

Item No. 11.1.8
Halifax Regional Council
August 14, 2012

TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY: Original signed by 

Richard Butts, Chief Administrative Officer

Original signed by 

Brad Anguish, Acting Deputy Chief Administrative Officer

DATE: June 25, 2012

SUBJECT: **Encroachment Agreement – Dynamic Properties Company Ltd.**
3737 Kempt Road, Halifax – Steele Subaru

ORIGIN

Application by B.D. Stevens Limited on behalf of Dynamic Properties Company Limited.

RECOMMENDATION

It is recommended that Halifax Regional Council approve the Encroachment Agreement with Dynamic Properties Company Limited, regarding private light standard bases and a retaining wall within the Kempt Road and Lady Hammond Road rights-of-way, as provided in Attachment A.

BACKGROUND

The registered owner of 3737 Kempt Road, Dynamic Properties Company Limited (DPCL) has re-graded the property at this location in conjunction with the construction of the new automobile dealership (Steele Subaru). The project included a new sales building, newly constructed parking lot and 13 light standards located along the perimeter of the property. Upon completion of the site construction, it was determined that the light standard bases were located within the HRM street right-of-way, and the extent of the infilling and re-grading of the site significantly changed the elevations along Kempt Road and Lady Hammond Road resulting in the elimination of the pedestrian foot path along both of these streets. In order to address the situation, the approval of Regional Council in the form of an encroachment agreement is required.

DISCUSSION

The applicant is proposing to utilize the boulevard area along the Kempt Road and Lady Hammond Road right-of-way to allow for grading changes to the newly developed lot. The change in grading was done to provide a car display parking lot and new lighting for the newly constructed Steele Subaru building on the property. Prior to construction, the boulevard area had a gentle slope between the back of curb and the DPCL property line which allowed for the creation of an unofficial pedestrian foot path along Kempt Road and Lady Hammond Road. Due to the re-grading of the property within the HRM right-of-way, the ability for a safe pedestrian travel area has been removed. In order to remediate this situation, DPCL has proposed to construct a retaining wall within the right-of-way and retain the 13 light standards on HRM property. The proposed retaining wall and existing light standards would be located within the boulevard area of the HRM right-of-way comprising a total encroachment area of approximately 25 square metres.

As outlined in the Encroachment By-Law, E-200, permanent encroachments located upon and under the HRM street right-of-way, require an encroachment agreement, as well as authorization from Regional Council. The proposed retaining wall and light standards within the right-of-way is a type of encroachment which requires approval from Regional Council, and is also subject to an annual fee as outlined in Administrative Order 15.

In order to reinstate the right-of-way to its original condition, significant changes to the newly developed site, including the construction of a retaining wall of a considerable height along the HRM and DPCL property line would be required. Such a retaining wall would require substantial structural and geotechnical design, could potentially impact the HRM right-of-way further, and would be visually unpleasing to the pedestrians and the travelling public.

It is not typical practice for HRM to allow the requested types of encroachments within the public right-of-way. However, due to the extent of the lot grading to accommodate the new

development and to discourage the possibility of a substantially sized retaining wall along the HRM right-way which would be necessary to reinstate the site, staff believe that the request is reasonable for Council to consider with the following conditions:

(i) The applicant be required to fully reinstate the foot path along Kempt Road and Lady Hammond Road to HRM standards and provide a minimum of 2.1 m (7 feet) for a pedestrian travelled way (this is illustrated on Schedule "B" of the agreement and comprises the area shown as 2 feet of sodding and 5 feet of concrete sidewalk). A travelled way of 2.1 metres will allow for an acceptable pedestrian travel zone, sufficient area for snow storage, as well as allow for the installation of future sidewalk in the area; and

(ii) DPCL is to own and fully maintain both the retaining wall and all light standards within the HRM right-of-way.

Through the permit review process, the retaining wall be required to meet current HRM Municipal Design Specifications, including certification by a Geotechnical Engineer and incorporate a safety fence into the design.

The area of the proposed encroachment will be a total of 25 square metres. In accordance with By-law E-200, the encroachment will be subject to an annual encroachment fee of \$250.00 (\$10.00 per square metre).

