



## Committee of the Whole Report For the Meeting of January 16, 2020

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**To:** Committee of the Whole **Date:** January 2, 2020  
**From:** Karen Hoese, Director, Sustainable Planning and Community Development  
**Subject:** Setback Regulation for Retaining Walls and Other Structures on Waterfront Properties

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### RECOMMENDATION

1. That staff bring forward, for first and second readings, the attached Zoning Regulation Bylaw Amendment Bylaw No. 20-002 to add a regulation that applies building setbacks to garden suites, accessory buildings, outdoor features and retaining walls on waterfront properties with residential development.
2. That, subject to Council approving the related 2020 Supplemental Budget request, Council direct staff to undertake a second phase of this work, including initiating work on the creation of an environmental protection Development Permit Area for residential shoreline properties, delegating authority for staff to review and approve Development Permit Applications that are consistent with design guidelines, as well as small variances within this area, and begin work on incorporating provisions of the *Fence Bylaw* into the *Zoning Regulation Bylaw*.

### LEGISLATIVE AUTHORITY

In accordance with Section 479 of the *Local Government Act*, Council may regulate within a zone the use of land, buildings and other structures; the density of the use of the land, building and other structures; the siting, size and dimensions of buildings and other structures; as well as, the uses that are permitted on the land, and the location of uses on the land and within buildings and other structures.

### EXECUTIVE SUMMARY

The purpose of this report is to present Council with information, analysis and recommendations regarding a Council directed amendment to the *Zoning Regulation Bylaw* which adds a regulation that applies building setbacks to retaining walls and other structures on waterfront properties with residential development. The report also discusses the potential risks and implications associated with the proposed setback regulation.

### BACKGROUND

On September 5, 2019, Council made the following motions:

*That Council direct staff to amend the Zoning Regulation Bylaw to apply building setback regulations to retaining walls and other structures on all waterfront properties with residential development.*

*That Council direct staff to report back with implications of setback regulations for other structures on all waterfront properties.*

This report responds to the above motions.

## **PROPOSED ZONING REGULATION BYLAW AMENDMENT**

In response to the Council motion directing staff to amend the *Zoning Regulation Bylaw* to apply building setback regulations to retaining walls and other structures on all waterfront properties with residential development, staff have prepared a Bylaw amendment that would add the following general regulation to the Bylaw:

*Notwithstanding Sections 40 and 41, on waterfront lots occupied by residential uses, setback regulations that apply to principal buildings also apply to garden suites, accessory buildings, outdoor features and retaining walls that are located between the principal building and the property boundary with the waterfront.*

The proposed *Zoning Regulation Bylaw* amendment is attached to this report (Attachment A). If adopted, this regulation would prohibit garden suites, accessory buildings, outdoor features and retaining walls proposed on waterfront lots from being located within a prescribed setback that exists between the principal building on a lot and the boundary with the waterfront unless a variance from the *Zoning Regulation Bylaw* is granted. The setbacks from the waterfront that would normally apply to a building do not currently apply to outdoor features not exceeding 0.6m in height, garden suites and accessory buildings, hence these have been specifically included in the proposed regulation.

The Bylaw amendment also involves creating a new definition for “waterfront lots.” These would be defined as follows to differentiate properties fronting a tidal water body:

*“Waterfront Lot” means a lot that abuts a tidal water body along any portion of the lot’s boundary.*

The proposed regulation would apply to all properties sharing a property boundary with the waterfront that accommodate one or more residential dwelling units. The properties that would be affected by the Bylaw amendment are identified on the attached map (see Attachment B) and are predominantly concentrated along the Victoria Arm and on Hollywood Crescent and Crescent Road in the Gonzales neighbourhood.

## **IMPLEMENTATION**

If adopted, the new regulation would apply to all garden suites, accessory buildings, outdoor features and retaining walls located within the setback prescribed between the principal building on a lot and the property boundary with the waterfront. For information, outdoor feature is defined in the *Zoning Regulation Bylaw* as follows:

**“Outdoor Feature”** means any structure constructed or placed on a lot, whether attached or detached from a building, including but not limited to swimming pools, patio, decks and stairs, and excluding:

- a) buildings;
- b) raised gardens bed;
- c) docks;
- d) wharfs;
- e) piers;

- f) *cistern;*
- g) *stormwater retention and water quality facility;*
- h) *retaining walls;*
- i) *fences.*

The *Zoning Regulation Bylaw* currently excludes outdoor features from required building setbacks where the feature projects no more than 0.6m above natural or finished grade. Strict application of the proposed Bylaw amendment would mean that patios, decks, swimming pools and stairs would be subject to applicable setbacks, with no height exemption for any features. In other words, a patio constructed with pavers at natural grade would require a variance if it was located in the required setback between the principal building and the waterfront.

