**MEMO**

To: Just Food
Date: June 19, 2023
From: Kristi M. Ross, Barrister & Solicitor
Re: **Analysis of Legal Liability associated with ROW gardens and use of ROW gardens to grow food/ consumables**

*If any Councillor/s would like to speak with Kristi Ross, LL.B/M.E.S, she is open to discuss this memo, ahead of the Transportation Committee meeting. Contact info: please email her at kristi.ross@gmail.com to arrange a time.

**Summary Points:**
(Please see them highlighted within the text for more detail)

- If the City were to make a decision to permit the planting of fruit and vegetables ("consumables") as part of the Gardening in the Right of way By-law this would be considered a "policy decision". Policy decisions involve the complex balancing of competing interests, and the draft of legislation and municipal by-laws are considered policy decisions. In the case of the Gardening in the ROW by-law, broad economic, social, environmental, financial and issues related to food scarcity and security are being debated and balanced, and the government cannot be held liable for the balance struck, as per the recent decision of the Supreme Court of Canada (the "SCC") in *Nelson* (City) *v.* Marchi *and the SCC's decision in Just v. BC.* These case draw a distinction between policy decisions (where liability cannot be found) and operational decisions (such as deciding how and where to plow snow, where municipalities have been held to be liable). The difference is discussed further in the section on municipal liability.
- Ottawa needs to include an indemnity clause in the by-law language (both related to the right of the City to remove gardens to service utilities etc. and to clarify the City is not liable for any other issues which may arise)
- Planters in some neighbourhoods are already allowed and the wording of Ottawa's zoning by-law currently considers planters to be soft landscaping (see s. 161 (15) (e)).
- While silence in the by-law on the ability to plant food (i.e. permitting "soft landscaping" which many may think includes food plants) might result in less food being planted; food safety would be be better protected by expressly allowing the planting of food and then regulating it and offering guidance documents and education about how to do soil safely and how to ensure

that the planting soil is clean.

- In a negligence claim, there must be evidence that there is a causal link between the harm experienced and the negligent act and evidence that the harm was caused by the negligent act and that it was not the result of another factor. Further, the harm alleged must not be too remote. This means that a court will ask whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct. Further, courts also consider if persons claiming negligence, made decisions to contribute to their own negligence.

**This chart below outlines three scenarios for permitting the planting of consumables in the ROW:**

| **Scenario** | **Compare to other jurisdictions** | **Liability Risk** | **Ways to Address Liability Risk** | **Other City Concerns and Ways to Address** |
|---|---|---|---|---|
| **Scenario 1: Consumables are permitted in a planter box (with clean soil)** | Victoria has detailed regulations permitting the use of planter boxes.<br><br>The regulations ensure that sight-lines are maintained, the total height of plants and box are regulated and the boxes must be moved (at the expense of the gardener) to enable access to utilities.<br><br>The regulation planter boxes is very similar to the | • Liability risk is very low<br>• No risk associated with soil contamination as clean soil is used<br><br>Liabilities include:<br>• Risk of planter box obstructing views / resulting in accidents etc.<br>• BUT this can be addressed through regulation of height of box+plants<br><br>• Risk of third party harm (tripping and falling) | The size and material used for planter boxes can be highly regulated (cf. proposed Little Library regulation)<br><br>Further, just as the City is requiring a signed letter of acknowledgement prior to installing a library, this could be a requirement for planter boxes - stipulating that the gardener understands all regulations and will comply with them<br><br>Indemnity clause can stipulate that the City can:<br>1) Remove the planter | Concerns related to visibility and sight lines can be addressed by ensuring that the planter box + the vegetation do not exceed 75 cm (or the max height in the by-law)<br><br>Regulations can require that boxes are easily movable to enable access to underground utilities, and can regulate the design of the box |

| Scenario | Compare to other jurisdictions | Liability Risk | Ways to Address Liability Risk | Other City Concerns and Ways to Address |
|---|---|---|---|---|
| | regulation of Little Libraries, proposed to be included in the by-law wording. | ● BUT this risk currently exists with sidewalks and retaining walls and can be reduced through regulation of planter boxes | boxes at their discretion and<br>2) Clarify the City is not liable for any damage to boxes<br><br>NOTE: This wording is already included in the proposed wording of the by-law in the Staff Report<br><br>Cf. Victoria / Calgary guidelines, and indemnity clauses included below chart | |
| **Scenario 2: Consumables are permitted to be planted in the soil of the ROW, with a material to retain soil and prevent it from spilling onto the sidewalk/ roadway (i.e. a piece of wood / plastic / metal, concrete)** | Victoria has detailed regulations permitting structures to retain soil.<br><br>These structures would permit the building up of clean soil and mulch. | ● Soil may be contaminated with contaminant transfer to food<br>● Lower risk than planting in ground b/c the retaining structure allows the build up of clean soil and mulch<br><br>● Risk of mechanism retaining soil harming a third party (tripping, or a piece being broke of and hurting someone) | ● Soil risk<br>● Regulations can require: soil testing (and even the submission of soil tests to the City), and the building up of clean soil and mulch<br><br>● With respect to the material to retain soil, its size and material can be highly regulated in the by-law or | These structures would permit the building up of clean soil and mulch, with a “structure” such as a piece of wood / plastic / metal, concrete to ensure this soli doesn’t spill onto the sidewalk / road. |

