adequate number of available and accessible shelter spaces. However, even this may not be a guarantee, due to comments made in the Kingston decision casting doubt on the ability to estimate the ever-fluctuating homeless population and the difficulty of making a proper assessment about whether available shelter spaces are accessible. Staff will need to continue to monitor this emerging issue to determine the need for future amendments.
- 3.10 It is acknowledged that, to be fully consistent with judicial guidance and the approach in other urban municipalities around the Province, any enforcement response will need to be undertaken in close collaboration with the Region of Durham Social Services Department and the Durham Regional Police Service. To further enhance these relationships, and to ensure standardization of our approach, Staff will develop a written protocol to clearly articulate a consistent methodology that is sensitive to the complexity of the encampment issue.
- 3.11 The protocol will not be enacted as a by-law but rather it will be an administrative document that outlines our standard operating procedure. Among other things, it will seek to ensure that the risks associated with an eviction from a prohibited encampment are balanced against the other objectives of the Parks By-law, and that efforts have been made to connect encamped individuals with services to meet their needs.
- 3.12 The changes recommended in this Report are a sincere effort to reform outdated provisions in the Parks By-law, and to establish a proactive approach to the regulation of encampments that does not result in an unconstitutional deprivation of the right to life, liberty, or security of the person.

4. Financial Considerations

Not Applicable.

5. Strategic Plan

Report LGS-008-24 contributes to the Municipality's understanding of its role in relation to issues of housing and homelessness, and as such is relevant to the following Strategic Plan Priorities:

C.2.2 – Support and invest in the creation of housing to meet the needs of the community.

C.2.5 – Support the proactive management of community safety and well-being.

6. Concurrence

Not Applicable.

7. Conclusion

Recent court decisions have made it clear that municipalities need to be sensitive to human rights when attempting to regulate encampments. The information and recommendations contained in this report are a proactive effort to align Clarington's Parks By-law with the requirements of the Canadian Charter of Rights and Freedoms.

Staff Contact: Rob Maciver, Deputy CAO/Solicitor, 905-623-3379 or rmaciver@clarington.net.

Attachments:

Attachment 1 – Parks By-law Amendment - Draft

Interested Parties:

The following interested parties will be notified of Council's decision:

- Stella Danos-Papaconstantinou, Commissioner of Social Services
- Lisa McIntosh, Director of Income, Employment and Homelessness Supports
- Jocelyn Siciliano, Area Manager of Homelessness Direct Delivery Team
- Sahar Foroutani, Area Manager of Homeless System Team
- Brandy Henderson, Region of Durham
- Inspector Stefanie Finateri, Durham Regional Police Service
- Staff Sergeant Amanda Hoover, Durham Regional Police Service
- Rileigh Bint, Durham Regional Police Service