

July 25, 2019

Subject Properties:

- 1886 Dartmouth Drive (Lot 8, District Lot 3821S, SDYD, Plan 16251) and
- 1883 Dartmouth Drive (Lot 3, District Lots 3429S and 3821S, SDYD, Plan 19115, Except Plan 25700)



Application:

Temporary Use Permit PL2019-8558

A Temporary Use Permit, to allow for industrial use on parts of the subject properties that lie adjacent to Ellis Creek, issued in 2016 for a 3 year term expires September 30, 2019. The current application is to extend the Temporary Use Permit for an additional 3 years to expire September 30, 2022.

Information:

The staff report to Council and Temporary Use Permit PL2019-8558 will be available for public inspection from **Friday, July 26, 2019 to Tuesday, August 6, 2019** at the following locations during hours of operation:

- Penticton City Hall, 171 Main Street
- Penticton Library, 785 Main Street
- Penticton Community Centre, 325 Power Street

You can also find this information on the City's website at www.penticton.ca/publicnotice.

Please contact the Planning Department at (250) 490-2501 with any questions.

Council Consideration:

Council will consider this application at its Regular Council Meeting scheduled for **6:00 p.m., August 6, 2019**, in Council Chambers at Penticton City Hall, 171 Main Street.

Public Comments:

You may appear in person, or by agent, the evening of the Council meeting, or submit a petition or written comments by mail or email no later than **9:30 a.m., August 6, 2019**, to:

Attention: Corporate Officer, City of Penticton
171 Main Street, Penticton, B.C. V2A 5A9
Email: publichearings@penticton.ca.

No letter, report or representation from the public will be received by Council after the conclusion of the August 6, 2019 Council Meeting.

Please note that all correspondence submitted to the City of Penticton in response to this Notice will form part of the public record and will be published in a meeting agenda when this matter is before the Council or a Committee of Council. The City considers the author's address relevant to Council's consideration of this matter and will disclose this personal information. The author's phone number and email address is not relevant and should not be included in the correspondence if the author does not wish this personal information disclosed.

Those persons with special hearing, language or access needs should contact City Hall at (250) 490-2400 prior to the meeting.

Blake Laven, RPP, MCIP
Manager of Planning



Date: August 6, 2019
To: Donny van Dyk, Chief Administrative Officer
From: Anthony Haddad, Director of Development Services

File No: 6420-20

Subject: Temporary Use Permit TUP2019-8558 – 3 Year Extension Request
1883 Dartmouth Road & 1886 Dartmouth Road

Staff recommendation

THAT Council approve “Temporary Use Permit TUP2019-8558”, for Lot 8, District Lot 3821S, Similkameen Division Yale District, Plan 16251, located at 1886 Dartmouth Road and Lot 3, District Lots 3429S and 3821S, Similkameen Division Yale District, Plan 19115, Except Plan 25700, located at 1883 Dartmouth Road, a permit that allows for industrial uses on those parts of the subject properties as identified on Schedule A of the permit;

AND THAT the permit be valid for a period of three years, commencing October 1, 2019;

AND THAT staff be directed to renew the Licence to Use Agreements for use of City land for an additional three year period, in line with the Temporary Use Permit TUP2019-8558;

AND FURTHER THAT staff continue to work with the adjacent property owners, who have requested long term licence renewals, to protect and enhance the existing business operations and Ellis Creek, in line with the Licence to Use Agreements and Ellis Creek Master Planning process over the coming years.

Strategic Priority

Mission: Penticton will serve its residents, businesses and visitors through good governance, partnership and the provision of effective and community focused services.

Subject Lands

For over 40 years the privately owned industrial properties have encroached upon the City owned land adjacent to Ellis Creek and its use has ranged from industrial and commercial storage, temporary buildings, permanent buildings, vehicle parking and circulation.

The subject’s lands are located along Okanagan Avenue East, between Government Street and the east end of the Okanagan Avenue East cul-de-sac, which adjoins the Cantex Gravel Pit lands. The City of Penticton owns the land along the Ellis Creek corridor (1883 & 1886 Dartmouth Road) and the privately owned land backing on this creek corridor fronts onto Okanagan Avenue East (Attachment A).

Background

Historical Zoning of Lands

The City of Penticton's Zoning Bylaw regulates the use and development of land within the City boundary. The Zoning Bylaw outlines which uses are 'permitted' on land within the City – specific to the Zone that covers a parcel of land.

Up until 1985, the City portion of land at 1883 and 1886 Dartmouth Road was zoned for Agricultural purposes. When a new Zoning Bylaw was created in 1985, the Zoning Bylaw, and all zoning Bylaws subsequent to that, identified the subject City lands as zoned for Parks & Recreation. Neither the Agricultural Zone nor the Parks & Recreation Zone permitted industrial or commercial uses.

The privately owned lands fronting onto Okanagan Avenue East and backing onto the Ellis Creek corridor lands have been zoned for Industrial purposes since the early establishment of this area as an industrial park. The uses on the private property have historically conformed to the Industrial Zoning.

Riparian Area Regulations

In 2004 the Province of British Columbia enacted the Riparian Area Regulation, under Section 12 of the Fish Protection Act. The purpose of the Regulation is to protect the many and varied features, functions and conditions that are vital for maintaining stream health and productivity, including:

- Sources of large organic debris, such as fallen trees and tree roots;
- Areas for stream channel migration;
- Vegetative cover to help moderate water temperature;
- Provision of food, nutrients and organic matter to the stream;
- Stream bank stabilization; and
- Buffers for streams from excessive silt and surface run-off pollution.

When the 2004 Riparian Regulations were applied in Penticton, like many other municipalities in British Columbia, a 30m riparian buffer (Streamside Protection & Enhancement Area) was applied to all waterways (creeks, lakes, etc) within the City boundary. This 30m riparian buffer was overlaid on top of land within the City and in many cases along Ellis and Penticton Creek (for example) covers existing buildings, roads, and a variety of established uses.