If Council chooses to allow the encroachment, the attached draft encroachment agreement (Attachment A) would apply which includes the following terms:

1. Construction and maintenance of the encroachment must comply with Streets By-law S-300.
2. DPCL would be responsible for ownership and maintenance of all approved encroachments.
3. If requested by HRM, the encroachment(s) would be removed by DPCL and the area within the right-of-way reinstated at their expense.
4. Record information shall be provided in paper and electronic format to HRM.

The encroachment agreement would be effective concurrently with an approved Streets and Services Permit.

BUDGET IMPLICATIONS

Should Regional Council choose to approve the encroachment, cost centre R112-4912, Right-of-Way Approval – Signs and Encroachments will be used to record this new annual revenue.

FINANCIAL MANAGEMENT POLICIES/BUSINESS PLAN

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Project and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Project and Operating reserves, as well as any relevant legislation.

COMMUNITY ENGAGEMENT

Community Engagement as described by HRM's *Community Engagement Strategy* is not applicable to this process.

ENVIRONMENTAL IMPLICATIONS

No implications identified.

ALTERNATIVES

1. Council may choose to approve the encroachment and include other terms and conditions in the encroachment agreement. Such modifications may require further discussion with the applicant.
2. Council may choose to not approve the encroachment agreement and require DPCL to fully reinstate the boulevard and remove the light standards currently located within the HRM right-of-way. Staff do not recommend this option for the reasons outlined in the report.

ATTACHMENTS

Attachment A: Draft Encroachment Agreement
Attachment B: Encroachment Request by B.D. Stevens Ltd.

A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/cagenda.html> then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

Report Prepared by: Mark McGonnell, Development Engineer, 869-4727

Report Approved by: Kelly Denty, Manager, Development Approvals, 490-4800

Report Approved by: Taso Koutroulakis, Acting Manager Traffic & Right-of-Way 490-4816

Financial Approval by: Greg Keefe, Director of Finance & Information, Communications & Technology/CFO 490-6308

Report Approved by: Brad Anguish, Director Community & Recreation Services, 490-4933

Report Approved by: Ken Reashor, Director, Transportation and Public Works, 490-4855

Legal Review by: Marian Tyson, Acting Director, Legal Services & Risk Management, 490-4226

Attachment A

This **Encroachment License Agreement** made this day of , 2012

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY, a body corporate
("HRM")

and

DYNAMIC PROPERTIES COMPANY LIMITED, a body corporate

("DCPL")

Recitals

- A. Whereas DCPL owns property at 3737 Kempt Road and wishes to construct a retaining wall within the HRM street right of way at Kempt Road and Lady Hammond Road as shown and described in Schedule "A";
- B. And Whereas DCPL has constructed light standards within the HRM street right of way at Kempt Road and Lady Hammond Road as shown in Schedule "A";
- C. And Whereas by resolution of the Halifax Regional Municipal Council on _____, 2012, the Halifax Regional Municipality agreed to give DCPL an encroachment license in accordance with the terms and conditions set out in Halifax Regional Municipality By-law E-200, being the Encroachment By-law, and as contained in this license agreement.

In consideration of the mutual promises contained in this agreement the parties agree as follows:

Definitions

1. In this agreement, unless the context otherwise requires:
- (a) "Engineer" means the Engineer as defined by the Halifax Regional Municipality Charter;

License

2. Subject to the terms of this encroachment license agreement, HRM hereby grants to DCPL the non-exclusive right by its officers, servants, agents and contractors at all times to enter on, over and under that portion of Kempt Road and Lady Hammond Road, identified in Schedule "A" to install and maintain a retaining wall and to maintain 13 light standards.

Ownership

3. DCPL retains ownership of the retaining wall and the light standards.

Relocation

4. If the retaining wall and light standards must be relocated for HRM purposes, as determined at the discretion of HRM, such relocation will be at the sole expense of DCPL. Should DCPL wish to relocate the retaining wall and light standards, such shall be done only upon receipt of the written consent of HRM, and said relocation shall be at the sole expense of DCPL.

Maintenance

5. DCPL agrees, at its sole expense, to maintain the retaining wall and light standards in a safe condition and so that they are not dangerous or hazardous to traffic, pedestrians or the public at large.

