

Financial Implications

The approval of the Topsoil Removal and Site Alteration By-law will result in a minimal increase in the cost of topsoil directly purchased by the City of Greater Sudbury.

1. Background

Topsoil and topsoil removal is an important community issue. Topsoil is an important resource for Greater Sudbury's agricultural community, which consists of approximately 160 census farms. It is an important resource for property owners seeking to improve the quality of their lands. It is also an important source of employment and income for those who supply and distribute the resource. Like any extractive industry, topsoil removal can alter surface drainage patterns and water quality, contribute to erosion, and cause adverse offsite impacts (e.g. noise, dust), if not properly conducted.

Topsoil removal regulation has been discussed in Greater Sudbury for a number of years. In 1992, the Town of Valley East enacted a Topsoil Removal By-law. This by-law was passed under the authority of the *Topsoil Preservation Act*. Between 1992 and 2003, approximately 20 permits were issued under this by-law. Together, these permits authorized topsoil removal from approximately 360 acres of land within the former Town of Valley East. The *Topsoil Preservation Act* has since been replaced with new provisions in the *Municipal Act*

In recent years a number of new developments including strengthened provincial legislation, a newly defined Agricultural Reserve with enhanced protective policies, and a growing interest in the creation of more sustainable food networks, have led the City of Greater Sudbury to re-examine the need for a by-law to prohibit topsoil removal from its best agricultural land and regulate topsoil removal in other areas to minimize the potential for adverse impacts.

In 2006, City Council passed Resolution #2006-541 to form a Topsoil Committee, comprised of three Council Members, to:

- examine Council's policies and provisions as contained in the Official Plan, the new draft Official Plan, secondary plans and zoning by-laws;
- examine provisions of the Municipal Act, 2001 with respect to topsoil preservation, fill replacement and grading of lands;
- prepare a by-law for Council's consideration if appropriate;
- recommend to Council policies, practices and regulations to preserve the topsoil on lands valuable for agriculture and forestry; and,
- provide for the rehabilitation of lands where topsoil removal is permissible.

The Topsoil Committee met throughout 2006 and held two public meetings, the first with topsoil producers on June 16, 2006, and the second with agricultural producers on July 25, 2006.

Following the November 2006 municipal elections, City Council established an Agricultural and Topsoil Advisory Panel. The Panel's mandate is to provide input and advice on agricultural issues in the community, including such matters as agricultural land use, the promotion of the agricultural sector of the local economy and topsoil preservation.

In 2007, Council approved a budget option to provide the resources necessary to develop a draft topsoil removal by-law for Council's consideration. The draft topsoil removal by-law would be intended to further protect Greater Sudbury's prime agricultural lands for agriculture and related uses, control topsoil removal activities to minimize any potential offsite adverse impacts, such as noise and dust, and ensure that topsoil removal areas are appropriately rehabilitated.

2. Evolution of the Draft By-law

2.1. First Draft By-law

In 2008, City Staff surveyed a number of Ontario municipalities with topsoil removal by-laws, including: Ottawa; Nepean; Kanata; Gloucester; Barrie; Innisfil; Caledon; Brampton; Milton; and, Niagara. Based on this review, City Staff developed a first draft of the Topsoil Removal and Site Alteration By-law (the first draft by-law).

The first draft by-law:

- prohibited topsoil removal in the Agricultural Reserve, as defined in the new Official Plan;
- permitted removal in the Rural Area, as defined in the new Official Plan, subject to approval;
- required existing and new rural topsoil removal operations submit an application to the City for approval, which included prescriptive control and rehabilitation plan requirements;
- required that applications be accompanied by a non-refundable permit fee of \$10/hectare of removal area, with a minimum fee floor of \$500;
- required that applications be accompanied by a refundable environmental protection security deposit of \$500/hectare of removal area to ensure compliance with the approved rehabilitation plan;
- included exemptions for those uses and activities called for in the *Municipal Act*;
- allowed decisions under the by-law to be appealed to Council's Hearings Committee; and,
- repealed the former Town of Valley East's Topsoil Removal By-law.

Permits issued under the first draft by-law would be good for one calendar year, and eligible for renewal for a second one year term. The first draft by-law also included standard enforcement provisions.

The first draft by-law was presented to Priorities Committee on January 21, 2009. At this meeting, Priorities Committee passed Resolution #2009-03, which was ratified by Council on January 28, 2009:

"That the Topsoil Removal and Site Alteration By-law report and draft by-law be accepted in principle, and

THAT the Topsoil Removal and Site Alteration report and by-law be referred to City staff for a meeting in February, 2009, to be attended by staff and any Members of Council who wish to attend in order to receive feedback from the general public, agricultural community and topsoil producers, and

THAT an updated report and by-law be brought back to the Priorities Committee for adoption."