Should Council wish to allow for structures of a modest height within the setback from the waterfront, consistent with the current exemptions for outdoor features, then staff would recommend the following alternate motion:

*Notwithstanding Sections 40 and 41, on waterfront lots occupied by residential uses, setback regulations that apply to principal buildings also apply to garden suites, accessory buildings, outdoor features and retaining walls that:*

*(a) are located between the principal building and the property boundary with the waterfront; and,*

*(b) for outdoor features only, are above 0.6m in height from natural grade or finished grade, whichever is lower.*

The risk of adopting the above alternate motion is that it would generally allow property owners to build an unlimited number of outdoor features, including swimming pools, with unlimited site coverage, within the setback from the waterfront, as long as those features did not exceed 0.6m in height, which could create the perception of a large retaining wall or similarly hardened foreshore.

### Transition Provisions

If adopted by Council, the setback regulation would come into effect immediately. Property owners proposing garden suites, accessory buildings, outdoor features and retaining walls within the setback prescribed between the principal building on a lot and the property boundary with the waterfront would then require a variance if they had not yet submitted a Building Permit for such work. Should Council wish to include a transition provision, which would delay the date the new regulation comes into force, then Council may wish to direct staff to revise the *Zoning Regulation Bylaw* amendment accordingly. If Council considers adding such a provision, staff recommend that an effective date no longer than one month from the date of adoption should be considered.

## **ISSUES AND ANALYSIS**

### Exclusions (Old Town District)

Staff recommend that the proposed general regulation be added to *Zoning Regulation Bylaw No. 80-159* but not to *Zoning Bylaw 18-072*, which covers Old Town and the Central Business District. The reasons for this are as follows:

- the regulation would only apply to a limited number of properties between Pandora Avenue and Herald Street that are regulated by *Zoning Bylaw 18-072*. This includes The Janion, the adjacent parking lot (which has an approved Development Permit for a residential development) and two undeveloped lots situated between Mermaid Wharf, the Canoe Club and the Inner Harbour

- there are no setback requirements from the waterfront specified in the site zoning for the properties potentially affected by the proposed regulation
- the Harbour pathway is envisaged to be located along the edge of these properties adjacent to the waterfront and, to facilitate this, the construction of retaining walls and similar features may be required (it is also noted that these are not uncommon features in this part of the harbour)
- Design Guidelines exist and are applied in the review of applications for waterfront development in this area.

It is noted that there are two properties regulated by *Zoning Regulation Bylaw 80-159* and located to the south of the Johnson Street Bridge that will likely be affected by the proposed Bylaw amendment. Firstly, the City is in receipt of Rezoning and Development Permit Applications for the Northern Junk buildings located at 1314 & 1318 Wharf Street. These applications are still under review and the plans do indicate a number of features, including patios, between the principal buildings and the waterfront. If these features are deemed supportable by Council, then the Zoning Regulation Bylaw amendment associated with this Rezoning Application could likely be written in a way to allow such features at this specific location (or alternatively, they could be considered as a variance as part of the Development Permit Application).

It is understood that the Regent Hotel, located at 1234 Wharf Street, accommodates a number of permanent residential units; therefore, the proposed regulation would apply to this site. The property is currently zoned IHR Zone – Inner Harbour Regent District, which requires a minimum building setback from the high water mark. The existing building already appears to be legally non-conforming (it is closer to the high water mark than 7.5m) and the adoption of the proposed regulation may result in additional legal non-compliance if retaining walls or outdoor features are located between the existing building and the property boundary with the waterfront. While additional non-conformity would not immediately impact the property, it would mean that any new retaining walls or outdoor features (or work to such existing structures) would likely require approvals.

### Other Exclusions

The proposed regulation would not apply to:

- residential development on waterfront properties where there are no rear setback requirements specified in the current site zoning (note that the majority of affected properties do have applicable setback requirements)
- properties that do not have a boundary with the waterfront (for example, where the Songhees Walkway is located between residential developments and the waterfront)

### Land Use Contracts

There are several waterfront properties accommodating residential uses that are currently regulated by Land Use Contracts. Land Use Contracts were legislated as a regulatory tool in place of zoning in the 1970s. The LUCs addressed development issues that zoning could not, and in these cases Zoning was rendered inapplicable.

