



P.O. Box 1749
Halifax, Nova Scotia
B3J 3A5 Canada

Item No. 15.1.3
Halifax Regional Council
February 21, 2023

TO: Mayor Savage and Members of Halifax Regional Council

SUBMITTED BY: Original Signed

Cathie O'Toole, Chief Administrative Officer

DATE: February 10, 2023

**SUBJECT: Permanent Encroachment of a Building Entrance and Balconies at 5550
Bilby Street, Halifax**

ORIGIN

Application DEV-ROW-2022-09504 by Lindsay Construction Ltd., on behalf of 3276428 Nova Scotia Limited, for a permanent encroachment of a Building Entrance and Balconies currently constructed in the HRM right-of-way.

LEGISLATIVE AUTHORITY

Halifax Regional Municipality Charter, S.N.S. 2008, c. 39, Subsections:

324 (1) "Where any part of a street, other than the travelled way, has been built upon and it is determined that the encroachment was made in error, the Engineer may permit, in accordance with any by-law made pursuant to subsection (2), the encroachment to continue until such time as the building or structure encroaching upon the street is taken down or destroyed.

(2) "The Council may, by by-law, regulate encroachments upon, under or over streets, including stipulating the period of time an encroachment may remain and the entering into of agreements, including terms and conditions, for particular encroachments."

Encroachment By-Law E-200, Subsection:

4B "An encroachment license shall not be issued unless the encroachment is authorized by Council except for the following encroachments, which may be authorized by the Engineer, (b) for a permanent encroachment for: (i) for a canopy for a commercial, industrial or institutional building, restricted in width to not more than the width of the entrance plus six feet;"

RECOMMENDATION ON PAGE 2

Administrative Order Number 15 Respecting License, Permit And Processing Fees:

Schedule A, Encroachment Bylaw S.6, (1) "Encroachment other than those described in paragraph 4(a)(iv) of Bylaw E-200 shall be subject to an annual rental fee in the amount of \$1.00 per 0.1 square metres of such encroachment, with a minimum fee of \$10.00."

RECOMMENDATION

It is recommended that Halifax Regional Council not approve the application for encroachment of the main entrance and balconies currently constructed within the HRM right-of-way at civic 5550 Bilby Street Halifax, NS. The location of the encroachments is shown on Map 1 and Attachments A, B and C.

BACKGROUND

"The Bilby" located at 5550 Bilby Street, is a newly constructed seven-storey residential building consisting of 71 residential units at the southeast corner of Bilby and Isleville Streets in Halifax. At the final stages of building construction, the contractor identified that portions of the building were located too close to the property line shared with the HRM right-of-way. As a result, both the façade of the main entrance as well as the second storey balconies along both Bilby and Isleville Streets encroach in the right-of-way.

Under the *Encroachment By-law E-200*, the Engineer may authorize encroachment Licenses only for the following items:

- canopies and awnings;
- built elements that are encroaching no further towards the curb than other existing building elements;
- pole mounted infrastructure;
- installation of building equipment such as HVAC and exhaust fans;
- underground conduit;
- public facilities;
- barrier free accesses;
- infrastructure that facilitates construction of a building; and,
- decorative building features required by a by-law.

All other types of encroachments into the right-of-way are at the full discretion of Regional Council.

In accordance with *Encroachment By-Law E-200*, permanent structures of this nature located within the right-of-way require Regional Council approval, and if approved, are also subject to an annual fee as outlined in Administrative Order 15.

DISCUSSION

Encroachment license applications are reviewed by staff to determine whether they contribute to or hinder current and future use of the right-of-way for the purpose of establishing and maintaining infrastructure for use by the public.

The main entrance along Bilby Street projects 12 inches (0.3 metres) inside the right of way, while the second storey balconies 10 feet (3 m) above the right-of-way project between 4.7 inches (0.119 m) and 7.8 inches (0.198 m) inside the right of way. The total area of the encroachment along both Bilby and Isleville Streets is approximately 5.17 square meters. Information provided by the applicant in support of this request

include a site plan, rendering photos of the encroachment and request letter (Attachments A, B, C and D respectively). The applicant describes the error of using outdated construction information when positioning the building, which resulted in the building being located closer to the property lines than originally designed, and the façade of the main entrance and the second storey balconies encroaching into the right-of-way.