Specific to this issue, much of the use of the City and Private lands pre-dated the enactment of the Riparian Area Regulations, and typically existing uses would be 'grandfathered' until a change is made to a site covered by the new regulations – at which time the appropriate approvals through the City would be required. The privately owned industrial land covered by the 30m riparian boundary is 'grandfathered' because the City's zoning bylaw permitted those uses to exist. The problem with 'grandfathering' the existing use on the City land is that, as outlined above, the City's Zoning Bylaw never permitted the use in the first place, so 'grandfathering' cannot be used to authorize these uses long term on City land. The Temporary Use Permit process is intended to deal with this historical matter.

Historical Use of City Lands

1970s - 2014

For approximately forty-fifty years, businesses located on the north side of Okanagan Avenue East, have been utilizing City owned land adjacent to Ellis Creek for industrial purposes. While historically some of these businesses negotiated agreements to use the land from the City, it is only now that the adjacent property owners have licence agreements in place. Historical reviews of agreements between the City and landowners identified a mixture of license to use agreements, some of which were approved by Council.

The use of the City lands along Ellis Creek, behind the subject Okanagan Avenue properties has varied over the years. Looking back at historical air photographs and records, the use of these lands has ranged from outdoor industrial storage, shipping containers, vehicle storage and a couple of structures have been constructed.

In 2008 the City's Land Management Department were approached by some of the landowners to investigate the potential sale of the Ellis Creek corridor to the adjacent owners that have been using it. Staff at the time did not support the sale of the lands, largely in part due to the existing Parks & Recreation zoning, the creek environment and existing policies within the Official Community Plan that did not support it.

Between 2009 and 2010 the City began to take a more proactive role in dealing with this issue, after visiting the lands and identifying concerns with regards to materials being stored on them. With the historical use of the lands authorized (in some circumstances) by the City, the use of the City land had become an integral part of the business operations within each of the properties – in some cases for over 30 years. Towards the end of 2014, staff began to develop a plan to re-engage the landowner group to move the process forward.

2015-2017

During consultation with the business operators and property owners on Okanagan Avenue throughout 2014 and 2015, the landowners identified a strong desire to continue using the lands and even to enter into formalized License to Use Agreements. In many cases, these lands are integral to the continued operation of these businesses, as noted above and the lack of a legitimate license to use would greatly impact the ability to sell these businesses and the value of the business itself. Some of the owners have advised that significant changes would impact their business viability.

Through 2014 and 2015, as staff reviewed the existing Zoning and permitted uses for the land, looking back into historical records and zoning it was clear that the industrial uses were not permitted on the City's land. The mechanism to allow the uses to remain in some form would be through either a Temporary Use Permit or Rezoning.

In 2015, the City committed to starting the process to understand options available that would bring the land use back in compliance with the provincial legislation and try to legitimize the City land use by the businesses. Staff undertook a process in early 2015 to hire a Qualified Environmental Professional (QEP) to complete a Riparian Area Regulation Assessment, to better understand the Riparian Area Regulations as they applied to these lands and determine the appropriate Streamside Protection Enhancement Area (SPEA) and setback from the creek.

The QEP Report is summarized as follows:

- Established a setback from the high water of the creek of 26 meters. This was established using the provincial RAR methodology. The QEP, however, indicated that given the already disturbed area an enhanced 11m buffer could be established as a starting point, which would lead toward a

rehabilitated creek. The report recommended that a re-vegetation plan be initiated to have 1 plant replace 1 m² of area restored;

- Facilitated the continued use of the structures that fall within the 11 meter buffer zone. The QEP report indicated that compensatory plantings could be used in lieu of remedy of these encroachments. That a re-vegetation plan be used for 4 plants per 1m² of building footprint for the buildings within the 11m buffer zone;
- Observed that several businesses where storage of potentially hazardous or toxic materials within 15m of the creek created potential for leaching into groundwater. These property owners were advised to remove these materials from the city land in 2015, and staff can confirm that these materials have been removed prior to the signing of the licence agreements;
- Recommended a no build covenant on the 11m buffer zone;
- Recommended that when the properties are sold that the no build covenant be extended to the City's commercial property boundaries;
- Where businesses did NOT want to enter into a license to use that the setback be increased from 11m and replanting occur;
- That invasive weeds be removed by hand; and
- The fencing be put in place to delineate the 11m buffer area as early as possible to establish the creek protection and restoration.

On September 6, 2016, Staff brought forward a report to an open meeting of Council requesting a Temporary Use Permit for industrial uses within the City's Park & Recreation Zone at 1883 & 1886 Dartmouth Road. Issuing TUP's and entering into License to Use Agreements with all business willing to participate was considered in 2016 the most effective way to move forward. To bring these businesses into conformance, Council could support temporary use permits (TUP) for the businesses. A temporary use permit allows uses not permitted by zoning to be conducted for a period of up to three years. Renewals or additional TUPs may be possible and if a TUP is in place, the City could lawfully collect rents for the use of the land.

Council passed the following Resolution at its Regular meeting on September 6, 2016:

383/2016

It was MOVED and SECONDED

THAT Council approve "Temporary Use Permit TUP2016-7706", for Lot 8, District Lot 3821S, Similkameen Division Yale District, Plan 16251, located at 1886 Dartmouth Road and Lot 3, District Lots 3429S and 3821S, Similkameen Division Yale District, Plan 19115, Except Plan 25700, located at 1883 Dartmouth Road, a permit that allows for industrial uses on those parts of the subject properties as identified on Schedule A of the permit; AND THAT the permit be valid for a period of three years, commencing October 1, 2016.