On May 29, 2014, the Province adopted Bill 17, *Miscellaneous Statutes Amendment Act*, which amended the *Local Government Act* to automatically terminate Land Use Contracts on June 30, 2024. Prior to termination, municipalities are required to have underlying zoning in place on any affected properties by June 30, 2022. The City has the underlying zoning in place for all of the waterfront properties impacted by the proposed setback regulation; however, the regulation would not come into effect on properties regulated by Land Use Contracts until these Contracts are

terminated (i.e. by June 30, 2024, unless Council direct staff to discharge these earlier).

### Fences

The proposed *Zoning Regulation Bylaw* amendment would not prevent the construction of a fence on a waterfront lot. Fences are regulated by the City's *Fence Bylaw*, not the *Zoning Regulation Bylaw*, and this would allow the construction of a fence up to 1.83m tall on a residential boundary along the waterfront.

Should Council wish to address this issue, Council could consider one of the following options:

- amend the *Fence Bylaw* to prohibit fences, or fences of a certain height, along a residential property boundary with the waterfront;
- refine the regulations contained in the *Fence Bylaw*, addressing the height of fences on the waterfront, and transfer the regulations to the *Zoning Regulation Bylaw* and *Zoning Bylaw 2018* (rescinding the *Fence Bylaw* in the process); and/or
- amend the OCP by creating a new environmental Development Permit Area (see below) along specific parts of the waterfront and prohibiting certain types of fences in this area.

An amendment to the *Fence Bylaw* would be the most expedient response; however, this Bylaw currently presents staff and property owners with a number of interpretation issues, including:

- the Bylaw does not define a fence (unclear whether this include walls, railings, gates, retaining walls where they support a fence etc.)
- the Bylaw does not clarify how the height of a fence is measured (is it from the side of the fence with the lowest grade or from the side with the highest grade, is it measured to the tallest part of the fence or just the panels etc.).

Given the above, staff would recommend that, in the long term, Council ultimately direct staff to amend the *Zoning Regulation Bylaw* to include updated regulations relating to fences and subsequently rescind the *Fence Bylaw*. However, this would be a more substantive work item as staff would be effectively creating new regulations relating to fences which would require some research and analysis, and ultimately a *Zoning Regulation Bylaw* amendment, which would require Council approval following a Public Hearing. Should Council wish to pursue this then appropriate wording is included in Part 2 of the staff recommendation.

### Soil Removal and Grade Manipulation

The proposed setback regulation would not prevent property owners from removing soil from their rear yards or from manipulating grades through removing, importing or moving soil, as long as retaining walls were not being proposed to stabilize the affected land (it should be noted that the proposed regulation would not prevent the installation of rip-rap or piling of rock/boulders along the shoreline, however, this could be addressed through the creation of a DPA). Such work could potentially have significant impacts on the appearance of residential yards. The City does not currently have a Bylaw to specifically control such work and, if Council did wish to have some control, then staff would recommend the creation of a Soil Removal and Deposit Bylaw. Other municipalities (for example, Langford, City of Kelowna, City of Surrey) have such Bylaws in place and these typically specify the amount of soil or rock that can be removed from a site or deposited on a site without requiring a Permit from the municipality.

### Board of Variance

Should a property owner wish to seek a variance to the proposed setback regulation, then they may

be entitled to apply for a relaxation to the Board of Variance (BoV). The Board deals with requests for minor relaxations to the *Zoning Regulation Bylaw* and may grant a variance where it is persuaded that the present zoning creates an undue hardship unique to the property in question. It is up to the BoV to determine whether such a hardship exists and what constitutes a minor relaxation. The Board may deny the variance request if, amongst other things, it feels that the proposed variance would substantially affect the use and enjoyment of a neighbouring property, harm the natural environment or defeat the purpose of the *Zoning Regulation Bylaw*.

Should Council wish to have greater control over residential development located adjacent to the waterfront then this could be achieved by establishing a new DPA for the purposes of protection of the natural environment, the ecosystems and biological diversity (see below). A new DPA would identify works that would require a Development Permit and the BoV does not have the authority to deal with such applications.

### Development Permit Area

The *Official Community Plan* (OCP, 2012) identifies an area of land covered by water, shoreline and uplands within 7m from the high water mark as Development Permit Area (DPA) 8: Victoria Arm – Gorge Waterway (see Attachment C). Notwithstanding the proposed setback regulation, this requires Development Permits for buildings, structures and other features within the designated DPA with only limited exemptions (such as 1m wide path to the shoreline, fences perpendicular to the shoreline and repairs to existing lawful structures). This means that, if Council adopted the proposed general regulation, then accessory buildings, outdoor features and retaining walls would likely require a Development Permit with Variance if located within this DPA.