2.2. February 2009 Public Meeting and Draft By-law Revisions

City Staff facilitated a public meeting on the first draft by-law on February 10, 2009. The meeting was broadly advertised and well attended by members of the agricultural community and topsoil producers. Minutes of this meeting are included in Attachment #1. A number of written submissions were made following the public meeting. Staff also met with some of the large topsoil producers to further discuss their concerns. Some key summary comments are:

1. Some public meeting participants felt that the proposed moratorium on topsoil removal should apply to all good agricultural land, both in and outside of the Agricultural Reserve.
2. The topsoil producers felt that sites in and outside of the Agricultural Reserve, including those with permits issued under the Town of Valley East Topsoil Removal By-law, should be grandfathered.
3. The topsoil producers raised concerns regarding the cost associated with the first draft by-law. They felt that the prescriptive nature of the proposed control plan requirements, the engagement of a professional engineer to develop the control plan and monitor the topsoil operation, as well as the application/security deposit fees would eliminate smaller topsoil producers and increase topsoil costs, which would be passed along to consumers.
4. Mining activities subject to a provincially approved Closure Plan issued pursuant to the *Mining Act*, should be exempt from the topsoil by-law.
5. The topsoil producers and public meeting participants expressed some concern that the first draft by-law would un-necessarily restrict residential landscaping activities, and questioned whether this was the intent of the by-law.

In response to this feedback, City Staff proposed a number of changes to the first draft by-law, as follows:

1. The first change saw the prescriptive control and rehabilitation plan requirements replaced with more objective standards that would provide flexibility to tailor the required control and rehabilitation measures to fit individual removal operations. As part of this change, the professionals qualified to undertake the required control and rehabilitation plan was broadened to include landscape architects.
2. The second change saw existing topsoil removal operations in the Rural Area provided with a “grace period” to transition into the requirements of the new by-law. Applicants would have a period of time to file the necessary application form, fee and security deposit with the City to receive a transitional conditional topsoil removal permit. Such applicants would then have another three months to develop and submit the required control and rehabilitation plan.
3. The third change saw a new exemption for mining activities subject to an approved Closure Plan.
4. The fourth change saw additional clarification within the by-law that exempted residential landscaping activities, which are captured within other municipal by-laws such as the existing Site Grading By-law, from this by-law.

These changes were presented to the Priorities Committee on March 4, 2009. At this Meeting, the Priorities Committee passed Resolution #2009-12 and Resolution #2009-13 which were ratified by Council on March 11, 2009:

#2009-12

"THAT the City of Greater Sudbury maintain the prohibition of removal of topsoil within the Agricultural Reserve outlined in the draft Topsoil Removal and Site Alteration By-law presented on January 21, 2009.

#2009-13

THAT provisions be developed within the draft by-law which would allow the City of Greater Sudbury to "grandfather" existing top soil stock piles in the Agricultural Reserve which were established prior to January 1, 2009."

2.3. Options to Recognize Existing Agricultural Reserve Sites

City Staff identified a number of potential topsoil removal sites within the Agricultural Reserve and proposed three potential methods to grandfather these operations as part of the draft by-law.

Option #1: Recognize existing topsoil stockpiles.

Option #2: Recognize existing topsoil stockpiles and permit 5 hectares of additional removal, subject to Site Alteration Permit.

Option #3: Permit topsoil removal across all the property, subject to Site Alteration Permit.

These options were presented to the Priorities Committee at its April 22, 2009 Meeting. The Priorities Committee agreed to defer this item to enable an additional public meeting to be held with the topsoil producers, agricultural community and public.

2.4. Additional Consultation and May 2009 Public Meeting

Since this time, City Staff met with local topsoil producers on April 28, 2009 and May 5, 2009. These meetings were productive and resulted in a good exchange of information and perspectives. Some key comments can be summarized as follows:

1. The topsoil producers are concerned with the scope of the draft by-law, which primarily speaks to topsoil removal, but also includes provisions relating to site alteration and the placing or dumping of fill, as permitted under the *Municipal Act*. The producers would prefer the scope of the by-law to be limited to topsoil removal only.
2. The topsoil producers continue to raise concerns with the cost associated with the draft by-law. They feel that the revised control plan requirements, the engagement of a design professional to develop a control plan and monitor the topsoil operation, as well as the application/security deposit fees would eliminate smaller topsoil producers and significantly increase topsoil costs.

3. The topsoil producers have also expressed concerns regarding certain substantive provisions of the by-law including the language relating to rehabilitation, the lifespan of a permit, and the transferability of a permit when ownership of a property changes. The producers propose that more objective language be introduced into the by-law relating to rehabilitation. They also propose that the by-law be revised so that the lifespan of a permit matches the length of the proposed removal activity, and so that a permit can be transferred when property changes hands.
4. The topsoil producers have also expressed concerns regarding certain administrative provisions of the by-law including those relating to the Director's ability to waive certain control plan requirements and an applicant's appeal rights.