THAT Council direct staff to negotiate licence to use agreements (LTU), for fair market value plus a percentaged contribution to environmental remediation, with any businesses currently using the above noted lands, outside of those areas identified as a 'buffer area' by the report prepared by the City's contracted Qualified Environmental Professional (QEP);

AND THAT Council direct staff to negotiate licence to use agreements (LTU), for fair market value plus a 3:1 percentaged contribution to environmental remediation, with the 2 businesses with structures currently residing on the above noted lands inside of those areas identified as a 'buffer area' by the report prepared by the City's contracted Qualified Environmental Professional (QEP);

AND THAT Council give direction to staff that all businesses currently using the subject lands that have not entered into such an agreement by December 31st, 2016, are notified to have all materials removed from the City owned lands by March 1, 2017.

THAT Council direct staff to plan for the installation of a no post barrier and vegetative buffer between any established LTU area and Penticton Creek, in accordance with the recommendations of the City's contracted QEP and that Council direct staff to allow businesses to install a security fence at their cost in lieu of the no post barrier; AND THAT Council direct staff to begin the environmental investigation into any possible site contamination of the City owned lands.

CARRIED UNANIMOUSLY

2018 – Now

Since approval of the Temporary Use Permits in 2016, staff have been working with representatives from the landowner group to negotiate License to Use Agreements (LTUs). The 2017 and 2018 freshet and Ellis Creek deterioration raised a number of issues over the past couple of years, which now looking forward, waiting to finalize the agreements until recently was the most appropriate decision, so that any new licence agreements could reflect the flooding impacts and Ellis Creek Master Plan process that is currently underway.

In the latter part of 2018, staff and the landowner group committed to completing this process and on January 24, 2019, staff presented to the majority of the Okanagan Avenue landowners and provided them with the proposed license to use agreements. The landowners recognized the inconsistency with historical approach to the agreements and supported moving forward in a more consistent manner.

Concerns with the License to Use Agreements included:

- Long term uncertainty with a 3-Year TUP;
- Security with public access along Ellis Creek;

- Maintenance of and landscaping provided along the creek corridor;
- Potential fire along creek corridor; and
- Non-exclusive use rights under a License to Use Agreements.

Staff are now pleased to report that all of the land owners subject to the Temporary Use Permit application have complied with the Riparian Assessment Report and recommended creek setbacks. The property owners have either signed a licence agreement (and are now paying for use of the lands) or agreed to remove all materials from the City land, which is an incredibly positive step in the process that has been underway for close to ten years. The licence agreements also contain clauses that allow for the City to access and use the lands, with the appropriate notice, should the city land be needed for flood restoration of work coming out of the Ellis Cree Master Plan process.

Economic Impact to Businesses

Irrespective of the lack of formal agreements and mix of approvals going back close to fifty years, many of the landowners and tenants have established and grown their businesses based on the use of the City land. Based on the 15 businesses that are located adjacent to the City lands, a payroll of approximately \$250M has been established within these industrial businesses. While some businesses will be impacted more than others by elimination of use of the lands, the potential for significant business impact exists, either resulting in business closure or relocation. This, in addition to all of the other issues identified, is one of the decision making criteria that staff have had to consider as part of this process over recent years.

Ellis Creek Master Plan Process

The process to create a master plan for the naturalization and flood control of Ellis Creek commenced in late 2018, working with the Penticton and Ellis Creek Advisory Committee and is scheduled for completion in Q4 2019. The master plan is the first step in the process. This will be followed by detail design on a reach by reach basis and construction. The complete project will take several decades to finish.

Staff have made the Creek Committee aware of the history behind the Okanagan Avenue Properties given the potential impact of the future creek plans on the portion of City land historically used by the industrial properties. Ultimately, it would be the intention to balance adjacent land uses against flood protection and environmental protection works. That being said it may be necessary to use some of the City land currently being used by adjacent land owners for Ellis Creek works, the results of which may not be known until completion of the master plan process and ultimate detailed design work. There is the ability to proceed with more detailed design work along the sections of Ellis Creek where the industrial lands exist at an earlier stage, however staff will need to consider this as part of the 2020 budget planning process, as cost estimates for this work are approximately \$300,000.

Financial implication

Before the licence agreements were signed, the City was not collecting rents on lands that it owns that are being used by third party businesses on a consistent manner. As noted above some had paid, and other had not over the years. Revenue from these properties is intended to be contributed back into the restoration of Ellis Creek. A market assessment was completed in 2016 for the License to Use Agreements and a rate of \$1.35/sq.m was set for the licenses. As noted in the Riparian Assessment Report, costs of \$1.50/sq.m would be required for future plantings to rehabilitate the creek environment. Annual revenues through the License Agreements (License rates and planting value requirements) will total approximately \$25,000 per year, should

all of the property owners agree to the LTU Agreements. Annual increases to the licence rates have been built into the agreements.

The following provides a summary of some of the expected costs (which would be distributed over the coming 3 year period and beyond), some of which would be collected from the property owners in accordance with new License to Use Agreements.

- Qualified Environmental Engineer's Report: \$5,000 (paid);
- Survey work: \$8,000;
- Environmental site assessments: \$100,000+;
- Barrier installation: \$25,000; and
- Recommended plantings: \$87,000.

Staff will be bringing forward budget requests over the coming year for these works and likely much will form part of the Ellis Creek Master Plan implementation over the coming years.

With regards to the Ellis Creek Master Plan, staff may be in a position to bring forward a budget request for a pre-design report for the land adjacent to the industrial properties, so that detailed design work can proceed in the shorter term – ultimately determining how the creek redesign and restoration works will impact the adjacent property owners in the long term. This budget item could be in the order of \$300,000, however staff will prepare for this work as part of the 2020 Budget Process.

2016 Temporary Use Permits: Issued September 2016 (Expiring October 2019)

The Temporary Use Permit's (TUP) approved by Council in 2016, will be expiring at the end of September 2019, as noted above, however staff have worked with the landowners to agree to the terms of a Licence to Use Agreement for payment to use the City lands. The landowners have ensured compliance with the RAR Assessment Report and any remaining hazardous materials have been removed entirely from the City land.