The development agreement applicable to the site allows for portions of the building to be constructed up to the property line, and the approved building design was required to accommodate a main entrance emphasized by detailing and apartments with balconies. The approved plan showed the building set back sufficiently to accommodate both the enhanced entrance detailing and the balconies within the property boundary. The development agreement does not provide specific requirements for the size or dimensions of either the main entrance or the balconies and allows the Development Officer to approve minor variations to the exterior architectural appearance of the building. Such minor variations could accommodate alternative detailing at the main entrance as well as re-sizing of the balconies to fall within the property boundary.

At ground level, the existing right-of-way at this location consists of a sidewalk and grass boulevard. The encroachments would not interfere with the existing public infrastructure and staff have confirmed that there is presently no risk to public safety.

There is no public benefit associated with the requested encroachments. The encroachments are requested by the applicant to rectify construction errors.

Conclusion

Staff do not recommend approval of the encroachment license request. In the absence of policy direction to the contrary, encroachments of this nature in the right-of-way that do not provide a clear public benefit, are not supported by staff.

Encroachments such as this are approved at the sole discretion of Council and are considered on a case-by-case basis.

FINANCIAL IMPLICATIONS

If Regional Council chooses to approve the encroachment, Cost Centre R112-4912, Right-of-Way Approval – Signs and Encroachments would be used to record this new annual revenue.

RISK CONSIDERATION

There are no risks associated with the staff recommendation.

If Council chooses to approve of the encroachment license, the impact resulting from the encroachment potentially obstructing future uses of the right-of-way is minor, and the likelihood that the encroachment will conflict with public infrastructure is possible, but unlikely. There is a potential low risk with respect to general liability regarding use of the balconies and entrance way which would need to be addressed in any encroachment agreement. There is a higher risk that supporting errors in new building construction set a precedent that lack of care and diligence by the contractor would be supported in the future for other developments.

COMMUNITY ENGAGEMENT

Community Engagement, as described by the Community Engagement Strategy, is not applicable to this process.

ENVIRONMENTAL IMPLICATIONS

No environmental implications have been identified.

ALTERNATIVES

Regional Council may choose to approve the encroachment application, in which case an Encroachment Agreement would be formed between HRM and the Property Owner, and an annual encroachment license fee as set by AO 15 (Currently \$57.10) would be collected.

Encroachment Agreement

If Regional Council approves of the encroachment, an Encroachment Agreement would be established between the property owner and HRM in the format similar to other encroachment agreements previously drafted and approved by HRM Legal Services. Typical conditions that would be considered for inclusion in the Encroachment Agreement include:

- a) construction and maintenance of the encroachment must comply with all applicable legislation including, Streets By-law, S-300, Encroachment By-law, E200, and Administrative Order, 2018-005-ADM;
- b) the Encroachment is required to meet current HRM Municipal Design Specifications.
- c) the Applicant would be responsible for third party liability insurance, ownership and maintenance of the approved encroachment;
- d) if requested by Regional Council, the encroachment would be removed or relocated by the property owner(s) and the area within the HRM right-of-way reinstated at their expense; and
- e) record as-built drawings of the encroachments and related information must be provided to HRM.

Annual Fee

If an Encroachment Agreement is reached, the property owner would be subject to an annual fee for the encroachment as outlined in Administrative Order 15.

Administrative Order 15 states that all permanent encroachments within the HRM street right-of-way shall be subject to an annual rental fee of \$1.00 per 0.1 square metres (\$10 per square metres) of such encroachment, with a minimum fee of \$10.00. The encroachment area that will lie within the HRM Right of Way on Bilby Street and Isleville Street would be 5.17 square meters. Therefore, the encroachment would be subject to an encroachment fee of \$51.70 per year.

ATTACHMENTS

Map 1 – Location

Attachment A Site Plan

Attachment B Encroachment Rendering

Attachment C Encroachment Photos

Attachment D Applicant Request Letter

A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Ashley Blissett, Manager, Development Engineering, 902-476-7210



