

To Smith's Falls Mayor and Council, and Kerry Costello (Director of Corporate Services/Clerk)
Cc: Beth Sinclair

From Lorraine Johnson

October 18, 2021

Re: Pollinator habitat and 8 St. Lawrence Street landscape

I am writing to you regarding the recent Council discussion/decision on the pollinator-supporting landscape at 8 St. Lawrence Street, in particular, but also regarding the broader issue of naturalization and Property Standards bylaws.

First, I would like to offer my appreciation to Council for all of the comments in support of creating pollinator habitat, particularly in the context of the intersecting crises of climate change and biodiversity loss. I commend the Town for beginning the process of updating the Property Standards bylaw.

To put my comments in context: I'm the author of many books on naturalization and gardening with native plants (*The Ontario Naturalized Garden: The Complete Guide to Using Native Plants* (1995); *Grow Wild! Native Plant Gardening in Canada and the Northern U.S.* (1998); *100 Easy-to-Grow Native Plants for Canadian Gardens* (1999, 2005, 2017); *Tending the Earth: A Gardener's Manifesto* (2002); and *A Flower Patch for the Rusty-Patched Bumblebee: Creating Habitat Gardens for Native Pollinators* (2020, co-authored with conservation biologist Sheila Colla). As well, I am also the Canadian editor of numerous more general gardening books, including the *Canadian Gardener's Guide*, *What Plant Where Encyclopedia*, and *Garden Plants and Flowers: A-Z Guide to the Best Plants for your Garden*.

I've been doing public education on the value of naturalization for more than 25 years. I'm the former president of the North American Native Plant Society, and am involved in many volunteer and community projects to create natural habitats, particularly for pollinators. I was on the City of Toronto's Expert Advisory Committee on developing Toronto's Pollinator Protection Strategy, and was also a "Subject Matter Expert" for the recent revisions to Toronto's grass and weeds bylaw.

The scientific literature on the positive environmental value of naturalization is clear. The more support and encouragement for naturalization, the better.

Citizens' constitutional right to "natural gardens" has been upheld in two court cases (*Bell v. Toronto (City)*, 1996, and *Counter v. Toronto (City of)*, 2002). The courts have ruled that this right can be limited for legitimate health and safety reasons, but not for aesthetic purposes.

Two quotes from Justice Fairgrieve in the *Bell v. Toronto* (1996) Ontario Court of Justice decision make this very clear.

- “Even if a preference for the typical suburban lawn remains prevalent (and I am sure it does), I think we have all become accustomed to accepting that not everyone shares the same tastes, and that differing practices are no less valid or tolerable simply because they deviate from the norm. While the by-law may have been passed for a legitimate purpose, it should be remembered that Ms. Bell’s garden was found to have ‘excessive growths of weeds and grass’ not because there was any evidence of any health concern, fire hazard or other nuisance or harm caused by it, but simply because of its appearance.” (paragraph 43 of the decision)
- “I think it is apparent that one of the purposes of the by-law, indeed its primary purpose, is to impose on all property owners the conventional landscaping practices considered by most people to be desirable, and that one of its effects is to prevent naturalized gardens which reflect other, less conventional values. The by-law has a direct effect on the appellant’s freedom of expression and, in my view, clearly violates s. 2(b) of the Charter.” (paragraph 54 of the decision)

In Council’s discussion of 8 St. Lawrence Street, there was no mention of any health or safety concerns with the property. Instead, there was acknowledgement that this landscape was intentional, “ahead of the curve,” and created and maintained for habitat enhancement (rather than being “let go” or unmaintained).

Councillors expressed concerns about placing a hold on enforcement for this property because it would create a precedent and hold the property to a different standard from other properties. However, as the two court judgements on naturalization make clear, Property Standards bylaws such as the one in Smiths Falls, with its vague, arbitrary (“weeds” undefined) and aesthetically based language (“untidy,” “neat,” and “unsightly”) would not withstand a constitutional challenge if tested in court.

If Council is concerned about fairness, there is already an inherent unfairness in the application of this bylaw because enforcement rests on the subjective judgement of “neatness,” “tidiness” and the definition of “weeds” made by enforcement officers.

I note, as well, that the letters of complaint about the property are likewise not based on health and safety concerns but are aesthetically based, something the Courts have already dismissed. (The reference to “murder bees” in one of the letters should have been a red flag to Council that the concerns had no merit in terms of health or safety. The closest murder hornets (not “murder bees”) to the yard are more than 4,000 kilometres away, in the Fraser Valley of B.C.)