Should Council support the renewal of the TUP's from October 2019 – October 2022, during the term of the permit, the City in conjunction with the businesses, can conduct environmental assessments. During this time, the businesses will be required to ensure no ongoing use of the 11m zone, in accordance with the LTU agreements. Staff also recommends following the recommendations of the Riparian Area Assessment Report to establish an 11m buffer reinforced with barriers from the natural boundary of the creek. Any business that wishes to fence the 11m area should be allowed to do so, provided that there is a License to Use Agreement in place. Existing fences do exist in most circumstances, however some fencing may need to be relocated. Staff will then need to work closely with the Ellis Creek Master Plan process to ensure alignment and where conflict exist, identify early and move forward to a resolution.

If Council were supportive of an additional 3 year TUP approval, staff would need to commit to the following, which would need to be included as part of the 2020 Budget process:

- Survey the lands and construct a physical barrier along the 11m setback to delineate the LTU areas from Ellis Creek;
- Begin soil sampling and environmental testing to determine the existence of or extent of soil contamination (if any);
- Completion of Ellis Creek Master Plan – determining land needs for creek restoration works;

- Subject to the requirements of the Ellis Creek Maser Plan and timing of any restoration works, construct the landscape buffer plantings in accordance with the recommendation of the City's contracted QEP and in accordance with the Elis Creek Master Plan; and
- Determine if it is in the City's interest to pursue a longer term solution of zoning amendments and/or site remediation (if required).

Long Term Future of City Lands

Should Council support this additional 3 year TUP approval, ongoing renewal or reissuance of a temporary use permit or a change in zoning, permitting the industrial use of the lands would need to be in place. But further complicating the zoning process is the requirement to go through environmental site assessment (ESA) process to determine if any ground contamination has occurred. This is a requirement under the Environmental Management Act anytime a land use change is proposed. The City could not rezone, subdivide or sell the lands without this review and referral to the Ministry of Environment for their approval.

If Council were desirous of proceeding with a permanent zoning amendment or potential land sale in the future, the environmental assessments could be completed during the three year period of a new Temporary Use Permit. Once the Ellis Creek Master Plan is complete, however, next steps in this regard will need to be determined.

Staff Recommendation

It is in both the City and the neighbouring businesses' interest to bring the current situation into a conforming state and much work has gone into achieving a positive outcome over the past year. For the City, the environmental risk, liability risks and non-conformance with City zoning and provincial legislation needs to be addressed. The property owners need certainty with respect to their businesses, for expansion plans and ultimately for succession planning and the City needs to ensure that the public interest and environmental liability is managed appropriately. Given the historical land uses and range of agreements that have been in place, it has taken time to resolve these matters.

Re-issuing temporary use permits and entering continuing to renew the licence-to-use agreements to all business willing to participate is the most effective way to move forward, ad staff will continuing to work with the land owners to ensure the future use of the lands is dealt with appropriately.

A temporary use permit allows uses not permitted by zoning to be conducted for a period of up to three years. Renewals or additional TUPs are possible after that time. And once the TUP is in place, the City shall will continue to collect rents for the use of the land through the renewal of the Licence to Use Agreements that have recently been put in place. In the ensuing three years, the requisite environmental investigation can be completed to inform a longer term solution, in line with the recommendations of the Ellis Creek Master Plan process.

Alternate Recommendations

Council, after hearing delegations and submissions on this issue, may choose one of the following alternate recommendations:

1. THAT "Temporary Use Permit TUP2019-8558" not be issued and no action is taken with regard to the current use of the subject lands by adjacent businesses.

2. THAT "Temporary Use Permit TUP2019-8558" not be issued and Council gives direction to staff to notify those businesses that are using City land to remove encroachments from within the Streamside Protection and Enhancement Area of 26 m or the City property line whichever is closer to the creek.

AND THAT Council direct staff to include funds in an upcoming year's budget for environmental assessment and remediation from general City funds.

3. THAT Council give staff direction as Council thinks appropriate.

Attachments

Attachment A –Subject property location maps

Attachment B – Aerial images showing industrial encroachments into City lands and the established SPEA and proposed buffer areas as established by the City's contracted Qualified Environmental Professional (QEP)