6. HRM may at any time and without notice inspect the retaining wall and light standards. HRM may at any time and without notice enter upon DCPL land, to the extent required to inspect the retaining wall and light standards.

7. If HRM determines in its sole discretion that the retaining wall and light standards are unsafe or dangerous, HRM may:

- a. Notify DCPL that DCPL, at its sole expense, shall repair or alter the retaining wall or light standards in any manner that HRM determines, in its sole discretion, is necessary to make them safe; and
- b. If DCPL does not, within 5 business days of receiving notice to repair or alter the retaining wall or light standards, begin the repair or alteration, HRM may cause the work to be done and DCPL shall be fully responsible for all costs of the repair or alteration. HRM may, in addition to any other remedies available at law, lien DCPL property for any of the costs or expenses owed to HRM.

8. If HRM determines in its sole discretion that the retaining wall and light standards are an immediate safety issue, danger or hazard, HRM may without notice remove the retaining wall or light standards without compensating DCPL.

9. DCPL agrees to reimburse HRM for any work done by HRM or expenses incurred by HRM under this section within 5 business days of receiving notice of the costs of the work or expense.

Permits

10. a. DCPL agrees to comply with all municipal By-laws including the Streets By-law, S-300 for the original construction of the works and all subsequent work which involves the excavation of the street.

- b. The application for a Streets & Services permit shall include an engineering plan and profile stamped by a professional engineer of the retaining wall.
- c. The final location of the retaining wall shall be subject to the approval of the Engineer.
- d. For the purposes of the construction of the original works, DCPL agrees to engage the services of a professional engineer, licensed to practice in the Province of Nova Scotia, and to file with the Engineer a written undertaking stating that the professional engineer had been engaged by DCPL to supervise and set out the work; that the work will be done in accordance with the approved plans; that the project shall be subject to full time inspection and approval by the professional engineer or his representative.
- e. For the purposes of the construction of the original works, DCPL agrees to arrange a preconstruction meeting with HRM staff.
- f. DCPL shall provide HRM with a certificate from a professional engineer certifying that all works are completed according to the approved drawings, any applicable municipal services specifications, and standard drawings and approved changes.

Record Drawings

- 11. DCPL shall provide a copy of the record drawings immediately upon completion of said project, and immediately upon completion of any relocation.

Indemnity

- 12. DCPL agrees to indemnify and save harmless HRM, its Mayor, Councillors, employees, agents, contractors and volunteers from all claims, liabilities and expenses of any kind in any way related to or connected with the grants of the rights set forth in this license agreement or from the existence or operation of the light standards and the retaining wall however caused, except to the extent that the loss arises out of the gross negligence of HRM or those for whom it is law responsible.

Fees

- 13. DCPL shall pay the fees set out in Encroachment By-law E-200, and for the purpose of the calculation of said fees, it is agreed that the space occupied by the light standards and the retaining wall is 25.0 square metres. The current fee is \$250 per year, which shall be paid before March 1 every year.
- 14. DCPL acknowledges that this fee is subject to review by HRM Council and may be increased upon three months notice.

Occupational Health & Safety Act

- 15. DCPL agrees to comply with the requirements of the Occupational Health & Safety Act and all regulations enacted pursuant thereto. Specifically DCPL agrees to exercise the due diligence required by the Act in ensuring that to the extent possible the

requirements of the Occupational Health & Safety Act and its regulations are followed by its contractors or agents.

Termination

16. a. Either party may terminate this license agreement, in writing, at any time.
- b. Upon termination of the license agreement, DCPL shall have sixty calendar days, at its sole expense, to remove the light standards and the retaining wall and restore the street right of way, unless otherwise agreed to between the parties.
- c. If DCPL does not, within sixty calendar days or such other time agreed to between the parties, remove the light standards and the retaining wall and restore the street right of way, HRM may cause the work to be done and DCPL shall be fully responsible for all costs and expenses of the work. HRM may, in addition to any other remedies available at law, lien DPCL property for any of the costs or expenses owed to HRM.