1 Foot Overhang into ROW

5.5-inch Overhang into ROW

4.7-inch Overhang into ROW

7-inch Overhang into ROW

Attachment C - Encroachment Photos

Photo 1 - Entrance Encroachment on Bilby Street

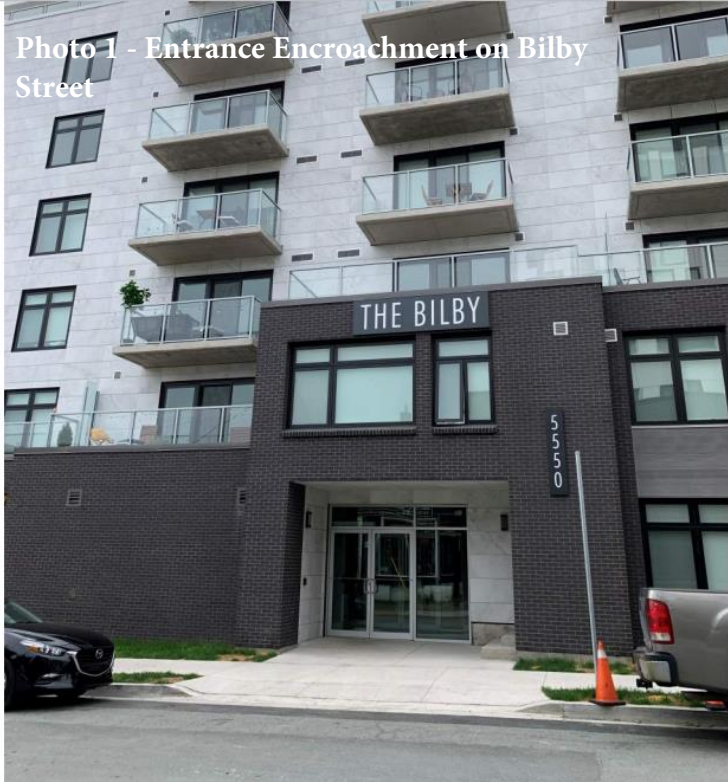


Photo 2 - Balcony Encroachments on Isleville Street

Photo 3 Looking Southeast





Attachment D - Applicant Request Letter

May 11, 2022

Halifax Regional Municipality
Attn: Ashley Blissett
Suite 2005 – 7071 Bayers Road
Halifax, Nova Scotia B3L 2C2

Dear Ashley:

**Re: 5550 Bilby Street, Halifax, Nova Scotia
Development Agreement Dated August 31, 2016
Permanent Encroachment License Approval Request**

We are writing to you today on behalf of our client regarding this multi-unit residential building project located at 5550 Bilby Street, Halifax, Nova Scotia (the “**Project**”). The Project’s owner is 3276428 Nova Scotia Limited, which is led by Jonathan, Derek, and Renee Ross; Lindsay Construction is the Construction Manager.

The Project is nearly fully complete, and the Rosses are excited to be on the verge of opening multiple new, quality units in Halifax which will help address the current housing crisis. However, we have come to the point where we need HRM’s help to be able to “cross the finish line”.

Just before partial occupancy, it was brought to our attention that (through inadvertent error) the building was located inches off where it ought to have been. While the difference is slight (roughly a foot at most), the result is that there are two small encroachment areas into the HRM rights-of-way on both Isleville and Bilby Streets: one relates to the front entrance of the building, and the other relates to the second level balconies. The depth of the encroachments is between 4.7 and 12 inches.

We have attached a mark-up showing the location and extent of these encroachments. As you will see, none of them actually encroaches onto the sidewalk – only the grass immediately adjacent to the property.

And even though the second level balconies and entrance structure are encroaching, the building itself is still the same size and shape that it should be per the Development Agreement. In other words, it is the right building in (slightly) the wrong spot.

Once discovered, we promptly investigated the cause of the encroachments. Although Lindsay sent updates to the Project’s civil engineer, it appears that they did not incorporate those updates and instead used an outdated base file in the civil design, which was then used for the layout (positioning) of the building. In the result, anyone (like the building surveyor) who used the civil design was working off of incorrect distances to the property line, by a matter of inches.



Normally this discrepancy would not result in an encroachment. However, the Project's Development Agreement permitted construction right up to the property line. The result of the civil drawing discrepancy is that the building corner closest to the Bilby/Isleville intersection is closer to the property line than it should be. While the building foundations remain entirely within the property boundaries, the second level balconies/entrance structure encroach onto the adjacent rights-of-way. Only the second level balconies encroach on HRM lands; after the second floor, the building narrows and so all balconies above that level are also entirely within the property limits.

Unfortunately, given the tight dimensions of the project footprint in relation to the property line, the discrepancy in the civil drawings could not be seen on the PDF civil drawings provided. It can only be seen when zooming in on the CAD drawing file. This shows the incorrect (i.e., not updated) base file on the drawings that were ultimately used to position the building on the property.

