

LICENCES AND ENCROACHMENT AGREEMENTS

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WHAT IS A LICENCE?

A Licence is a right to enter upon and use someone's land in a certain manner or for a specific purpose. In the municipal context some examples might be a Licence to hang a sign over a street, place a sandwich board on a sidewalk, use an outdoor patio for a restaurant, or build a driveway on an unopened road allowance. Licences are personal rights and do not create an interest in land.

WHAT IS A LEASE?

I have often been asked the question when should a municipality use a Licence and when should it use a Lease? It is often a difficult problem to distinguish between the two. Usually a Lease gives exclusive possession to the tenant with a fixed term and is not revocable except for default. Rent is payable on a periodic basis. A Lease also creates an interest in land and can be registered on title.

By contrast a Licence is more temporary. It often does not give exclusive possession to the Licensee and many are revocable upon giving notice during the term of the Licence. A licence fee may or may not be payable. A Licence usually cannot be registered on title to either the municipal land or the land benefitted.

Leases are governed by legislation such as the *Residential Tenancies Act* and the *Commercial Tenancies Act* and also by the contract itself. Licences are governed by

contract. It is important to note that the name given to an agreement does not govern the nature of the document. You may call a permission given a Licence, but by the language used within that document it is effectively a Lease. In other words, if it looks like a duck, walks like a duck and quacks like a duck then - it's a duck! To confuse matters licences and easements often have similar characteristics. In both cases they grant a limited use of property - not exclusive like a Lease. Easements however are usually more permanent than a licence and can be registered on title. Easements are commonly used to allow for municipal and utility services and for rights-of-way. Here again a document may be called a licence, but if it has the characteristics of an easement such as benefitted lands and servient lands then it can create an interest in land and be registered on title if it has a proper legal description.

THE POWER TO LICENCE

Prior to the complete overhaul of the Municipal Act which took effect January 1, 2003, municipalities were given specific licensing powers with respect to highways and road allowances. Prior to 2003 the general rule was that if you could not find a specific power in the *Municipal Act* then the municipality did not have it. For example, one section of the old Act listed 176 specific powers and a number of those allowed for permitting private encroachments on public highways. Similarly, in the Highways and Bridges part of the old Act, municipalities were given the authority to lease or licence the use of untraveled portions of highways and to give permission to use parts of a highway for private purposes. That all changed on January 1, 2003 with the passage of the *Municipal Act, 2001*. Under the new Act municipalities have been given more general powers including what are referred to as “natural person powers”. This gives more flexibility in dealing with licensing situations.

PURPOSES OF A LICENCE AGREEMENT

Generally speaking municipalities enter into Licence Agreements for two purposes:

- (a) to recognize an existing encroachment onto municipal property, or to permit a future encroachment. For example, a property owner may have a survey done of his or her property and find out that part of the garage encroaches onto a municipal street. Sometimes those encroachments are ignored both by the private landowner and the municipality; however, it may be that a purchaser of the property or a mortgagee requires a Licence Agreement with the local municipality. A private landowner cannot obtain possessory rights on highways, whether assumed or unopened.

- (b) secondly, a Licence Agreement may give a permission to a private person to make some specific use of municipal property. The most common examples of this are Licence Agreements relating to the use of an unopened road allowance as a means of access to that person's property.

As a matter of terminology you may find Licence Agreements referred to as Licences of Occupation, Encroachment Agreements, Licences of Use, or simply Permits or Permissions.

WHAT ARE SOME OF THE IMPORTANT ISSUES THAT STAFF AND COUNCIL MUST CONSIDER WHEN DECIDING WHETHER OR NOT TO ENTER INTO A LICENCE AGREEMENT?