It should be noted that Development Permit Applications in DPA 8 are delegated to staff under the *Land Use Procedures Bylaw* where the applicant satisfactorily demonstrates that the proposal is consistent with the applicable Guidelines outlined in the OCP. Variances triggered by the proposed regulation would not be delegated to staff. As such, if Council adopts the proposed Zoning Regulation Bylaw amendment, Council may wish to consider directing staff to amend the *Land Use Procedures Bylaw* to delegate variances to the proposed setback regulation to staff where the proposal is demonstrated to be consistent with the relevant Guidelines and the variance is relatively minor.

As per Part 2 of the staff recommendation, pending the approval of the 2020 financial planning process and allocation of an additional FTE, staff recommend that Council consider directing staff to undertake a second phase of this work, including initiating work on the creation of an environmental protection DPA for residential shoreline properties and delegating authority to staff to review and approve applications and small variances within this area. This is consistent with the *Strategic Plan* which identifies the following as a 2020 action item:

*Increase protection for shoreline areas and Garry Oak ecosystem including the shoreline between Gonzales Bay and Ross Bay and the shoreline along Gorge Waterway*

Furthermore, it is consistent with the *Climate Leadership Plan* which identifies the following action item:

*Explore the creation of Environmental Development Permit Areas or other mechanisms to protect and enhance shoreline and marine habitats.*

## Implications for Applicants

In the event that Council adopts the proposed *Zoning Regulation Bylaw* amendment, affected property owners would need to seek a variance for any garden suites, accessory buildings, outdoor features or retaining walls located within the setback prescribed between the principal building on a lot and the property boundary with the waterfront. Such an application would likely take a minimum of 3-4 months to process and an application fee would apply. Council would make the final decision to approve or decline an application following an Opportunity for Public Comment.

It is likely that the applicant would need to submit a grading plan (completed by a land surveyor) and have the work further surveyed upon completion (to ensure that the work does not exceed the height requirements specified in the new regulation). These costs (application fees and consultant fees) would apply regardless of the scope of work (i.e. they would apply to a patio built at grade).

Some of the impacts on applicants outlined above could be reduced by delegating some or all of these variances to staff, whereby the application fee and application processing time would be reduced. This would require an OCP Amendment to establish a Development Permit Area as well as an amendment to the *Land Use Procedures Bylaw*.

## **CONSULTATION**

In this instance, given the specific Council direction on this matter staff recommend that, consistent with the *Local Government Act* and City's *Land Use Procedures Bylaw*, notice of the Public Hearing is advertised in the local newspaper and on the City website. On-site sign posting is not required where ten or more properties are affected by a City initiated Zoning Regulation Bylaw amendment. Information will also be posted and made available in the City's Development Centre so that land owners and developers are aware of the new regulation.

## **OPTIONS AND IMPACTS**

### **2019-2022 Strategic Plan**

The proposed Zoning Regulation Bylaw amendment and creation of an environmental protection DPA is consistent with the 2020 action item which seeks to increase protection for shoreline areas.

### **Impacts to Financial Plan**

The proposed amendments to the *Zoning Regulation Bylaw* will not impact the *Financial Plan*; however, the second phase of work, which would involve an OCP Amendment to establish a shoreline protection DPA and improvements to the Fence Bylaws, would require an additional position in the Development Services Division, which has been included in the 2020 Supplemental Budget Requests.

### **Official Community Plan Consistency Statement**

The proposed amendments to the *Zoning Regulation Bylaw* is consistent with the OCP, which supports the role of the Bylaw to help implement plan objectives, land uses, built forms and densities.

## **CONCLUSIONS**

The proposed amendment to the *Zoning Regulation Bylaw* responds to the September 5, 2019, Council motion and, if adopted, would prohibit garden suites, accessory buildings, outdoor features

and retaining walls proposed on waterfront lots from being located within a prescribed setback that exists between the principal building on a lot and the boundary with the waterfront unless a variance from the *Zoning Regulation Bylaw* is granted.


Staff are also recommending that, pending the approval of the 2020 financial planning process and allocation of an additional FTE, Council consider directing staff to initiate work on the creation of an environmental protection Development Permit Area for residential shoreline properties, delegating authority for staff to review and approve Development Permit Applications that are consistent with design guidelines, as well as small variances within this area, and begin work on incorporating provisions of the *Fence Bylaw* into the *Zoning Regulation Bylaw*.

Respectfully submitted,

  
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Report accepted and recommended by the City Manager:

  
Date: Jan 10, 2020

**List of Attachments**

- Attachment A: Proposed Zoning Regulation Bylaw amendment
- Attachment B: Map showing affected properties
- Attachment C: Development Permit Area 8: Victoria Arm – Gorge Waterway map.