

SUBJECT: Proposed public access easement encroachment – 419 Brant Street

TO: Committee of the Whole

FROM: Development and Growth Management  
Community Planning

Report Number: DGM-60-25

Wards Affected: 2

Date to Committee: July 7, 2025

Date to Council: July 15, 2025

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## **Recommendation**

Conditionally approve three (3) private encroachments (two [2] permanent and one [1] seasonal) into the City's 128 square metre public access easement located at the north-east corner of Brant Street and James Street, as set out in development and growth management report DGM-60-25; and

Instruct the Commissioner, Legal and Legislative Services to draft, execute and register an encroachment and consent agreement between the proponent and the City to establish the terms of use for that space.

## **Executive Summary**

Purpose of report:

- To recommend conditional approval of proposed encroachments into a Public Access Easement located at the northeast corner of Brant Street and James Street. Staff are of the opinion that the proposed encroachments, as modified by staff, are appropriate with a condition that the proponents enter into an Encroachment Agreement with the City that will stipulate the terms of use for the space.

# Recommendation Report

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## Background

### Description of Property

419 Brant Street, 2007 James Street and 2011 James Street are properties located along the north side of James Street, between Brant Street and John Street in downtown Burlington. These properties were part of a comprehensive mixed-use tall building development approved in 2017 and recently constructed.

The approved development was subject to the provision of a number of community benefits under the previous Section 37 regime of the *Planning Act*, which permitted municipalities to secure community benefits in exchange for increased height and density.

As set out in Report PB-33-18, one of the community benefits secured as part of this development related to ‘the provision of public areas, crosswalks, and walkways, and connections to external walkways / trail systems.’ The Developer agreed to provide public access by way of an easement to be registered on title for lands located at the northeast corner of Brant Street and James Street, the minimum dimensions of which are in the form of a triangle measured at 16 metres x 16 metres (128 square metres). This type of arrangement is commonly referred to as a Privately Owned Public Space (POPS). This publicly accessible triangle was secured through a Section 37 agreement between the developer and the City (registered in June 2018) and the subsequent registration of a Public Access Easement (registered in November 2023).

## Description of Proposal

The tenant of the retail / commercial unit located at 419 Brant Street (Bardo Restaurants) adjacent to the privately owned public space (POPS) has expressed an interest in using the POPS as follows:

- Two (2) permanent patio / fence encroachments to facilitate minor extensions to the existing approved permanent patios that exist along Brant Street and James Street, as shown on the plan attached as Appendix A; and,
- The temporary installation / seasonal use of the POPS as follows:
  - Installation of tables, chairs, furniture, planter boxes, flowers, etc. for use by patrons of the restaurant;
  - Usage between beginning of May – end of October;
  - Use would occur 7 days a week, between 11am – 10pm;

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## **Analysis**

### Executed Section 37 Agreement

The executed and registered Section 37 agreement between the City and the property owner sets out that the owner shall construct, repair and maintain the Privately Owned Public Space (POPS) at all times free and clear of encumbrance for pedestrian use, in perpetuity. The agreement goes on to state that the POPS shall remain open and accessible to the public year-round. The Owner is to advise the City 30 days prior to any obstruction of the space and the City is to respond with any concerns 15 days prior to the date of obstruction. The Agreement stipulates that the Owner shall not use the POPS in a manner that will render the POPS exclusive to the use of the residents / tenants of the site.

### Public Access Easement

The Public Access Easement ('easement') was established over the 128m<sup>2</sup> POPS at the northeast corner of Brant Street and James Street and allows the City and general public to use the space as a publicly accessible open space and publicly accessible amenity area. Similar to the Section 37 agreement, the easement sets out that the area is to remain open and accessible to the public 365 days a year.

The easement sets out that the lands will remain free and clear of any physical encumbrances (i.e. trees, fences, structures, obstructions, etc.) unless permitted by the City's Commissioner, Development & Growth Management. Notwithstanding, the Owner is permitted to install any such physical encumbrances that have been permitted on an approved site plan. The approved site plan for these lands (attached as Appendix D) shows movable tables and chairs within the easement area, but does not specify the ownership of use of those items or show any obstructions that would hinder or prevent public access to that space.

The easement also speaks to leases and sets out that the Owner will not enter into any agreement or lease which has the effect of granting the use of the easement lands unless the proposed user enters into an agreement with the City which sets out the obligations and terms of use. As such, any use of the POPS would require an agreement between the City and the proposed user (i.e. Bardo Restaurant).

### Circulation

Planning staff circulated this proposal to internal departments for review and comment.

Transportation staff have commented that they have no concerns with the proposed permanent encroachments from a mobility, safety or traffic operations perspective.

Transportation staff have also commented that they have no concern with the proposed seasonal encroachment / use of the POPS provided that a 6 metre x 6 metre visibility triangle is maintained, within which no solid fencing or landscaping exceeding a height of 1 metre would be permitted.