Notices

17. Any written notice or communication relating to the administration of this agreement to be given or delivered by one party to the other shall be deemed to be duly given or delivered by hand, by fax or by courier to the following addresses or such other address that may subsequently be provided:

Halifax Regional Municipality
Director of Transportation & Public Works
P.O. Box 1749
Halifax, N.S. B3J 3A5

and

Dynamic Properties Company Limited
3600 Kempt Road, Suite 200,

Halifax, NS, B3K 4X8

18. This agreement shall enure to the benefit of and be binding upon the parties hereto, their respective successors and permitted assigns.
19. DCPL shall not acquire any right, title or interest in or to HRM property or HRM's public road allowance, or the portion thereof affected by the encroachment, except the right to maintain the encroachment in accordance with this agreement.
20. This agreement shall be construed according to the laws of the Province of Nova Scotia.

21. The parties agree this is a public document within the meaning of Part XX of the Municipal Government Act.

IN WITNESS WHEREOF the parties hereto have executed this license agreement as of the day and year first above written.

HALIFAX REGIONAL MUNICIPALITY

Witness

Mayor

Witness

Clerk

Dynamic Properties Company Limited

Witness

Name:
Title:
I have the authority to bind the Corporation.

Witness

Name:
Title:
I have the authority to bind the Corporation.

PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX, NOVA SCOTIA

ON THIS ____ day of _____, A.D., 2012, before me, the subscriber personally came and appeared _____ a subscribing witness to the within and foregoing Indenture, who, having been by me duly sworn, made oath and said that **Dynamic Properties Company Limited**, one of the parties thereto, signed, sealed and delivered the same in his presence

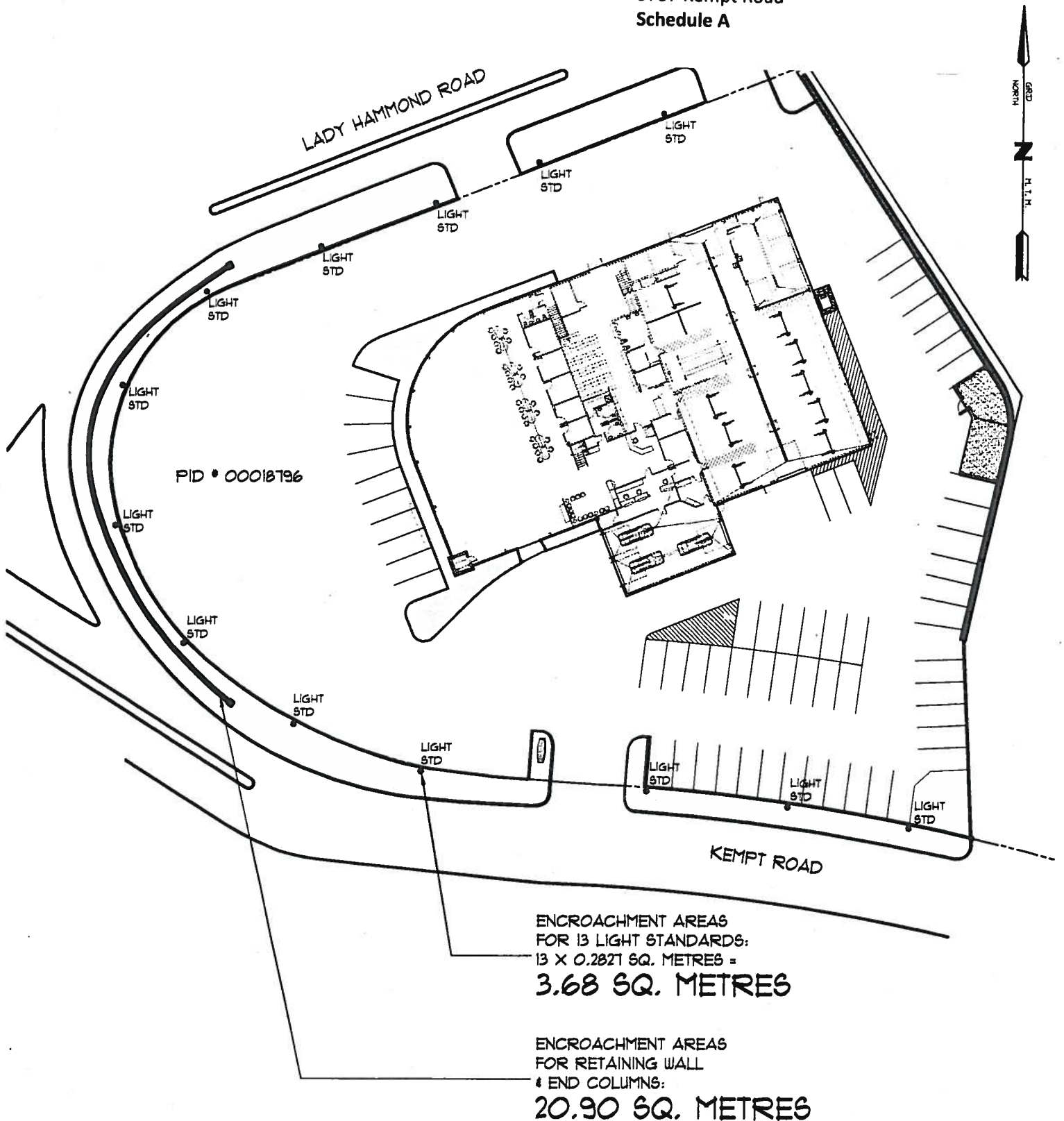
A Commissioner of the Supreme Court of Nova Scotia

PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX, NOVA SCOTIA

ON THIS ____ day of _____, A.D., 2012, before me, the subscriber personally came and appeared before me _____ the subscribing witness to the within and foregoing Indenture, who, having been by me duly sworn, made oath and said that the **Halifax Regional Municipality**, one of the parties thereto, caused the same to be executed and its Corporate Seal to be thereunto affixed by the hands of _____, its Mayor and _____, its Municipal Clerk, its duly authorized officers in his presence.

A Commissioner of the Supreme Court of Nova Scotia

Encroachment Agreement
3737 Kempt Road
Schedule A



B.D. STEVENS LIMITED
20 MacDonald Avenue
Dartmouth, N.S.
Tél. (902) 468-8040
Fax (902) 468-4839

PROJECT **Steele Subaru**

3737 Kempt Road,
Lot T, Halifax, Nova Scotia

PROJECT NO.

751

TITLE **SITE PLAN SHOWING:
PERMANENT ENCROACHMENT AREAS**

DRAWN

W.L.

CHECKED

MYZ

DATE

FEB 01 2012

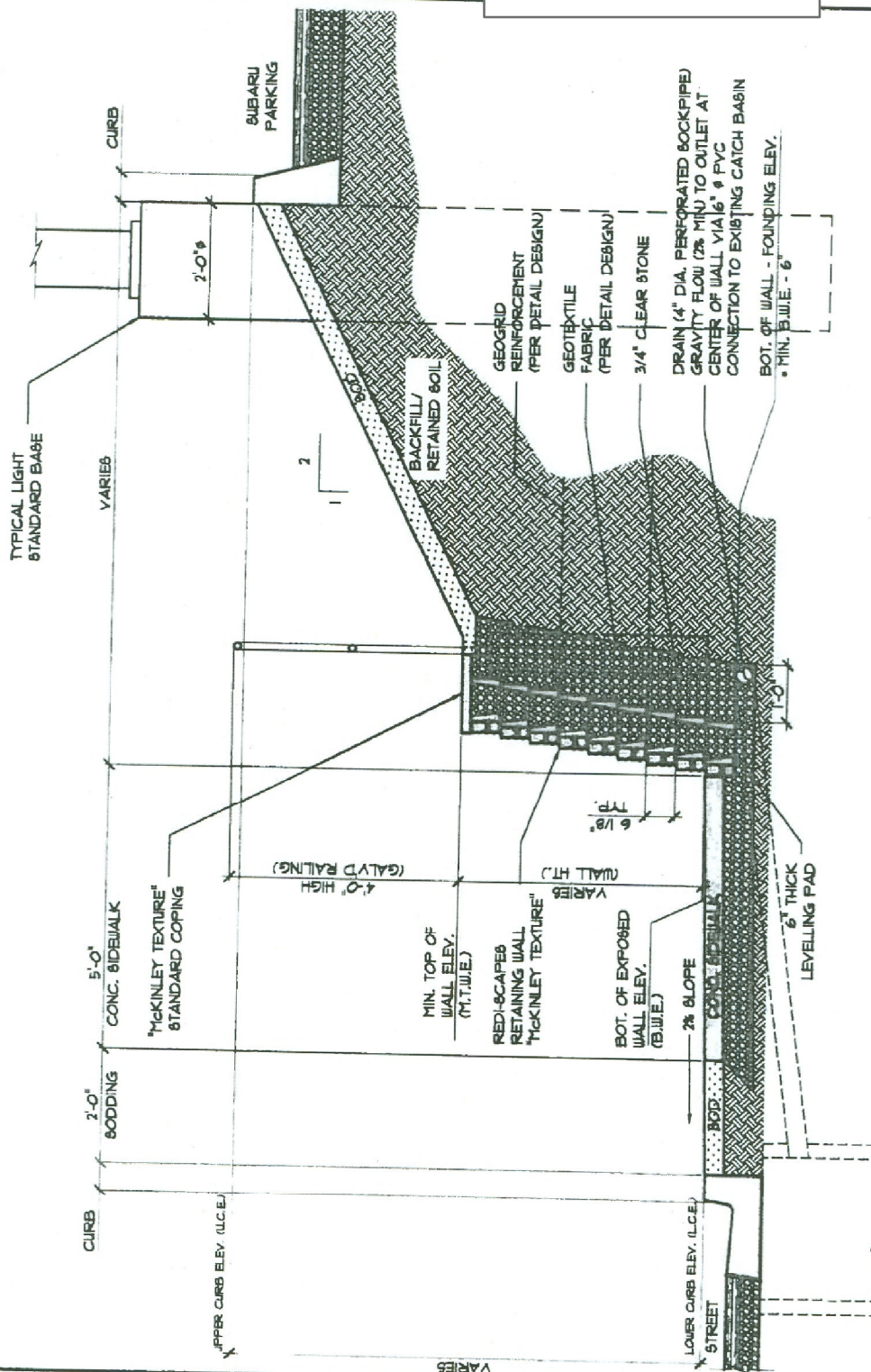
SCALE

1 : 60

DWG. NO.

SK-16

**Encroachment Agreement
3737 Kempt Road
Schedule B**



B.D. STEVENS LIMITED
20 MacDonald Avenue
Dartmouth, N.S.
Tel. (902) 488-8040
Fax (902) 488-4839

PROJECT **Steele Subaru** PROJECT NO. _____

3737 Kempt Road,
Lot T, Halifax, Nova Scotia

751

DRAWN DATE FEB 02 2012

W.L. SCALE $3/8" = 1'-0"$

CHECKED DWG. NO.

MVZ SK-17

TITLE
TYPICAL WALL & LIGHT STANDARD BASE

**Encroachment Request
Attachment B**



February 2, 2012

Halifax Regional Municipality
7071 Bayers Road, Suite 2005