Attachment C – "Temporary Use Permit PL2019-8558

Respectfully submitted,

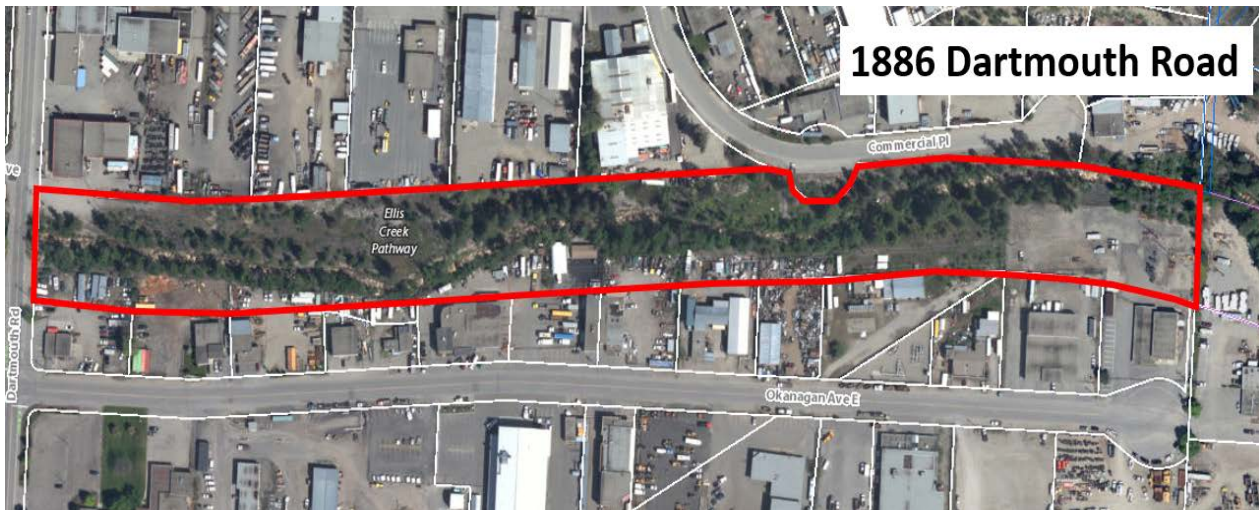
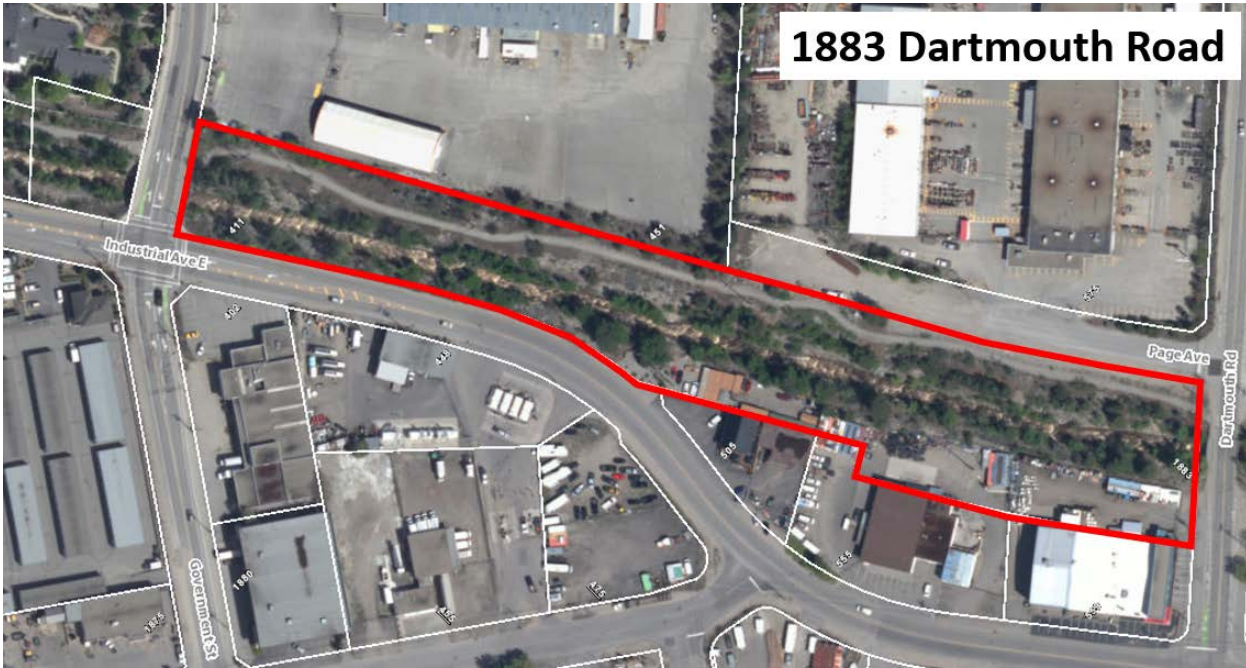
Anthony Haddad

