



## Report to Council

Department: Office of the CAO  
Division: Legal and Legislative Services  
Date: August 23, 2021  
Prepared by: Robert Auger, Town Solicitor/Clerk  
Matthew Ducharme, Legal & Legislative Services Intern  
Report Number: Legal and Legislative Services-2021-15  
Subject: Noise Control By-Law Review and Updates  
Number of Pages: 8 plus attachments

### Recommendation(s)

The following two (2) recommendations are provided for Council's consideration:

1. **That** Legal and Legislative Services 2021-15 **entitled** "Noise Control By-Law Review and Updates" **prepared by Robert Auger, Town Solicitor/Clerk and Matthew Ducharme, Legal & Legislative Services Intern** dated August 23, 2021 be received; and
2. **That** By-Law No. 2038 being a by-law to prohibit and regulate noise in the Town of Essex be read a first, a second time and be provisionally adopted on August 23, 2021.

### Purpose

Being that the existing by-law to control noise was approved almost 16 years prior, the Town of Essex has developed significantly in that time and a review of the current by-law is timely and warranted. Council further has specifically directed Administration to review the current by-law and to review in particular the use of "Bird Bangers" in our agriculturally zoned areas of the Municipality. Accordingly, the purpose of this report is to provide Council with an update on the requested Noise By-Law review including with respect to the use of bird bangers on agricultural operations, and to recommend a proposed new Noise Control By-Law.

## Background and Discussion

On October 5, 2020 at the Regular Council Meeting, Council provided the following direction to Administration by the passing of the following motion:

### **R20-10-374**

Moved by Councillor Bjorkman

Seconded by Councillor Bondy

**That Administration be directed to review the Town's noise by-law, specifically to the use of "Bird Bangers" in our agricultural zoned areas, and to use Best Management Practices outlined in the Farming and Food Production Protection Act (FFPPA) 1998 for reference.**

Carried

In response to Council's direction, Administration initiated a review of the Town's Noise By-Law No. 690 which was originally passed on August 8, 2005. The following areas of concern were identified with the current Noise By-Law:

- **Detonation of Fireworks** – The current Noise By-Law prohibits the detonation of fireworks at all times in all areas of the Town. This is in direct contradiction to the current Fireworks By-Law which prescribes its own specific regulations.
- **Discharge of Firearms** – The current Noise By-Law also prohibits the discharge of firearms at all times in all areas of the Town. This is in direct contradiction to the current Discharge of Firearms By-Law which allows for such actions in particular areas of the Town under certain conditions.
- **Prohibitions** – The prohibitions by time and place in the current Noise By-Law does not distinguish between Residential, Agricultural and Commercial Areas. These areas should be separated as they may require different regulated times for certain acts.
- **Exemptions** – The current Noise By-Law provides exemptions for public safety and for particular traditional, festive and religious activities as prescribed therein. Exemptions are not expressly provided for essential services or normal farm practices.
- **Temporary Noise Permit** – The current Noise By-Law provides for a person to make

an application to Council to receive an exemption from any provisions of the By-Law. However, the By-Law does not specify the process for making such application nor specify how a temporary permit is granted and the length of time of the permit.

After undertaking the review, Administration then reviewed the prescribing of regulations relating to the use of bird bangers in agricultural operations. In this review it was important to find the appropriate balance between the normal and permitted use of bird bangers for the protection of crops and the reality of such use as a nuisance factor in certain circumstances.

### What are Bird Bangers?



Bird bangers are propane-fired cannons that emit sounds to scare away birds. Bird bangers can be an effective method used by farmers to prevent crop damage by birds and should generally be used with other methods of bird control.

In particular crop damage is a major concern for grape growers from the onset of ripening (veraison) up until harvest in late fall or early winter. The sound can be heard throughout rural areas and in some residential neighbourhoods near vineyards or other crops where they are used.

### Normal Farm Practices & the FFPPA

If they follow normal farm practices, farmers are protected from liability resulting from nuisance noise complaints pursuant to the *Farming and Food Production Protection Act (FFPPA) 1998*. *Section 1 (1) of FFPPA* defines a “normal farm practice” as one which:

- is conducted in a manner consistent with proper and acceptable customs and standards, as established and followed by similar agricultural operations under similar circumstances; or
- makes use of innovative technology in a manner consistent with proper advanced farm management practices.

Section 6(1) of FFPPA additionally **provides that** “no municipal by-law applies to restrict a **“normal farm practice” carried on as part of an agricultural operation**”. However what this

conversely means is that a municipal by-law can in fact restrict or regulate those practices that **are not considered “normal farm practices”**.

In reviewing the FFFIPPA legislation it is important to note that there is no predefined list of practices that are **automatically deemed to be “normal farm practices”**. Instead it is often a case by case determination and in cases where it is in dispute whether something is a normal farm practice then the question of making an independent determination can if necessary fall to the Normal Farm Practices Protection Board, which is a quasi-judicial administrative board appointed by the provincial government.

Any person including the municipality itself may apply to the Normal Farm Practices Protection Board (the “NFPP Board”) for a determination of what is or is not a normal farm practice. In arriving at each decision in each case, the board takes several factors into consideration as it seeks to balance the needs of the agricultural community with provincial health, safety and environmental concerns. This is especially relevant in cases involving municipal by-laws as the board is also required to consider the purposes of the by-law including the effect of the farm practice on adjoining lands and neighbours.