| Scenario | Compare to other jurisdictions | Liability Risk | Ways to Address Liability Risk | Other City Concerns and Ways to Address |
|---|---|---|---|---|
| | | - Risk from physical harm to a third party is quite low, and very remote<br><br>In some similar cases, a municipality was not held liable for accidents including a car sliding and getting into an accident on ice[1] and a tree falling on a car and causing injuries[2], because there were policy decisions. | guidance document and the inclusion of loose rocks / stones / riverstone can be prohibited<br><br>● Further, just as the City is requiring a signed letter of acknowledgement prior to installing a library, this could be a requirement for planting a garden containing food, with the letter Installing stipulating that the gardener understands all regulations (re: soil testing first, clean-soil etc) and will comply with them | |
| **Scenario 3A: Consumables are permitted to be planted in the soil of the ROW (<u>through express wording</u>)** | The planting of edibles in the soil is expressly permitted by the other jurisdictions, including:<br>● Victoria, | ● Soil may be contaminated and transferred to food<br><br>● This could give rise to a cause of action in negligence as the City | ● Regulations can require:<br>● Soil testing<br>● Soil replacement with clean soil and mulch | The height of clean soil placement could be regulated to ensure that visibility is preserved.<br><br>Expressly permitting |

[1] *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420
[2] *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445

| Scenario | Compare to other jurisdictions | Liability Risk | Ways to Address Liability Risk | Other City Concerns and Ways to Address |
|---|---|---|---|---|
| | ● Calgary<br>● Oshawa | owes citizens a duty of care.<br><br>However, a cause of action in Negligence would be difficult to establish b/c:<br><br>a) This is a "pure" policy decision and there is no municipal liability for policy decisions (Just v. BC[3]; Nelson (City) *v.* Marchi[4])<br><br>b) Significant issues with causation linking any health claims to eating food grown in the ROW<br><br>c) At a minimum, a gardener would be held to have | ● In certain "hot spots" in Ottawa known to be largely contaminated container gardens could be required<br><br>● Education / guidance documents can be created about how to soil testing prior to planting food, and how to instal of clean soil / compost / mulch<br><br>● Partnerships with Just Food as well as other community organizations to help reduce risk<br><br>● Inclusion of indemnity clause in the by-law cf. Calgary[5] by-law, | food (rather than being silent) will enable the City to expressly regulate the planting of food to ensure food safety and will enhance guidance / education documents and the forming of partnerships to help ensure food safety<br><br>As recommended above, the City could require a signed letter of acknowledgement (cf. libraries) for planting a garden containing food, with the letter Installing stipulating that the gardener understands all regulations (re: soil testing first, clean-soil etc) and will comply with them |

[3] *Just* v. *British Columbia*, [1989] 2 S.C.R. 1228 (SCC).

[4] *Nelson (City) v. Marchi*, 2021 SCC 41: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19036/index.do

[5] Calgary - For example the Indemnity clause could include "The City cannot guarantee the suitability of the boulevard for growing food".

| Scenario | Compare to other jurisdictions | Liability Risk | Ways to Address Liability Risk | Other City Concerns and Ways to Address |
|---|---|---|---|---|
| | | voluntarily assumed the risk and / or be found to be contributorily negligent<br><br>See detailed discussion of case law below<br><br>Expressly permitting edibles means that the City can use education tools, partnerships and guidance documents to ensure best practices and lower the risk of growing food in contaminated soil | Victoria by-law[6], see language after chart<br><br>● Indemnity clause should address:<br><br>● 1) safety of soil, and<br>● 2) outline that the City / utility owner can remove without compensation / liability in order to maintain infrastructure (cf. Victoria and Calgary guidelines) | |
| **Scenario 3B: The by-law is silent with respect to Consumables** (no express wording; "soft landscaping is permitted") | Montreal, Toronto, Vancouver permit soft landscaping that includes the planting of food | ● Soil may be contaminated and transferred to food<br><br>See Negligence discussion above<br><br>Silence in the by-law does not act as a liability shield; however, it is possible there there would be fewer | All the above strategies apply. | While silence on the ability to plant food might result in less food being planted; food safety would be be better protected by expressly allowing the planting of food and then regulating it and offering guidance documents, and |

