

AMENDED ADMINISTRATIVE REPORT



Report Date: April 14, 2011
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RTS No.: 9116
VanRIMS No.: 08-2000-20
Meeting Date: April 19, 2011

TO: Standing Committee on Planning and Environment
FROM: General Manager of Engineering Services
SUBJECT: Amendments to the Street and Traffic By-law to Facilitate use of Structures on Streets for Political Expression

RECOMMENDATION

- A. THAT Council approve proposed amendments to the Street and Traffic By-law in order to regulate the placement of structures on city streets for the purpose of political expression;

FURTHER THAT the Director of Legal Services be instructed to prepare the necessary amending by-law, generally in accordance with Appendix A.
- B. THAT Council approve a new city program to place and maintain free standing city sponsored structures on city streets in order to facilitate free political expression in locations designated by the City Engineer, generally as outlined in this report.

COUNCIL POLICY

Council is on record as strongly supportive of the rights of our citizens to free political expression in our City.

PURPOSE AND SUMMARY

This report contains recommendations for changes to the Street and Traffic By-law in order to align with direction provided by the B.C. Court of Appeal in the matter of the Falun Gong. The report and the accompanying proposed by-law is designed to specifically enable and facilitate the use of structures on City streets for the purpose of political expression. Neither the report nor the proposed by-law is intended in any way to interfere with the Charter rights of Vancouver citizens to free speech and political expression.

The proposed by-law will be precedent setting in North America. Staff have been unable to find another municipality in Canada or the United States which permits and regulates street structures for political expression. In response to the court decision, our by-law moves away from our existing blanket prohibition on structures for political expression, an approach which is clearly the standard practice across municipalities in Canada and the United States. The proposed by-law provides a regulatory framework for the placement and use of structures on Vancouver's streets and sidewalks for the purpose of political expression.

DISCUSSION

On April 7, 2011, at Planning and Environment Committee meeting, staff brought forward proposed amendments to the Streets and Traffic by-law to enable the use of structures on City streets for political expression (RTS 9116).

Council provided significant feedback, endeavoured to get clarity from staff and also heard from a number of speakers. At the end of the meeting, there were numerous speakers who had not been heard and the matter was referred to Committee on Tuesday morning, April 19, 2011. There were many important issues and questions raised by both Council and the speakers. To address these important issues, and to meet the tight timelines related to the expiry of the current by-law on April 19, 2011, staff is bringing forward a new report and a significantly changed by-law proposal.

Key Concerns expressed regarding the proposed By-law brought forward April 7, 2011

A number of key issues were raised by the Mayor and Councillors and speakers:

- The proposed Fees and Deposits required by those obtaining a permit: there was considerable feedback that proposed Fees were prohibitive to groups wishing to use a structure on streets for protest and political expression.
- The proposed need for a traffic management plan: this was thought to be unnecessarily onerous
- The proposed limitation of 30 days at a time for the placing of a structure: there was some feedback that a structure should be able to be continuously permitted at the same location.
- The lack of clarity in regard to the definition of a "Structure" and concern that transient objects or even homeless individuals could be unintentionally captured under the definition: this was expressed by many members of Council and speakers.
- The proposed requirement for continuous attendance at a structure: there was a view expressed by some that this requirement was impractical and unnecessarily restrictive.
- The proposed exclusion of the use of structures on streets for political expression related to Consulates in residential areas: There were strong views from some that structures should be permitted near Consulates conducting business in residential areas.

Key Changes proposed in this report:

The following changes are integrated into the updated version of the proposed by-law attached to this report:

- All fees and deposits have been eliminated; fines for non-compliance with the by-law have been added
- The requirement for a transportation plan has been removed.
- The definition of the term “Structure” has been clarified and refined to be more specific and much less inclusive
- The requirement for continuous attendance at a structure, which was aimed at ensuring safety from a relatively large unattended structure, has been modified to attendance a minimum of six non-consecutive hours over the 12 hour period
- In conjunction with the reduced attendance requirement, the maximum size of structure has been reduced to ensure more stability of any structure and to minimize safety risks associated with an unattended structure.
- Street structures for political expression will be permitted outside Consulates who are conducting business in residential areas.

Other Proposed By-law Changes

The requirement for an indemnity will be dealt with as part of the permit application process, which is within the authority of the City Engineer. Applicants will be required to indemnify the City.

A breach of the requirements of the proposed by-law will be subject to a minimum of \$1,000 and a maximum fine of \$5,000.