1. Firstly, it should be recognized that municipal assets are in the nature of a public trust and are to be used for the benefit of the public. The question needs to be asked - Does the granting of a particular Licence in some way impair a municipality's ability to do its job or restrict it from providing some service that it considers necessary or desirable for the public?
2. Secondly, is the municipality assuming some additional liability by granting the Licence? Municipalities are sometimes asked to allow a gate and fencing to be constructed on an unopened road allowance to limit its use to certain private property owners and prevent use by off-road vehicles. Recently a municipality asked our firm to give an opinion on liability for allowing a cattle barrier to be placed across an unopened road allowance that was also used as a recreational trail. Liability for highways that have been assumed by a municipality is governed by the *Municipal Act*; however, for unassumed highways or other property owned by a municipality the *Occupier's Liability Act* needs to be considered. Municipalities are occupiers as defined in that Act if they are in physical possession of certain premises or have control of premises or control of the activities permitted on premises. I don't intend to dwell on the responsibilities of an occupier under the Act other than to say at this point that municipalities as occupiers are subject to a lower standard of care with respect to unopened road allowances and recreational trails. In those cases the duty to a person is to not create a danger with deliberate intent of doing harm or not to act with reckless disregard for the presence of persons on

the premises. This also applies to motorized snow vehicles and off-road vehicles under the *Motorized Snow Vehicles Act* and the *Off-Road Vehicles Act*.

3. If it is determined that a municipality is assuming additional liability by granting a Licence - and that will almost always be the case - then how can the Licence Agreement be used to reduce or manage the risks?

STANDARD PROVISIONS IN A LICENCE AGREEMENT

At this point I would like to take you through what I believe to be the standard provisions in a Licence Agreement, and deal with some specific ways of addressing that third consideration which is managing or reducing liability.

1. The Parties

Licence Agreements give some benefit to private property and the owner of that property. The Licensee therefore should be the person or persons whose private property is benefitted and the best way to confirm this is to carry out a title search and obtain a Parcel Register showing the owner of the land to be benefitted. Also, it may be important to check for corporate status if, for example, it is an Association that is asking for the grant of a Licence. There are many unincorporated Associations and they are not legal entities for the purpose of entering into a Licence Agreement. This is true particularly in cottage country where cottage groups want a Licence Agreement to use an unopened road allowance for access to the properties of its members. Sometimes a municipality will require the Association to incorporate. Alternatively, all of the property owners must personally sign the Licence Agreement.

2. The Permitted Use

It is important to be specific here. If it is an encroachment a survey identifying the encroachment is best. Another option is a site plan.

3. The Term

A term of a Licence should be specified. From the municipality's point of view it is likely better that the term be short. Some Licence Agreements have automatic renewals unless a party gives notice.

4. Licence Fee

Municipalities are entitled to charge a fee for a Licence granted. If the Term of the Licence is lengthy then it is wise to have some mechanism in place whereby after a certain number of years the Licence Fee can be increased. Licence fees are justified to compensate for private use of public property and also for administrative time that will be spent dealing with ongoing monitoring that may be necessary.

5. Restrictions on Use

While the permitted use may be specific there may still be a need to include restrictions. For example, if the permission is for a dock to be erected all or partly on municipal property the Licence may prohibit use of the dock for commercial purposes. Other restrictions might relate to signage, garbage, use of pesticides, storing of flammables and a prohibition from excluding the public. This last restriction becomes important when a municipality is granting a Licence to allow a private owner to improve and use an unopened road allowance as an access. Unopened road allowances are public highways and if a private landowner makes

improvements that does not prevent members of the public from also using it. There is a way to restrict public use without closing the road allowance by passing a By-law, pursuant to Section 35 of the *Municipal Act*, which would exclude public use of the allowance. Sometimes if the permitted use is intended to be permanent a municipality may consider actually carrying out a road closing and conveyance of the road allowance. However, this will involve considerably more expense and in particular, the requirement of a survey for the portion of road allowance to be closed so that the road closing by-law can be registered on title.

6. Required Signage

While the previous paragraph imposes restrictions on use, the Licence Agreement may require the Licensee to install and maintain signage. This is particularly common if a private driveway is located on a road allowance. Usually the sign indicates that the road is unassumed by the municipality “Use At Own Risk”.