Halifax, Nova Scotia

Attention: Ashley Blissett, P.Eng.

Dear Ms. Blissett:

Re: Encroachment Agreement Request, 3737 Kempt Rd. – Steele Subaru

Further to recent discussions with you, other HRM staff and Councilor Blumenthal we offer the following:

In accordance with HRM by-law E-200 Respecting Encroachments Upon Under or Over a Street we request an Encroachment License on behalf of the Property Owner Dynamic Properties Company Limited.

The encroachment consists of:

- 13 – 600mm diameter (0.2827m²) light standard bases located immediately abutting the property line but within HRM right-of-way. Total Area of encroachment for light standards is 3.68m².
- A 67m long retaining wall intended to shape transition slopes such that a 2.13m wide flat area adjacent to the curb that is suitable for sidewalk and grass verge is provided. Total Area of encroachment for the retaining wall is 20.90m².
- Total encroachment area is 24.58m².

The size and location of the proposed encroachments are shown on the attached drawing nos. SK-16, and SK-17.

This request is for a permanent encroachment for the useful life of the structures (light standards and retaining wall). It is understood that the property Owner of PID # 00018796, 3737 Kempt Road, will retain ownership, complete with all maintenance responsibility for the structures, and the encroachment License will require the payment of an annual rental fee as prescribed in the by-law.

Please contact me if you have any further comments or questions.