Generally, the topsoil producers recognize that some form of regulation is required. They have indicated that, should the draft by-law proceed, any lands purchased or leased for the purpose of topsoil removal prior to January 1, 2009 should be exempt from the provisions of the draft by-law for five years. They also propose that these operations be subject to the Town of Valley East's Topsoil Removal By-law.

In addition to these meetings, City Staff facilitated a second Public Meeting on May 11, 2009. This meeting was broadly advertised and attended by approximately 60 individuals and the majority of Council. Approximately 20 people spoke at this meeting, representing the agricultural community, topsoil producers, community stakeholder groups and concerned citizens. Minutes of this meeting are included in Attachment #2.

3. Moving Ahead

The public and stakeholder sessions on the draft by-law demonstrate a strong and diverse range of thoughts relating to topsoil and its importance to the community today, and in the future. The by-law should achieve the best possible balance between these competing interests. This could be accomplished by:

1. Recognizing existing topsoil removal operations in and outside of the Agricultural Reserve;
2. Developing a timeframe and process to transition existing topsoil removal operations to the full by-law standard;
3. Applying the by-law on a "go forward" basis to all new topsoil removal operations.

3.1. Recognize existing topsoil removal operations

Existing topsoil removal operations in and outside of the Agricultural Reserve could be recognized in the by-law. This could be accomplished by incorporating a new recognition system into the by-law that would define an "existing operation" and, provided the property meets the requirements of the definition, allow such an operation to continue, for a temporary transition period, subject to an Existing Operations Permit and Modified Control Plan.

- "Existing operation" would be defined as: property designated as "Rural" and "Valley East Urban Expansion Reserve" in the City of Greater Sudbury's Official Plan that was "under development" for the purposes of topsoil removal on or before January 1, 2009, as demonstrated to the satisfaction of the Director.

- The definition of an existing operation would also include those properties within the Agricultural Reserve shown on Attachment #3. Five of the nine properties were identified by City Staff based on an analysis of 2007 air photos as well as site visits. The remaining properties were identified in consultation with topsoil producers. Together, these properties are 750 acres in size. Of this amount, over 200 acres has already seen substantial topsoil removal activity.
- “Under development” would be defined as a property where at least two of the following criteria exist or have existed on the Site: the owner can supply documents evidencing topsoil removal activity (i.e. lease agreements, sales receipts, photographs, statutory declarations from owners/neighbors attesting to the activity, etc.); the owner can establish actual physical actions including but not limited to the removal of vegetation, plowing, harrowing, disking and/or excavation of topsoil; and/or the owner can establish the existence of topsoil stockpiles (i.e. topsoil which has been removed from its native or natural location and placed in an identifiable pile or heap for storage) on the site.

3.2. Transition existing topsoil removal operations to full by-law standard

Greater Sudbury’s topsoil industry consists of just over 15 producers. This industry can be characterized as a handful of “large” producers, with the remaining being relatively “smaller” producers, who undertake topsoil removal as part of a relatively larger integrated business enterprise (e.g. trucking and hauling). These producers are active on numerous sites throughout the city.

In order to ensure an effective transition to the new by-law, existing topsoil removal operations could be allowed to continue, subject to the submission and approval of an Existing Operations Permit. An Existing Operations Permit application would include a Modified Control Plan, prepared by the owner and/or the owner’s agent. The Modified Control Plan would include a Sketch Plan and describe the site, relevant natural and artificial features, the removal area, existing/proposed control measures, and existing/proposed rehabilitation measures.

An application for an Existing Operations Permit could be made to remove topsoil stockpiles and/or to permit an additional five hectares of removal activity from an existing operation. The life of this permit would match that of the removal project schedule, up to a maximum of five years. Any removal activity beyond five hectares or exceeding five years, may also be permitted from an existing operation, subject to Site Alteration Permit, which includes a full Control Plan.

The by-law would come into effect immediately upon passage. A two-stage application process is proposed to assist existing topsoil removal operations (i.e. those established before January 1, 2009) and new topsoil removal operations (i.e. those established after January 1, 2009) transition into the by-law.

Stage 1: Conditional Permit Application: Existing and new topsoil removal operations would have 30 days from the passage of the by-law to submit an application for a Conditional Permit. In both cases, this would require the submission of an application form, together with the required application fee and performance security deposit. In the case of a new topsoil removal operation, the application would also identify the owner’s design professional.