7. Construction to be Approved Including Alterations and Additions

As a matter of risk management, Licence Agreements often require any construction work - such as an overhanging sign or a private driveway - to be first approved by the municipality. The level of detail required will depend upon the permitted use. For example, the sign overhanging a sidewalk would be a serious safety issue for pedestrians whereas a municipality may not have as much concern about consenting to improvements being made to a remote unopened road allowance.

8. Security Required for Construction

When the construction work that a Licensee is authorized to do is substantial or there are significant safety issues the municipality may consider the requirement of security (usually by way of certified funds or a Letter of Credit) to ensure that the work is done correctly. This will make the Licence Agreement more complicated. There will need to be additional provisions to deal with the use of security by the municipality in the event of default, post-construction requirements to ensure that the work has been done satisfactorily and the release of security.

9. Maintenance and Repair

Coupled with the approval of construction should be a requirement that the Licensee maintain and repair any encroachment or driveway constructed on an unopened road allowance. Usually, the Agreement gives the municipality the power but not the obligation to carry out maintenance and repair if the Licensee has not done so and to charge those costs to the Licensee.

10. Indemnity

As part of its risk management, municipalities will require an indemnification from the Licensee for claims and actions brought by third parties as a result of the permission given. For example, if an overhanging sign falls on a pedestrian walking below it the Licensee should agree to indemnify the municipality from any claim made or action commenced.

11. Insurance

To back up the indemnity a municipality usually requires the Licensee to have third party liability insurance and that the municipality be added to the policy as an additional insured. As policies are generally written for a year at a time, the follow-up on this is somewhat problematic to ensure that each year the policy is renewed. Also, some insurance companies will not provide insurance for risks that are not within the complete control of the Licensee. For example, it is often difficult for a Licensee to obtain insurance coverage for the use of an unopened road allowance if the public also has access.

12. Assignment/Transfer

Usually Licence Agreements prohibit the assignment or transfer of the Licence without the municipality's consent. The assignee may be required to enter into a new Licence Agreement with the municipality and the Licence may only be transferred to the new property owner who will benefit from the Licence.

13. Early Termination

The Licence should always provide for early termination on default. Usually the Agreement requires the municipality to give notice of default and a time to correct. Also, it may be important to allow the municipality to give an early termination notice for reasons other than default such as the municipality's need for use of the premises on which the permitted use has been granted or when it is "in the public interest". Termination can be problematic when dealing with private roads on unopened road allowances. How do you prohibit future use as there is a public right of passage? You may need to consider a road closing or a by-law under Section

35 of the *Municipal Act*. The latter authorizes the removal or restriction of the common law right of passage by the public over a highway and the common law right of access to a highway by the owner of land abutting.

14. Registration of Licence

Generally speaking Licence Agreements provide that the Licence cannot be registered against the title of municipal lands. There are certain specific situations where a Licence Agreement can be registered (when it is in a form that would qualify as an easement), but the better course for a municipality is to prohibit registration in all cases.

15. Notice

As the municipality may wish to give notice of default or early termination the Agreement must prescribe how notice can be given and when it is deemed to have been received.

16. Legal Costs

Generally speaking the legal costs of the preparation and negotiation of a Licence Agreement are to be borne by the Licensee. A deposit is usually required before a solicitor is retained by the municipality.

AUTHORIZING BY-LAW - PROPERTY DISPOSAL POLICIES

Most municipalities pass a By-law authorizing the execution of the Licence Agreement. It may be possible to delegate the power to grant Licences to an officer or employee of the municipality. Also it is important to review your Policy regarding the sale or other

dispositions of land. Until 2006 the *Municipal Act* defined a sale to include a lease for 21 years or longer. Many municipalities have either not changed their policies to exclude leases or have continued to include them in a policy adopted since 2006. Can you avoid your policy by calling the Agreement a licence? Remember if it looks like a duck, walks and quacks like a duck!

DSC/adm