Yours truly

B.D. STEVENS LIMITED

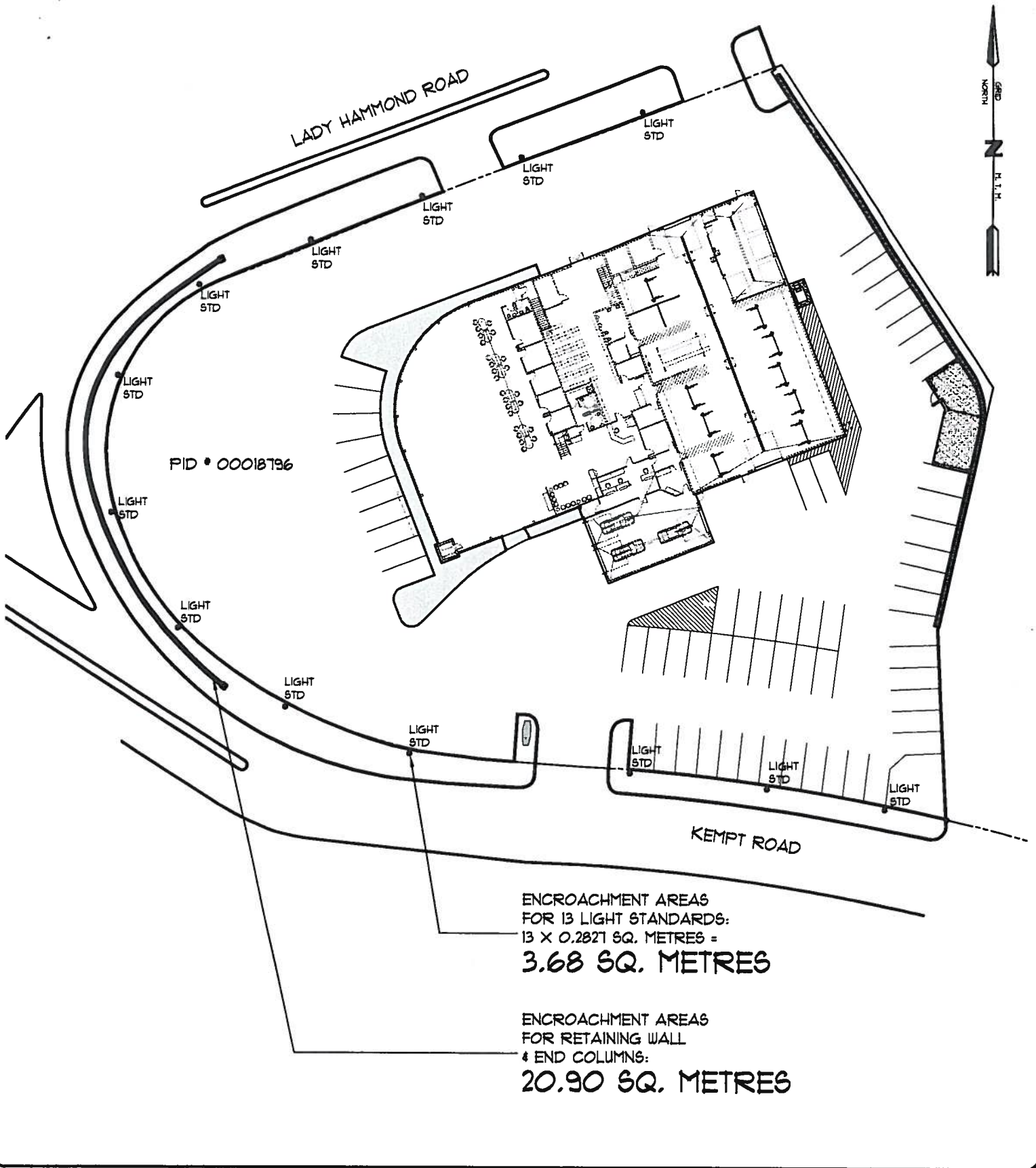
A handwritten signature in dark ink, appearing to read 'Mark VanZeumeren', is written over a horizontal line.

Mark VanZeumeren, P.Eng.