Stage 2: Submission of Plans: Existing and new topsoil removal operations would then be given an additional period of time to develop and submit their required plans. The by-law would require that Modified Control Plans for existing operations be submitted within 90 days of the Conditional Permit Application. The by-law would require that Full Control Plans for new operations be submitted with 180 days of the Conditional Permit Application.

These timeframes are seen as providing an adequate amount of time to prepare and submit any necessary applications.

3.3. Apply the by-law on a “go-forward” basis

New topsoil removal operations seeking to establish outside of the Agricultural Reserve, would be required to meet the more stringent requirements of the by-law.

The by-law would maintain many key features from the first draft by-law, including all those changes previously endorsed by Council (i.e. the replacement of prescriptive control standards with objective standards, the introduction of an exemption for mining activities, and clarifications around landscape activity exemptions).

The by-law would also incorporate many of the suggestions made since the April 22, 2009 Priorities Committee Meeting. The draft by-law would be modified so that the lifespan of an approved permit coincides with that of the topsoil removal operation schedule to a maximum of five years. The by-law would be modified to introduce new language relating to the rehabilitation of a topsoil removal area and to further scope provisions relating to the satisfaction of the Director. The by-law would be clarified to ensure that permits can be transferred from owner to owner on application to the City.

With these changes incorporated, the by-law would:

1. prohibit topsoil removal in the Agricultural Reserve, as defined in the new Official Plan;
2. permit removal in the Rural Area and Valley East Urban Expansion Reserve, as defined in the new Official Plan, subject to an approved Site Alteration Permit;
3. require existing and new rural topsoil removal operations submit an application to the City for approval, which includes objective control and rehabilitation plan requirements;
4. require that applications be accompanied by a non-refundable permit fee of \$50/hectare of removal area, or \$500, whichever is greater;
5. require that applications be accompanied by a refundable environmental protection security deposit of \$500/hectare of removal area (or such larger amount deemed appropriate by the Applicant's design professional) to ensure compliance with the approved rehabilitation plan;
6. allow decisions under the by-law to be appealed to Council's Hearings Committee; and,
7. repeal the former Town of Valley East's Topsoil Removal By-law.

Concerns have been raised regarding the cost of the proposed topsoil by-law. City Staff estimate that the cost implications of the by-law for an existing operation will be negligible. For example, a producer seeking to extract topsoil from 5 hectares from a parcel of land with an existing operation would be required to pay \$3,000 in application fees and security deposits (\$600 per hectare). Assuming that topsoil is removed to an average depth of 6 inches, and can be sold for \$8 per cubic yard, exclusive of any transportation charge, approximately \$80,000 can be realized in topsoil sales (\$16,000 per hectare).

City staff estimate that the cost of the by-law for a new topsoil removal operation on an 80 acre parcel of land to be less than 10% of current cost, when amortized over the lifespan of removal activity from the property, which is estimated at 15 years. The cost will be higher in the first year of operation, declining over the 15 year period. Ultimately, any cost increase will be passed along to the consumer in the form of higher pricing. City staff estimates that this cost increase will be modest. For example, for a consumer who wishes to place 4 inches of topsoil on his typical residential lot size of 50 feet x 120 feet, the cost would rise by \$225 from the current approximate cost of \$900 to \$1,125.

To further assist with this concern, City Staff will host an information and training seminar with local design professionals to ensure that the expectations and process around the by-law are fully understood. As part of the by-law's administration, applicants will be encouraged to pre-consult with City Staff to ensure the application requirements are tailored to the individual site/operation prior to an application being made. This model is similar to that used for land use planning approvals.

4. Conclusion

City Staff have conducted additional consultation on the draft topsoil removal by-law. In response to feedback received, City Staff propose a number of changes to the draft by-law, including a new system to recognize existing topsoil removal operations in the Agricultural Reserve, the Rural Area and the Valley East Urban Expansion Reserve.

Based on the above, it is recommended that Council:

1. Approve the definition of an "existing operation", as described above, and including the nine sites located within the Agricultural Reserve;
2. Allow stockpiles to be removed from all existing operations, subject to an Existing Operations Permit;
3. Allow five hectares of additional removal activity on all existing operations, subject to an Existing Operations Permit;
4. Allow any removal activity beyond five hectares and/or exceeding five years on all existing operations, subject to a Site Alteration Permit;
5. Approve the two-stage permit process, which would give existing and new topsoil removal operations 30 days from the passage of the by-law to apply for a conditional permit and an additional 90 to 180 days, respectively, to file any necessary plans.
6. Prohibit any new topsoil removal activity within the Agricultural Reserve, as defined in the new Official Plan;
7. Permit new topsoil removal operations in the Rural Area and Valley East Urban Expansion Reserve, as defined in the new Official Plan, subject to a Site Alteration Permit;
8. Direct staff to finalize the draft Topsoil Removal and Site Alteration By-law for approval.

Attachments