[6] Victoria's clause is long, but covers off indemnity related to the soil's suitability to grow food to the ability of the City to remove the garden, see clause at the end of this chart.

| Scenario | Compare to other jurisdictions | Liability Risk | Ways to Address Liability Risk | Other City Concerns and Ways to Address |
|---|---|---|---|---|
| | | consumables planted | | education |

**Ottawa Needs to include an indemnity clause**

Some examples include:

**Victoria's indemnity clause**

By assuming control of the boulevard adjacent to your property for gardening purposes, you and your helpers assume full and sole responsibility for any bodily injury, property damage, or other harm that is suffered by you, your helpers, or any third party, arising in any way from, or connected in any way to, your garden-related activities, and any related liabilities, damages, complaints or claims (collectively, "Claims") including, without limiting the generality of the foregoing, injury to anyone who may trip and fall in your garden, illness to anyone who may eat plants from your garden, and lost or damaged plants, structures or ornaments caused by anyone including the City. The publication of these Guidelines and the granting of permission to engage in gardening on City boulevards is not intended to establish any agency or other relationship between the City and any person engaged in gardening on a boulevard. The City does not assume any responsibility or supervising authority for gardening on boulevards and will not inspect or manage boulevard gardens in any way. By engaging in boulevard gardening, you agree, in return for permission to garden on City boulevards in accordance with these Guidelines, to comply with these Guidelines and to waive any and all claims against the City, its officers, employees, elected officials, contractors and agents (collectively, "Releases") in relation to any Claims and you further agree to indemnify and save harmless the Releases from any and all Claims including legal costs and expenses that may be based on or related to your action, omission or inaction. Publication of these Guidelines and the granting of permission to garden on City boulevards is not intended to confer any legal or equitable interest or property right in the City boulevards. The City reserves the right to re-occupy the boulevards at any time and for any reason without notice to you or payment of any compensation for removal of the plants or other property from the boulevard or for the time and effort spent by you or anyone else in gardening or improving the boulevard in any way.

**Calgary's Indemnity Clause**

The City of Calgary reserves the right with due notice to require that a boulevard garden be removed and returned to The City's turf grass standard at any time and, at the property owner's full expense. Failure to comply will result in The City removing the boulevard garden and remediating the boulevard to The City standard at the full expense of the adjacent property owner. Noncompliance of an adjacent property owner with the Boulevard Garden Guidelines can result in future boulevard garden applications being denied.

**Ottawa zoning by-law, R4 zoning - most of Centertown, Hintonburg**
**Planters already allowed and considered soft landscaping.**

Portions of Ottawa's zoning by-law provide that raised planters are deemed to be soft landscaping to satisfy the City's minimum soft landscaping requirements for front yards in Ottawa's denser urban areas. Much of the landscaped front yard is actually located in the municipal right of way area.

As such, it is problematic that this new by-law contradicts what occurs in R4 areas across the City, by prohibiting planter boxes.

Another way of looking at this is to read "soft landscaping" in the proposed by-law as permitting planter boxes, to ensure consistency with section 161(15)(e)of the zoning by-law.

Clause 161 (15) (e)

a. …
b. …
c. Any part of any yard other than the rear yard not occupied by accessory buildings and structures, permitted projections, bicycle parking and aisles, hardscaped paths of travel for waste and recycling management, pedestrian walkways, permitted driveways and parking exclusion fixtures per (e) must be softly landscaped.
d. The minimum area of soft landscaping in the front yard is per Table 161:

| Front Yard Setback | Minimum Aggregated Soft Landscaped Area (per cent of the Front Yard Area) |
|---|---|
| < 1,5 metres | No minimum, but all lands within the front yard and within the corner side yard that are not used by permitted projections, driveways and walkways, must consist of soft landscaped area. |
| 1.5 metres – three metres | 20 per cent |
| >3 metres | 30 per cent, in the case of any lot with a lot width of less than 8.25 metres, 35 per cent, in the case of any lot with a width between 8.25 metres but less than 12 metres and 40 per cent in the case of any lot with a width of 12 metres or more. |

e. The front yard and corner side yard must be equipped with solid, permanent fixtures sufficient to prevent motor vehicle parking in contravention of this By-law, and for greater clarity:

   i. such parking exclusion fixtures may include bicycle racks, benches, bollards, ornamental fences or garden walls, raised planters, trees, wheelchair lifting devices, wheelchair lifting devices or some combination thereof; and

   ii. raised planters are deemed to be soft landscaping for the purposes of (c) and (d)

**Overview of Municipal Negligence**

While the essential elements of negligence have been articulated in different ways over the years, it is clear that a plaintiff must prove five things in order to succeed in negligence:

1. A duty, recognised by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks. This is commonly known as the "duty issue". It is established law that a municipality owes its citizens a duty of care.