Background

Regulatory context in Canada and United States

Both the by-law introduced on April 7, and the amended by-law proposed today, would be breaking new ground in Canada and would be novel. At this time, we can find no precedent to guide our proposal. The provisions we are proposing would legally enable expanded opportunities to use structures on city streets for political expression. Staff has reviewed the relevant by-laws of many other jurisdictions in Canada and the United States including Victoria, Surrey, Calgary, Winnipeg, Ottawa, Toronto, Montreal, Halifax, San Francisco, Seattle, Portland, Oregon, and Washington D. C. We have not found any other jurisdiction that specifically permits structures for the purpose of political expression on public streets.

The typical regime governing encroachments or structures on public streets is to ban structures that are not authorized by a permit issued by the Engineer or another public official. This is the regime that the City of Vancouver has in place now, and which was struck down as unconstitutional by the B.C. Court of Appeal.

Through a permitting process, local governments commonly allow such things as patio furniture (associated with sidewalk café's), newspaper boxes, rubbish disposal containers and other similar encroachments in their by-laws. For example, the City of

Portland, Oregon allows as many as 26 different types of private encroachments on public land, none of which specifically includes structures for political expression.

Some by-laws, such as those in place in Winnipeg, Halifax and Toronto, make specific provision for the local Council to permit structures. At this time we can find no example of any local Council permitting a structure for political expression.

It is also common for local governments to issue parade or protest permits. These permits may or may not allow temporary structures, such as reviewing stands. These are temporary structures erected as part of a protest or celebration - they are not permanent or enduring.

Based on the lack of precedents from other jurisdictions, staff will monitor the implementation over the coming year and report back to Council on the need for any refinements.

In striking down Section 71 of the Street and Traffic By-law, the B.C. Court of Appeal provided some guidance to the City in regard to regulating street structures for political expression. Madam Justice Huddard wrote:

“A more minimally impairing scheme would keep the blanket prohibition, set down its purpose, and provide a procedure with clear guidelines for obtaining an exemption. As it is now, there is no regulation of political structures. There is only an absolute prohibition with an uncertain possibility of exception by Council on unknown grounds. There is nothing to reflect considerations to govern when such approval might be granted, such as public safety, the orderly use of public property or others required for proper management of city streets. The reasonable regulation of commercial and artistic expression cannot justify a by-law that effectively precludes any use of a structure, however minimal, for political expression.”

Some other important points from the decision are as follows:

- (a) The regulation of structures on public streets is a pressing and important objective of the City of Vancouver.
- (b) Streets are a finite public resource whose use must be regulated.
- (c) The freedom to use public streets cannot be absolute, because streets have a multitude of competing uses.
- (d) The City of Vancouver must manage the use of its streets so as to balance competing uses and ensure that the placement of structures will not preclude competing uses, impose dangers to other users, and affect the aesthetic appearance of the street.
- (e) The City of Vancouver is not precluded from prohibiting the kind of structures placed by the Falun Gong if it sees fit to do so, but it must do so in a manner that is constitutionally sound.

Political expression encompasses a wide range of expressions, most commonly involving disagreement or agreement with a political party's platform, or a government's decisions on a wide range of topics. In the case of the Falun Gong's structure for political expression, it was targeted at a foreign government represented in Canada by a Consular facility and Consular officials.

The litigation giving rise to this change involved the placement of an extensive structure by the Falun Gong on a residential street in Vancouver outside the Consulate of the Chinese government. In Vancouver, consular facilities are found in both residential and non-residential areas of the city. Requests from a foreign government to Foreign Affairs and International Trade Canada to establish their Consular premises requires among other things a confirmation that the use to which the property will be put does not contravene applicable local laws including but not limited to Provincial or Municipal by-laws regarding zoning, historical conservation and safety. In addition the Vienna Convention on Consular Relations provides guidance for States hosting consular facilities and staff:

Article 59 of the Vienna Convention on Consular Relations reads as follows:

"The receiving State shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity."

In Canada, this obligation is enforced by the RCMP. City staff is informed that the presence of permitted structures outside consular offices is not regarded by the RCMP or the Vancouver Police Department as a threat to public safety.

The proposed by-law in this report contemplates prohibiting street structures for political expression in residential areas; the placement of a structure for political expression at a consulate in a residential area could only occur if that consular property is listed with the Government of Canada as a consular office. Consular Offices in Vancouver are identified in the publication "Diplomatic, Consular and other Representatives in Canada", which is updated periodically and available from the Government of Canada by e-mail at <http://w01.international.gc.ca/Protocol-Protocole/archives.aspx?lang=eng> .