There were likewise examples of misinformation in the Council discussion. For example, the idea that pollinator gardens are landscapes restricted to sunny areas is incorrect. Woodland gardens have enormous value for pollinators. The idea that the two recently constructed public pollinator gardens in Smiths Falls are somehow “proper” pollinator gardens and that the garden at 8 St. Lawrence Street is not, is simply not correct. Pollinator gardens can (and indeed should, for reasons of biodiversity) take many different forms.

Council expressed concerns about the intentionally placed dead logs in the garden, and seemed to label them as “waste” prohibited by the bylaw. There are a number of problems with this interpretation. Firstly, it is a stretch to include dead logs in the definition of “timber” and “lumber” contained in the bylaw. Secondly, and more importantly, if Council refers to any of the extensive scientific literature on the pollinator value of dead logs, you will see that dead logs are a crucial component of pollinator habitat and recommended for inclusion in gardens by virtually all pollinator authorities. Far from being “waste,” they are crucial habitat for cavity-nesting bees and for beetles (along with bees, beetles are also pollinators).

There are a number of other issues with the staff report regarding the bylaw “infractions” at 8 St. Lawrence Street. For example, the report (and the bylaw) state that any “yard aesthetic/improvement related to a garden” must be a minimum of 1.5 m from the backside of the sidewalk or 3 m from the street or curb. This is clearly arbitrary and inconsistent because lawn grass is a yard aesthetic/improvement yet it is not prohibited or enforced for being out of compliance. While the Courts have sanctioned prohibitions based on health or safety considerations, the Courts have rejected overly broad and arbitrary restrictions that have no impact on health or safety, such as this provision. (If there were sightline obstructions, of course that is a different issue, but the bylaw is silent on such matters and includes no such sightline measurement standards for safety.)

The bylaw also requires that compost heaps be “retained” on four sides with wood. The photographs of the compost bin at 8 St. Lawrence Street show a bin that is retained on four sides with wood and that allows for air circulation (important for proper composting) through the animal-deterring chicken wire. (I have co-written a book on composting, with Mark Cullen, *The Real Dirt: The Complete Guide to Backyard, Balcony and Apartment Composting*, and our book contains designs for bin construction very similar to the bin at 8 St. Lawrence Street.)

My intention in writing this letter is to offer Council and staff the professional perspective of a pollinator habitat expert, and of someone who has volunteered that expertise to numerous municipalities (Toronto, Chatham-Kent, Burlington, etc.) in consideration of property standards bylaws.

There can and should be no conflict between property standards and the existence (indeed, the promotion) of pollinator habitat. However, bylaws such as the one currently on the books in Smiths Falls not only create conflict, and unfair application due to the vagueness and arbitrariness of their provisions, but they also create an enabling climate in which neighbours are able to utilize the vagueness and arbitrariness of municipal mechanisms in order to subject naturalized gardens to ongoing complaint.

Clearly, Council recognizes that the climate crisis and the biodiversity crisis call for committed action. Residents such as the owners of 8 St. Lawrence Street should be commended for taking action that responds to the clear calls for action from scientists and policy makers concerned about the decline of pollinators.

Instead of continuing the (clearly illegal) attempts to regulate aesthetics, and instead of punishing those who are creating valuable pollinator habitat, I urge Council to bring its actions and its Property Standards bylaw into compliance with the Court decisions and with pollinator protection. This would necessitate, at minimum, putting a hold on enforcement for this property (not as an “exemption” but because enforcement would contravene two Court decisions) and committing to robust revisions to the existing bylaw (a bylaw that includes provisions and language already ruled unconstitutional by the Courts).

I would value the opportunity to discuss this further with Council and staff, and to answer any questions, if you would find this useful. As well, I have been closely involved in various efforts to draft a “model” Property Standards bylaw that supports naturalization at the same time as it addresses municipal concerns around property maintenance, and I would be happy to discuss this further and to share research on how other municipalities are dealing with the issue in a way that supports pollinators and biodiversity.

You have the opportunity at this pivotal moment to support pollinators and biodiversity. I sincerely hope that you will embrace this moment for the positive opportunity it presents.

Many thanks for considering these comments.

Respectfully yours,
Lorraine Johnson