Director of Development Services

Approvals

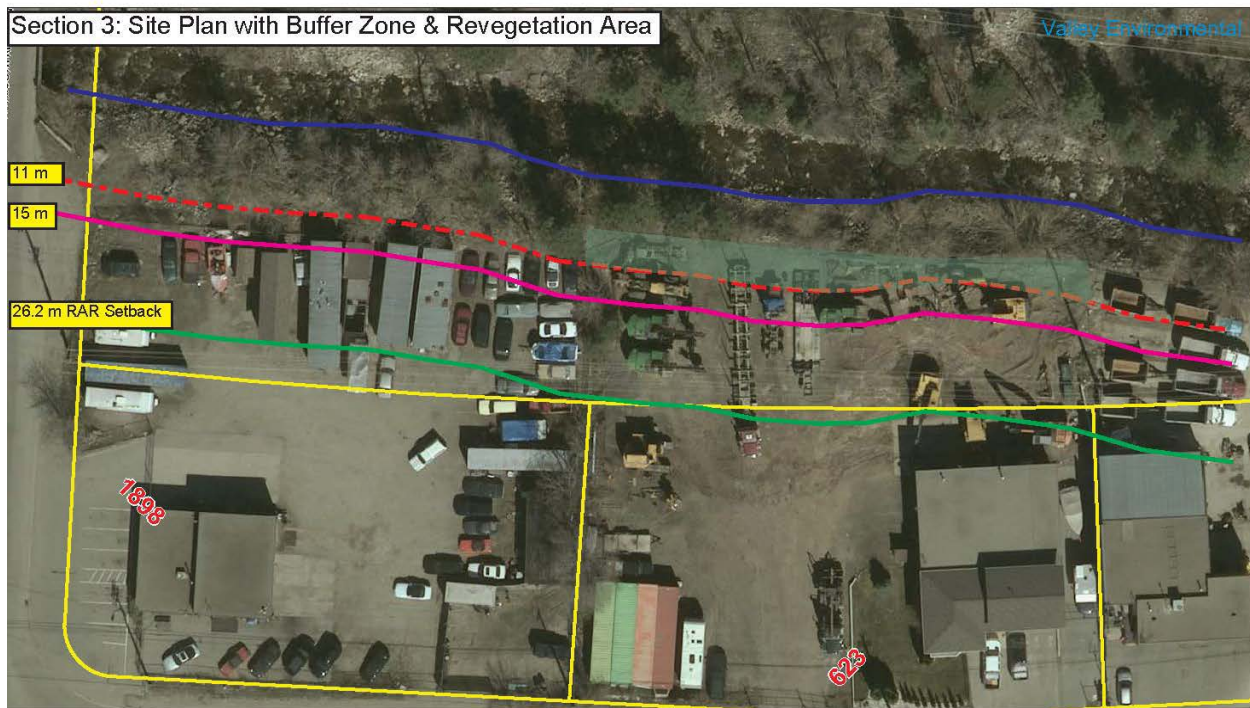
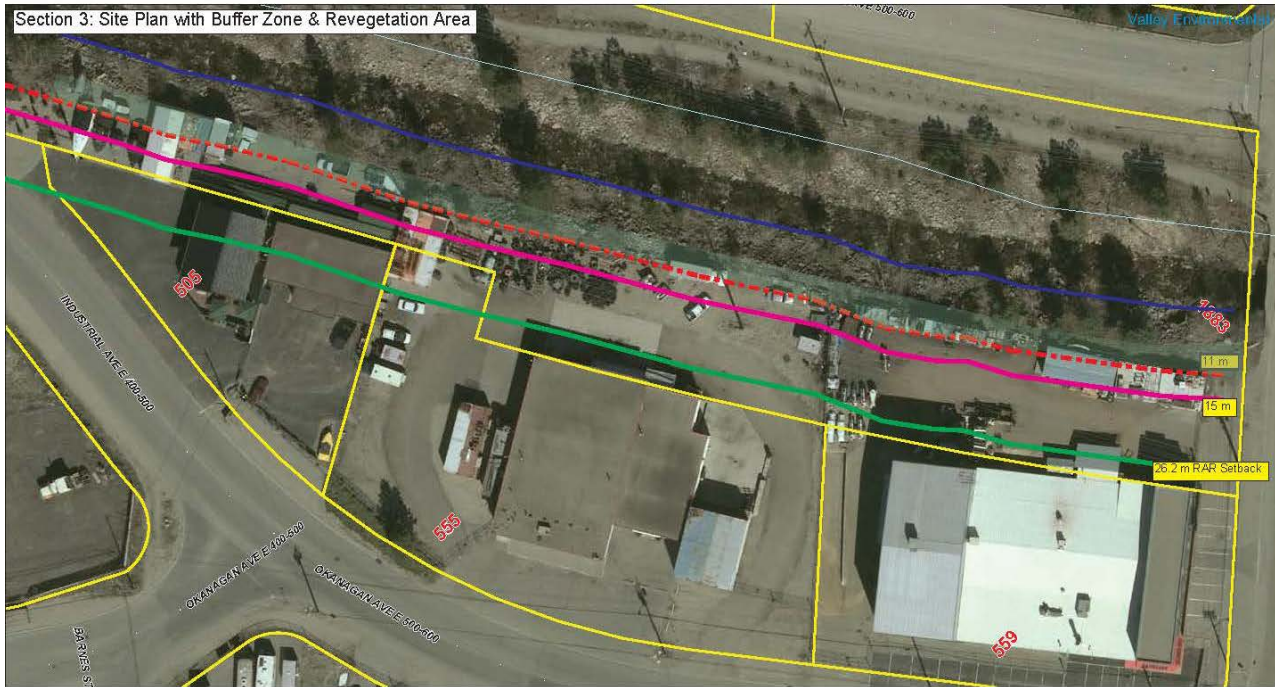
Director	CFO	GMI	CAO
			

Attachment A – Subject Property Location Map



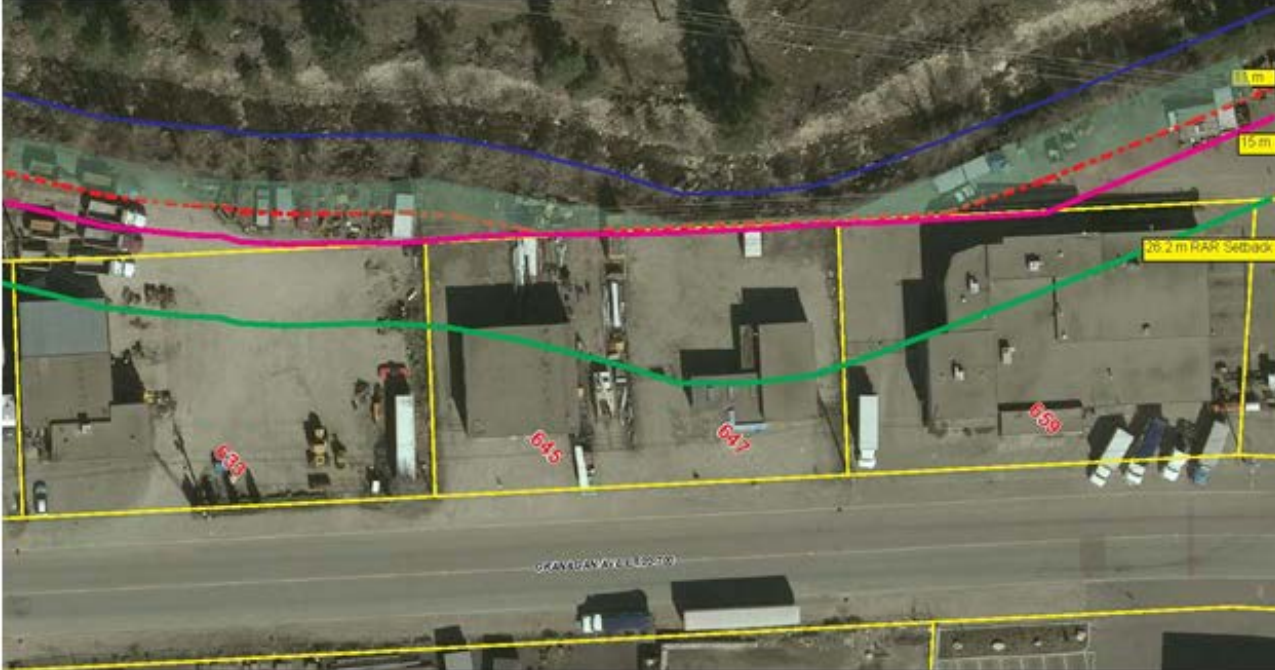
Attachment B

Aerial images showing industrial encroachments into City lands and the established SPEA and proposed buffer areas as established by the City's contracted Qualified Environmental Professional (QEP)



