

Legal questions remain over potential whistle cessation program

The amount of liability the Town might have to take on when it comes to pedestrian safety at Engelhard Drive remains at the heart of the debate on whether Aurora should pursue a train whistle cessation program.

With Metrolinx's plans for a traffic underpass at Wellington Street taking that crossing and the one just north at Centre Street out of the equation, and the assumption the Region would take on liability at St. John's Sideroad as it is a Regional road, the question of whether the Town would be at risk if anyone got injured at a crossing as a result of a whistle not being sounded came into sharp focus at last week's General Committee meeting.

There, Town Solicitor Patricia De Sario said she believed the Town shouldn't accept any liability.

"Maybe if I told you a worst-case scenario on what would happen if there isn't a whistle and the train does hit somebody," she said, responding Councillor Michael Thompson who asked what her position was on the issue. "If there are claims, there could be personal injury claims from any of the people who are in the vehicle. Say a train hits a vehicle—these would be the types of claims if the person is in the vehicle. If there is a passenger, if a person has passed away, then the estate could make a claim.

"There could be personal injury claims from anybody who could be on the train—whiplash and if they get thrown forward. If the incident includes a train derailment there's potential property damage claims as a result of the damages to any of the surrounding areas. There could be claims from Metrolinx for economic losses or any other company that happens to use the railway. This is a worst-case scenario, but this is something that could potentially happen without the whistle blowing."

At this point in time, Ms. De Sario noted, insurance premiums would not rise simply by putting the anti-whistle measures, including pedestrian mazes and gates, in place; rather, it would take a "catastrophic incident" to see premiums and deductibles increase substantially.

A cost/risk vs. benefit evaluation would need to be known at some point, said Councillor Rachel Gilliland, pressing for an estimate, but Ms. De Sario said this wasn't information that could be issued by the insurance provider at this point.

"Companies look at the market, whether it is a hard market or a soft market, but they also look at your loss history," said Ms. De Sario. "To date, we have had a very good loss history, so our premiums have been at an acceptable rate, as have our deductibles. If there's an incident, that impacts our loss history and that will then dictate what the premiums are. Because there are not many municipalities that have whistle cessation or because there hasn't really been an incident to date, we're aware of that went through the courts, the insurance companies haven't really been giving us any details as to what the increase could be because that is a future event they wouldn't be able to dictate right now."

But the information should be readily available, the Councillor contended, as the City of Markham has put a similar program in place.

"I understand there is a lot of collaboration between the Region, the Municipality and Transport Canada and there is strict, strict, safety precautions put in place to avoid it at all costs between the maze barriers, arms and all sorts of things," said Councillor Gilliland. "It is good to know that so far this is working. More and more people are finding work life balance at home, they're working from home, working out of their houses. I think times have changed a lot and with these 15 minutes [trains] going by constantly—it is something we really need to look at."

Speaking in favour of moving forward with cessation, Councillor Wendy Gaertner said there are different angles to consider; under Transport Canada regulations, the onus is on the train conductor to clear the tracks if they see an issue, she said.

"We can talk about this back and forth but at the end of the day we need to take that into consideration—the conductor holds the

liability," she said. "Barrie has also prohibited horns, I believe just in the morning. With respect to liability, we hold liability now. Anybody can look at our crossings at Centre and Engelhard, they're not safe. We would be increasing safety tremendously if we put this in place."

Councillor John Gallo also looked at liability through a different lens, stating that there are other "dangerous" situations in Town that could result in an accident "including on municipal roads."

"We drive cars, each and every intersection in the Town of Aurora, that could happen," he said. "We don't put up bars to try and stop that, we don't blow whistles to try and stop that. Is there an additional issue with trains? I bet if we did some research, they are far safer than motor vehicle accidents but we accept liability if, say, a light is out and someone inadvertently goes through there. There are so many of those situations where we have accepted liability where there is danger involved."

"We implement the best possible way to alert those people crossing there that there is a potential danger."

With the liability still a potential issue to consider, Mayor Tom Mrakas said he was not in favour of moving forward if it puts residents and taxpayers at financial risk. If it is a safety matter, however, he said he would be in favour of putting the necessary measures in place.

"By no means am I willing to put the municipality in harm's way and increasing liability in this case when we know it is going to increase our liability," he said. "The reason Markham's insurance is covering it is they are taking liability. Your insurance is not going to cover it if you don't have liability. It's that simple."

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