If the Normal Farm Practices Protection Board decides a farmer is following a normal farm practice, the operation may continue and it is protected from further similar complaints and the related regulations set forth in a municipal by-law. **However**, if the Normal Farm Practices Protection Board decides a farmer is not following a normal farm practice, then that farmer is subject to those Municipal regulations and the Board can further order the farmer to change or adjust their practice to reduce the nuisance.

**What this all means with respect to the use of Bird Bangers is that the Municipality can in fact regulate their use, but can only regulate in those cases where such use is outside accepted best practices or outside what would be considered a normal farm practice as determined by the Normal Farm Practices Protection Board.**

#### **Proposed New Noise Control By-Law**

After conducting the review of the current Noise By-Law, identifying the concerns, and reviewing the legality of regulating bird bangers on agricultural operations, Administration

drafted and is recommending that the proposed new Noise Control By-Law be adopted.

The key aspects of the proposed By-Law No. 2038 are outlined hereafter:

- **Definitions** – The proposed By-Law further defines certain words in Section 1 that may be considered objective in the By-Law to provide for greater enforcement.
- **Prohibitions** – The proposed By-Law specifically outlines the general prohibitions in Section 2 and further prohibits certain acts by time and place in Section 3 and **Schedule “A”**. The prohibitions by time and place also distinguish between Residential, Agricultural and Commercial Areas.
- **General Exemptions** – An exemption for public safety is provided in Section 4, which includes emergency measures to ensure immediate health and safety and the preservation or restoration of property. An exemption is further provided in Section 5 for essential services provided by the Town of Essex or its agents. Traditional, festive or religious activities are exempted in Section 6, namely the ringing of bells or chimes at a place of worship, the Harrow Fair Parade, the Legion Remembrance Day Parades, the Santa Claus Parades, the Essex Fun Fest Parade, and other events approved by the **Town’s Sepcial Event Resource Team (SERT)**.
- **Normal Farm Practices Exemption** – The proposed Noise By-Law does not apply to the operation of any machine or equipment that falls within a **“normal farm practice”** as may be determined on a case by case manner.
- **Bird Banger Regulations** – Section 8 of the proposed By-Law states that no person shall operate a bird banger on land that is not an agricultural operation. This Section then continues further and prescribes specific regulations relating to the use of Bird Bangers in agricultural operations. These regulations (set forth in Section 8.2 and **Schedule “B”**) are adopted directly from the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) *Best Management Practices (BMP’s)* for the Use of Bird Bangers. Under the proposed by-law an agricultural operation that follows these Best Management Practices will not be in violation of the proposed Noise By-law. An

agricultural operation that fails to follow these Best Management Practices will be in violation of the proposed Noise By-law unless and until that agricultural operation: 1) obtains a Temporary Noise Permit from Council (as described below) exempting their particular use of Bird Bangers or 2) obtains an order or determination from the the NFPP Board that their particular use of Bird Bangers is part of a “normal farm practice”.

- **Temporary Noise Permit** – Any person may make application to the Town and/or its Special Event Resource Team to be granted an exemption from any of the provisions of the proposed By-Law by the issuance of a Temporary Noise Permit. The process for making such an application, the process of considering the application and the determination of the length of time of such a permit are all prescribed in Section 9 of the By-law.

### Enforcement and Set Fines

- The proposed By-Law may be enforced by a Municipal Law Enforcement Officer, a Police Officer, a Provincial Offences Officer or any other individual duly appointed to enforce the By-Law.
- A Municipal Law Enforcement Officer or Police Officer may at all reasonable times enter upon any parcel of land, including any buildings or structures on the land, other than dwellings in order to ascertain whether the provisions of this By-Law are being observed and to conduct enforcement.
- Once an Order from the Ontario Court of Justice approving the Set Fines prescribed in **Schedule “C” is received pursuant to Part 1 of the *Provincial Offences Act, 1990***, a Municipal Law Enforcement Officer or Police Officer may fine an individual or corporation the amount set forth in Schedule “C” for particular offences.

### Conclusion

Council directed Administration to undertake a comprehensive review of the Noise By-Law with the specific goals of addressing bird banger resident concerns and improving enforcement effectiveness. In conducting the requested review, Administration identified a

number of concerns with the current By-Law and reviewed the legality of regulating bird bangers on agricultural operations.

As a result, the proposed new Noise Control By-Law No. 2038 is being recommended for adoption by Council as an effective method to regulate noise within the Town of Essex.

## **Financial Impact**

There is no direct financial impact. However, additional resources may need to be considered as part of future budgetary discussions as to ensure the Town can provide for the appropriate enforcement of this By-Law.

## **Consultations**

Kevin Carter, Manager, Building Services/Chief Building Official

Mike Diemer, By-Law/Property Standards Officer

Lori Chadwick, Director, Development Services

Doug Sweet, Director, Community Services/Deputy CAO

Chris Nepszy, Chief Administrative Officer

Shelley Brown, Deputy Clerk

Todd Lavigne, Staff Sergeant, Ontario Provincial Police, Essex Detachment Manager

## Link to Strategic Priorities

- Manage, invest and plan for sustainable municipal infrastructure which meets current and future needs of the municipality and its citizens.
- Create a safe, friendly and inclusive community which encourages healthy, active living for people of all ages and abilities.
- Provide a fiscal stewardship and value for tax dollars to ensure long-term financial health to the municipality.
- Manage responsible and viable growth while preserving and enhancing the unique rural and small town character of the community.
- Improve the experiences of individuals, as both citizens and customers, in their interactions with the Town of Essex.
- Improve the Town's capacity to meet the ongoing and future service needs of its citizens** while ensuring the corporation is resilient in the face of unanticipated changes or disruptions.