2. Failure to conform to the required standard of care or, briefly, breach of that duty. This element usually passes under the name of "negligence".

3. Material injury resulting to the interests of the plaintiff. Merely exposing someone to danger is not an actionable wrong if the hazard is averted in time. Nor is there any question here of vindicating mere dignitary interests or compensating fright or apprehension in the absence of ascertainable physical or psychiatric injury.

4. Not only must the defendant's breach of duty have been a cause of the injury, it must have been a "proximate cause". This is generally referred to as the question of "remoteness of damage" or "proximate cause".

5. The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered. This involves a consideration of two specific defenses, contributory negligence and voluntary assumption of risk.

A subset of negligence is "regulatory negligence". In the leading case of *Just* v. *B.C.*, the Supreme Court of Canada[7] held that the traditional tort law duty of care applies to "operational" decisions made by government agencies or officials; however, policy decisions would shield government agencies, like municipalities from regulatory liability.

This decision has been followed in Ontario where, for example, the Ministry of the Environment was held liable for negligence in inspecting and approving a defective septic system. This was found to be an operational decision.

A substantial number of cases have applied the *Just* category, including decisions of this Court. In *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, the plaintiff's car accident occurred on a sheet of black ice on the

[7] Just v. British Columbia, [1989] 2 S.C.R. 1228 (SCC).

road. The Court held that the duty of care to reasonably maintain roads from *Just* "would extend to the prevention of injury to users of the road by icy conditions" (*Brown*, at p. 439). Similarly, in *Swinamer*, a large tree fell on the plaintiff's truck while he was driving, causing serious injuries. The Court held that the duty of care from *Just* to reasonably maintain roads clearly applied (pp. 457-59). In both cases, however, the Court went on to find that the decisions at issue were core policy decisions immune from negligence liability.

Recently, the SCC has found that municipal snow plow operations and decisions related to snow clearing methods are operational rather than policy decisions: *Nelson (City) v. Marchi*, 2021 SCC 41: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19036/index.do

In this case, the plaintiff suffered significant physical injury on a municipal street in the City's downtown core. By plowing the parking spaces on Baker Street, the City invited members of the public to use them to access businesses along the street. The plaintiff was attempting to do just that when she fell into a snowbank that had been created by the City during snow removal.

The decision states:

> [51] Core policy decisions, shielded from negligence liability, are "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith" (*Imperial Tobacco*, at para. 90). They are a "narrow subset of discretionary decisions" because discretion "can imbue even routine tasks" and protecting all discretionary government decisions would therefore cast "the net of immunity too broadly" (paras. 84 and 88).

To assist in distinguishing between policy and operational decisions, the Court set out four factors to help assess whether a government's decision was shielded by policy immunity:

(1) the level and responsibilities of the decision-maker;
(2) the process by which the decision was made;
(3) the nature and extent of budgetary considerations; and
(4) the extent to which the decision was based on objective criteria.

These mean:

> [62] First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles (*Just*, at pp. 1242 and 1245; *Imperial Tobacco*, at para. 87).
>
> [63] Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.
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> [64] Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches (see, e.g., *Criminal Lawyers' Association*, at para. 28). On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.
>
> [65] Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment (Makuch, at pp. 234-36 and 238). Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria.

*Nelson* provides helpful guidance to local governments in their approach to risk management, specifically in terms of identifying what types of municipal decisions may (or may not) enjoy core policy immunity – being those that reflect the underlying rationale for the immunity. In short, courts are unlikely to step into the shoes of municipal actors where the court would substitute its own views in matters concerning the weighing of competing economic, social, and political factors, provided they are neither irrational nor taken in bad faith.

**Application of this case to the Gardening in ROW by-law:**

Therefore, the decision to permit fruit and vegetables as part of the Gardening in the ROW by-law is a policy decision, and municipal governments are immune to negligence claims arising from the decisions made in the by-law. In this case broad economic, social, environmental, financial and issues related to food scarcity and security are being debated and balanced, and the government cannot be held liable for the balance struck, as per the SCC decision in *Nelson.*

**Causation:**

The *Nelson* Case offers the following analysis on causation:

> [96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
>
> [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).