20 MacDONALD AVENUE,
DARTMOUTH, NOVA SCOTIA
B3B 1C5
WWW.BDSTEVENS.CA
TEL (902) 468-8040
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a member of the Stevens Group of Companies



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FEB 01 2012

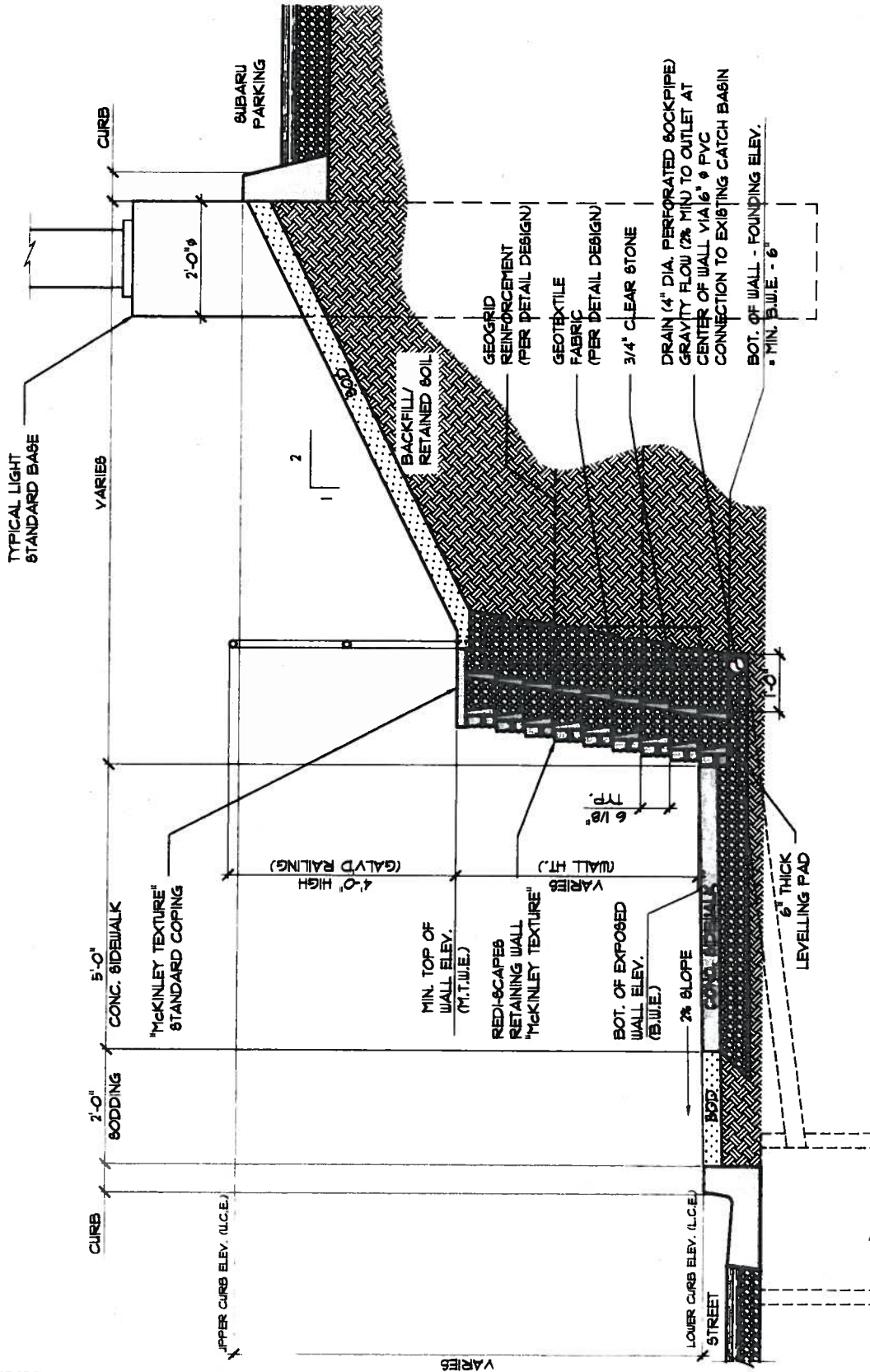
SCALE

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DWG. NO.

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3737 Kempt Road,
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751

TITLE

TYPICAL WALL & LIGHT STANDARD BASE

DRAWN

DATE

FEB 02 2012

W.L.

SCALE

3/8" = 1'-0"

CHECKED

DWG. NO.

MYZ

SK-17