Recreation, Community and Culture (RCC) staff commented that the City may wish to use the POPS occasionally for City needs or special events taking place within the downtown, in Civic Square, or along Brant or James Streets on occasions when those streets are closed to vehicular traffic. RCC staff recommend that the agreement for the use of this space be structured in such a manner to provide flexibility in terms of the City's needs to use the space.

### Planning Analysis

Planning staff is of the opinion that the two proposed permanent encroachments into the POPS are minor in nature (approximately 2.6 square metres in area along Brant Street and 3.2 square metres in area along James Street) and would not impact the intended purpose or function of the POPS as a publicly accessible space. These encroachments would allow additional area within the existing approved permanent patio spaces along Brant Street and James Street and increase the functionality of those patios. Further no concerns were raised from any internal departments as it relates to these two proposed permanent encroachments.

While these would represent permanent physical encroachments into the POPS, the Public Access Agreement sets out that such encroachments may be permitted, as long as they are deemed to be minor and maintain the intent of the easement.

With respect to the proposed temporary / seasonal encroachment that is being proposed, planning staff is of the opinion that a modified encroachment is considered appropriate conditional upon certain parameters being established and included in the recommended agreement between the City and the proponents to ensure the POPS remains publicly accessible and a benefit to the public at large. In line with the Public Access Easement, staff would recommend that the use of this space be conditional upon the user entering into an agreement with the City that would establish and reinforce the City's expectations in terms of the use of the space being publicly accessible as intended when it was established as a community benefit. Staff would recommend that the agreement align with the expectations as outlined in the Section 37 agreement and Public Access Easement, and build upon them by stipulating the following:

- the use would be limited between May 1<sup>st</sup> – October 31<sup>st</sup>;
- the use would only be permitted between 11am – 10pm;
- the space would continue to be publicly accessible. Any physical encumbrances that restrict public access or prevent or hinder public access (i.e. fencing, planter boxes, etc.) would not be permitted;
- flexibility is provided to allow the City to use the space as needed, given that sufficient notice has been provided to the user to allow them time to vacate the space, as required.

**Option 1 - Conditional approval of proposed encroachments (recommended).**

Benefits: This option will ensure that the interests of the City, the public and the private business are all balanced and respected, while contributing to the vibrancy and beautification of this important location within the City's downtown.

Considerations: This option would be conditional upon the business entering into an agreement with the City, which would stipulate the terms of use for the POPS space.

**Option 2 – Refuse any encroachments into the POPS (not recommended).**

Benefits: This option would ensure the space remains fully publicly accessible at all times.

Considerations: This option is not recommended as the approved site plan for this property envisions that the space would be activated in order to increase the overall vibrancy of the space. Refusing the proposed encroachments would also have a negative impact on the restaurant business and limit their ability to operate in this area.

**Option 3 – Allow permanent encroachment into the entirety of the POPS area (not proposed or recommended).**

Benefits: This option would be beneficial for the restaurant operation, it would have limited benefit to the City or its residents.

Considerations: Permitting permanent encroachment into the entire POPS space would negate the community benefit of public access to this space that was negotiated and secured through the development approvals process in exchange for additional height and density for the existing tall building.

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**Recommendation Details**

Planning staff is of the opinion that the two proposed permanent encroachments into the POPS are minor in nature (approximately 2.6 square metres in area along Brant Street and 3.2 square metres in area along James Street) and would not impact the intended purpose or function of the POPS as a publicly accessible space. The proposed modified temporary / seasonal encroachment is also considered appropriate, on the basis that it can support a local business, contribute to the vibrancy of the downtown, and ensure that the space remains publicly accessible and an asset to the City and the downtown.

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## Key Dates & Milestones

- November 13, 2017 – Council approved an Official Plan and Zoning By-law Amendment in principle for a mixed-use building, subject to execution of a Section 37 agreement (Report PB-62-17);
  - April 23, 2018 – Council approved Section 37 Community Benefits and instructed staff to prepare the Section 37 agreement (PB-33-18);
  - June 19, 2018 – Section 37 Agreement was executed and registered;
  - November 23, 2023 – Public Access Easement was registered.
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## Implications

Legal staff would need to prepare the recommended agreement.

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## References

- PB-62-17 – Report Recommending modified approval of an Official Plan and Zoning By-law Amendment for 421-431 Brant Street
  - PB-33-18 – Section 37 Community Benefits for 421-431 Brant Street
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## Strategic Alignment

- Designing and delivering complete communities
  - Providing the best services and experiences
  - Protecting and improving the natural environment and taking action on climate change
  - Driving organizational performance
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## Appendices:

- A. Proposed Permanent POPS Encroachments
- B. Section 37 Agreement
- C. Public Access Easement
- D. Approved Site Plan

**Notifications:**

Bardo Restaurants

Contact Info to be provided separately

**Report Approval:**

All reports are reviewed and approved by the Commissioner, Head of Corporate Affairs, Chief Financial Officer, and Commissioner of Legal and Legislative Services/City Solicitor.