The front entrance encroachment is 12 inches total. The Project's Development Agreement requires the street-level walls of the building to be of urban design, with high quality construction materials such as masonry. The encroachment for the front entrance is an *effect* of the building's "shift", but that is only because of the decorative masonry and the accessible entrance required by the Development Agreement. But for the masonry and accessibility structures, the entrance would not be encroaching onto the right-of-way. But, in order to maintain compliance with the Development Agreement, the Owner cannot remove those elements.

The balcony encroachments are 10 feet above ground level; the Bilby balconies encroach by 4.7 inches, and the Isleville balconies encroach by 7.8 inches. These balconies are the private balconies for the residential units, as detailed within the Development Agreement. They are concrete with pre-finished metal railings and glass, to match the other balconies on the building. As they are currently constructed, the encroachments do not impede anyone traveling along the right-of-way.

We explored the possibility of cutting down the balconies, and cutting back the entrance structure, to eliminate the encroachments. In order to maintain the materials required by the Development Agreement, the entrance would have to be cut down by 12 inches. However, the entrance structure extends the full first two levels of the building, and directly above the front door is another unit. If the entrance was to be cut back by 12 inches, it would require complete demolition and reconstruction of not only the front entrance but also the fully-finished unit above it. The cost and time of this would be significant, and would take weeks if not months to complete. The entire building would remain unavailable to public rental during this time.

HRM By-Law E-200 requires an encroachment license for encroachments of any depth. Section 4B(b) of By-Law E-200 allows the Municipality's Engineer to approve a permanent encroachment license in certain, limited circumstances. The three circumstances relevant to this Project are:

- 4B An encroachment license... may be authorized by the Engineer,
- (b) for a permanent encroachment for:



- (iii) for steps, a foundation or other structure of a building where the steps, the foundation or other building structure must encroach, ...
- (ix) the installation of infrastructure to facilitate the construction of a building, where the infrastructure is deemed by an engineer:
 - i. to be required for the construction of the building, and
 - ii. in the opinion of the Engineer would cause excessive disruption to remove;
- (x) the installation of a decorative building feature required by a by-law, including a land-use by-law;

As to s. 4B(b)(iii), it is only the entrance structure and balconies that are encroaching – it is not the building foundation. To maintain compliance with the Development Agreement the entrance materials and accessible ramp must be used, and there is no practical way to do that and eliminate the encroachment.

As to s. 4B(b)(ix), again the front entrance masonry and accessibility ramp are required by the Development Agreement, and would be exceedingly expensive and time consuming to remove. Cutting back the balconies would cause more disruption in the rights-of-way, once again blocking off this area for overhead work and disturbing the finished landscaping. Additionally, steel channels would need to be added to the balconies to ensure their structural integrity, which would result in an unappealing eye-sore just above the ground floor and would not be the finish standard as detailed in the Development Agreement.

As to s. 4B(b)(x), the Development Agreement (required by HRM land-use by-laws) mandates the features of the entrance that are now encroaching on the right-of-way, and the balconies have been constructed in accordance with the plans approved in the Development Agreement. Even if the balconies could be cut back, the cosmetic and accessible aspects of the entrance cannot.

Given the minor nature of the encroachments (balcony/entrance only (not foundation), and mere inches onto or above the right-of-way (not the sidewalk)), the near-complete status of the building, the pressing need for additional housing in Halifax, the time and cost of physically removing all the encroachments, and the requirements of the Development Agreement, we respectfully suggest that this is a clear instance in which the discretion of the Engineer ought to be exercised to issue an encroachment license. This would be in line with Council's stated desire to ensure speedy approvals to get new housing on the market, and enable a beautiful building that enriches the neighbourhood to fulfill the purpose for which it was initially approved.

If you have any questions about this matter we would be pleased to provide additional information, or help in any way we can. Please don't hesitate to contact me directly.



Sincerely,
Original Signed

-

Jamie Mills, CAT, GSC
Senior Construction Manager

Enclosure(s):

- Encroachment Mark-Up
- Amended Development Agreement – August 31, 2016
 - See specifically:
 - Entrance Brick – page 26, s. 2.3.3(i)
 - Balconies – page 27, s. s. 2.3.3(v)
 - Entrance Brick – page 27, s. s. 2.3.3(vii)
 - Balconies and Entrance Brick – page 34, “Siting, Building Design, and Neighbourhood Compatibility”
 - Balconies – page 48, s. 3.5.10
 - Lot Usage – page 74, s. 3.0, paragraphs 2 and 4

Cc. Client