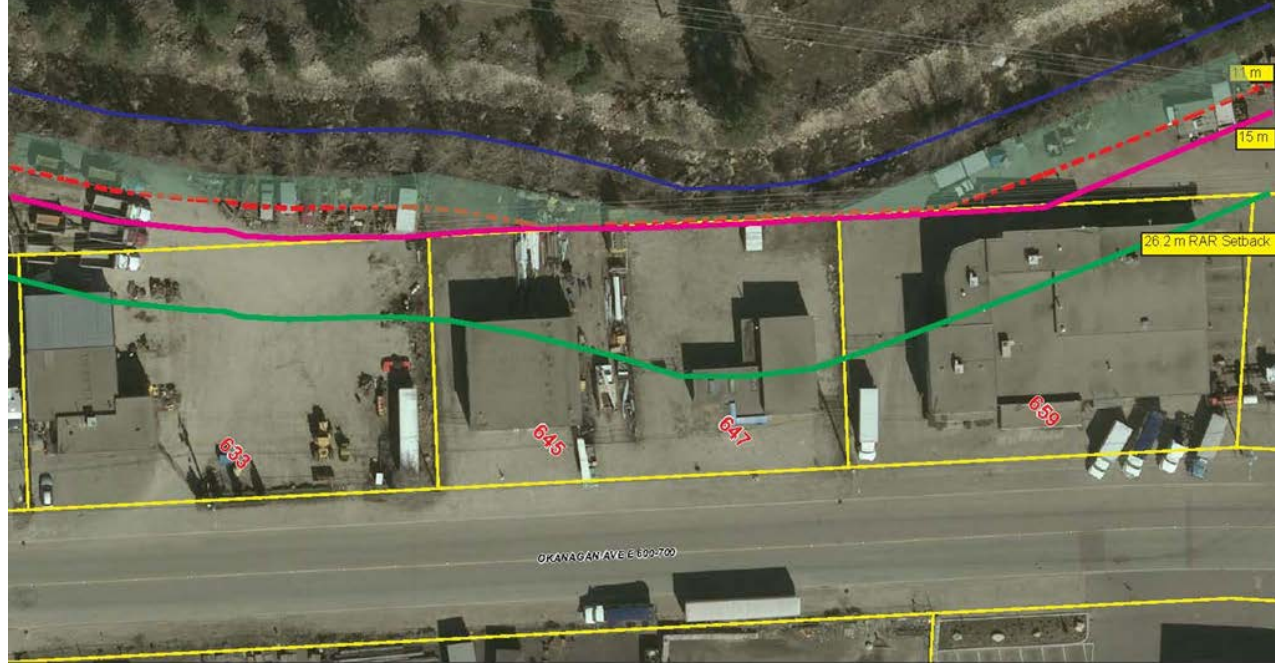
Section 3: Site Plan with Buffer Zone & Revegetation Area

Valley Environmental



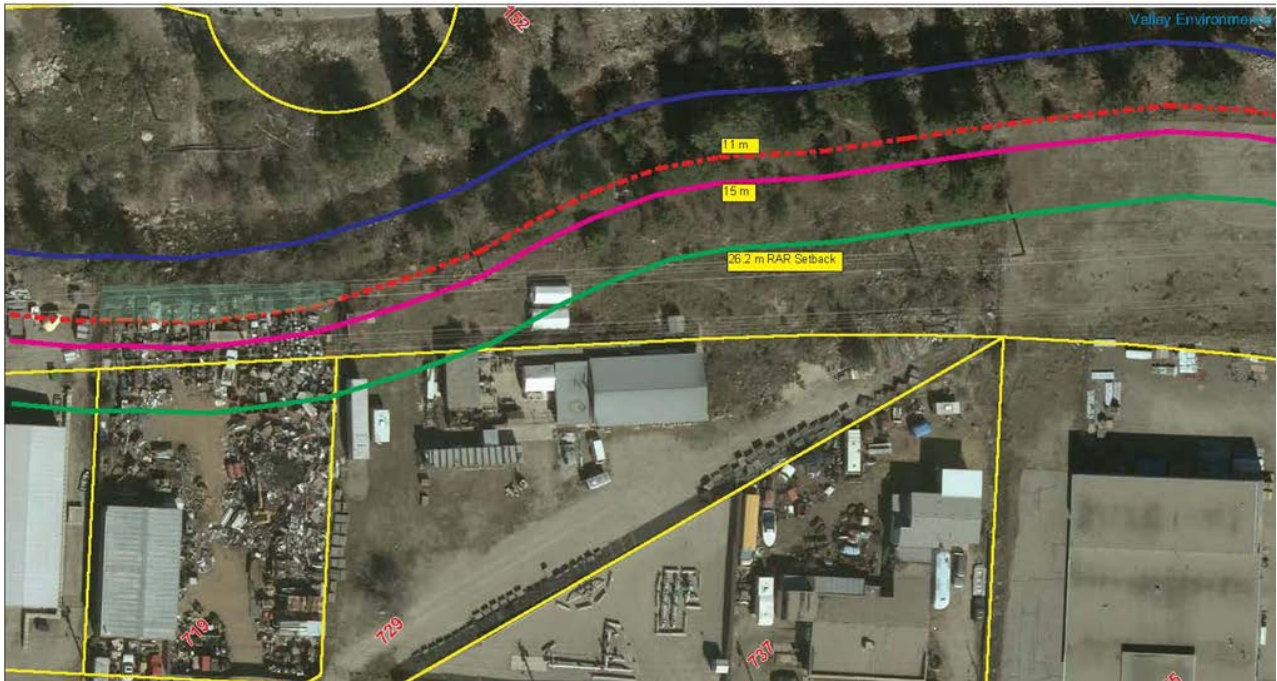
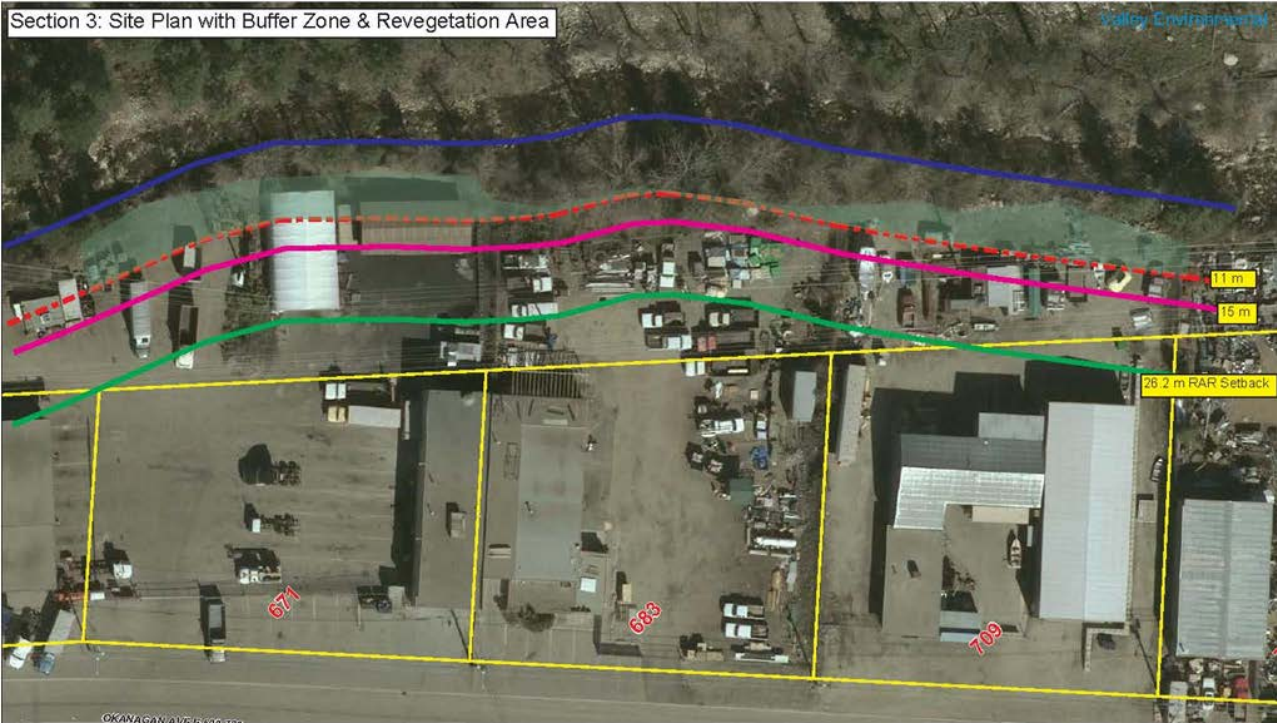
Section 3: Site Plan with Buffer Zone & Revegetation Area

Valley Environmental



Section 3: Site Plan with Buffer Zone & Revegetation Area

Valley Environmental



**Attachment C
Temporary Use Permit**

Temporary Use Permit

Permit Number: TUP PL2019-8558

Sheri Raposo, Land Administrator
Penticton City Hall
171 Main Street
Penticton BC V2A 5A9

Conditions of Permit

1. This permit is issued subject to compliance with all of the bylaws of the City, except as specifically varied or supplemented by this Permit.

2. This permit applies those parts of the following properties as shown on Schedule A:

Legal: Lot 8, District Lot 3821S, Similkameen Division Yale District, Plan 16251

Civic: 1886 Dartmouth Road

PID: 008-667-993

And

Legal: Lot 3, District Lots 3429S and 3821S, Similkameen Division Yale District, Plan 19115, Except Plan 25700

Civic: 1883 Dartmouth Road

PID: 008-133-786

3. This permit has been issued in accordance with Section 493 of the *Local Government Act*, to allow for the temporary use of the above noted lands for industrial uses.

General Conditions

4. In accordance with Section 501 of the *Local Government Act*, the lands subject to this permit shall be developed in general accordance with this permit and the plans attached as Schedule A.

5. In accordance with Section 497 of the *Local Government Act*, This permit shall expire on **September 30, 2022**.

6. This permit is not a building permit. In order to proceed with this development, the holder of this permit must hold a valid building permit issued by the Building Inspection Department.

7. This permit does not constitute any other municipal, provincial or federal approval. The holder of this permit is responsible to obtain any additional municipal, federal, or provincial approvals prior to commencing the development authorized by this permit.

8. This permit does not include off-site infrastructure costs that may be required at the building permit stage, such as Development Cost Charges (DCC's), road improvements and electrical

servicing. There may be substantial infrastructure and servicing costs payable at a later date. For more information on servicing and infrastructure requirements please contact the Development Engineering Department at (250) 490-2501. For more information on electrical servicing costs, please contact the Electric Utility at (250) 490-2535.

Authorized by City Council, the __ day of September, 2019

Issued this ____ day of _____, 2019

Angie Collison,
Corporate Officer

Schedule A

Temporary Use Permit is valid for those areas highlighted in blue