By-law Enforcement

As noted, the proposed by-law contained in this report reflects the BC Court of Appeal decision in providing a balanced approach across various competing public interests. This approach has also been taken in the area of by-law enforcement. Generally enforcement of our Streets and Traffic by-law involves a pragmatic risk based approach.

In busy downtown areas where there are frequent and competing public demands to share the street, police and city inspectors regularly patrol the streets and enforce street use by-laws. In other less congested areas, staff is less likely to conduct regular patrols and instead use a responsive approach to specific citizen complaints.

In response to concerns expressed at Council, the need to have full time attendance at a street structure for political expression has been reviewed and this requirement reduced to a total of 6 non-consecutive hours over the 12 hour period from 0800 am to 2000h. To reduce the risk of leaving a street structure unattended for significant periods of time, the permitted size of the structure has been reduced to a maximum of 1.3M (4 feet) in height; 1.6M (5 feet) in width; and 1M (3 feet) in depth. This reduced size is well within the standard size of commercially available display panels, standard sheeting panels (4 feet x 8 feet) or standard folding tables. This reduced size will mitigate the risk of harm to a passerby from an unattended structure which is rendered unstable.

During the discussion at Council on April 7, 2011, a number of scenarios were discussed to illustrate the concerns of Council and other public speakers in regard to the unintended consequences of the language of the proposed amendments brought forward by staff. In this report, staff has significantly enhanced the clarity of the definitions of structures in order not to unintentionally bring into the regulatory framework such things as lemonade stands, chairs, or other small structures which might be found temporarily on streets or sidewalks.

Homelessness

The Mayor, Councillors and speakers expressed significant concern about the unintended impact of the proposed by-law on the homeless. This by-law will not in any way change the current holistic approach taken by the city in relation to homeless persons placing structures on city streets. We will continue to follow our current practice of offering shelter and other assistance through the city's Tenants Assistance Program, the VPD Homeless Outreach Program, Vancouver Coastal Health, BC Housing and other colleagues in non-profits across the city. City staff are trained explicitly to assist homeless persons in a compassionate manner. In parallel with this approach, the city has enabled through key partnerships with the province and non-profits considerable expansion of both low barrier shelters and development of supportive housing. This report will not change in any way this approach, and the by-law changes are limited to defining the conditions for permitted structures for political expression.

Proposed City structures for political expression

To further aid political expression, it is proposed that the City provide a number of structures suitable for placement of larger posters and other expressive material, at selected high visibility locations. The proposed structures would consist of an upright cylinder around 1m in diameter and 2m in height, mounted on a free standing pole. These cylinders would be provided under the City's Street Furniture contract, and they would be managed in a similar fashion to the City's poster cylinder program. Potential locations for initial placement include:

- Vancouver Art Gallery
- Vancouver Public Library
- Transit interchanges at Commercial Drive and Main Street.

CONCLUSION

Council approval of this report will facilitate and enable the use of structures on city streets for political expression, thus aligning and responding to the B.C. Court of Appeal's concerns.

* * * * *

BY-LAW NO. _____

**A By-law to amend Street and Traffic By-law No. 2849
regarding political expression on structures on streets**

WHEREAS the City has the authority to regulate the placement of structures on streets;

AND WHEREAS streets are a finite public resource which must be properly managed in order to maintain public safety, balance competing public interests, and promote the orderly use of public property;

AND WHEREAS the City wishes to facilitate and promote the orderly use and placement of structures on streets, for the purpose of political expression.

THE COUNCIL OF THE CITY OF VANCOUVER, in public meeting, enacts as follows:

1. This By-law amends the indicated provisions of the Street and Traffic By-law.
2. In section 3, after the definition of "Commercial Vehicle", Council adds:

" "Consulate" means any consulate which is identified as such in the current edition of *Diplomatic, Consular and Other Representatives in Canada*, published by Foreign Affairs and International Trade Canada."
3. In section 3, after the definition of "Street Furniture", Council adds:

" "Structure" in sections 71A, 71B, 71D, and 85A of this By-law means something that is built, constructed or assembled and that is placed on a street permanently, semi-permanently or for a specified period of time."
4. In section 3, after the definition of "Vehicle", Council adds:

" "Zoning District" means a zoning district as established by the City's Zoning & Development By-law."
5. Council re-numbers section "71A" as "71I".
6. Council repeals section 71 and substitutes:

"STRUCTURES ON STREETS

- 71A. A person must not build, construct, place, maintain, occupy, or cause to be built, constructed, placed, maintained or occupied in any street, any structure, object, or substance which is an obstruction to the free use of such street, or which may encroach thereon, without having first obtained a permit issued by the City Engineer, in accordance with this By-law, except that this section does not apply to a person:

- (a) installing signs authorized by the City Engineer on or over City streets, and intended to control traffic or parking, or to provide directions or street identification;
- (b) putting up or installing street decorations authorized by the City Engineer;
- (c) putting up or installing any other temporary sign or structure which is authorized by by-law, or by provincial or federal legislation;
- (d) installing advertising devices which are integral with public conveniences, as covered by special agreements with the City, such as bus shelter advertising, map stand advertising or automated public toilet advertising; or
- (e) placing a sign or notice on a free standing kiosk or other structure on a street, which is provided by and in a location designated by the City Engineer, specifically for free public use for the purpose of political expression.

STRUCTURES CONVEYING POLITICAL EXPRESSION

- 71B. (1) A person seeking a permit under section 71A for any structure, object or substance which conveys political expression, must apply for the permit in the form prescribed by the City Engineer.
- (2) The applicant for a permit under section 71A must submit with the application drawings indicating the construction methods, materials and dimensions of any proposed structure for which a permit has not been previously issued.
- (3) The City Engineer may grant a permit under section 71A, except that the City Engineer must not grant a permit if the structure, object or substance:
- (a) obstructs or interferes with pedestrian or vehicular traffic;
 - (b) obstructs or interferes with any utility, postal or similar installation;
 - (c) obstructs or interferes with any other structure, object, substance or construction works which occupy the street pursuant to a permit;
 - (d) obstructs or interferes with the use of street furniture;

- (e) obstructs or interferes with City works, on or adjacent to the street;
 - (f) has a width greater than 25% of the width of an adjacent business frontage;
 - (g) is located on street frontage abutting a site which:
 - (i) contains only dwelling uses,
 - (ii) in the case of mixed uses, contains ground floor dwelling uses, or
 - (iii) is located in a zoning district listed in Schedule F, except that subsection (g) does not apply to any Consulate which is listed with the Government of Canada as a Consular Office.
 - (h) is within 5 meters of a building entrance or exit;
 - (i) is within 5 meters of a bus stop, street intersection, driveway crossing, loading zone, taxi zone, or wheelchair ramp;
 - (j) is within 0.5 meters of a curb;
 - (k) is attached or affixed to cement, asphalt or other hard surface on the street;
 - (l) measures more than 1.3 meters in height at the highest point;
 - (m) measures more than 1.6 meters in width at the widest point;
 - (n) measures more than 1.0 meter in depth at the deepest point;
 - (o) has a base area larger than 1.6 square meters;
 - (p) contains moving parts, electrical or electronic components or lights;
 - (q) is structurally unsafe or unstable; or
 - (r) was at the same location or in the same city block applied for, within the previous sixty days.
- (4) The holder of a permit granted under section 71A, or their authorized representative, must:
- (a) attend at the structure, object, or substance for a minimum of six non-consecutive hours between the hours of 8 a.m. and 8 p.m. daily;
 - (b) remove the structure, object or substance from the street between the hours of 8 p.m. and 8 a.m. daily; and
 - (c) keep the structure, object, or substance safe and in good

repair at all times.

- (5) The holder of a permit granted under section 71A must not use or permit the use of:
 - (a) electronic signs;
 - (b) electric or gas lighting or appliances;
 - (c) extension cords; or
 - (d) open flames, propane tanks, gas or electric heaters, or barbequesat or near the structure, object or substance authorized by the permit.

- (6) The holder of a permit granted under section 71A must not use or promote the use of expression which:
 - (a) is obscene;
 - (b) promotes hatred or violence;
 - (c) is defamatory; or
 - (d) contains commercial content.

TERM OF PERMIT

- 71C. A permit granted under section 71A is valid for thirty days from the date of issuance, except that the City Engineer must not issue:
 - (a) a permit for a term greater than thirty days;
 - (b) more than six non-consecutive permits per year, for any city block or location;
 - (c) more than one permit every sixty days, for any city block or location; or
 - (d) a permit to an applicant who is the current holder of such a permit.

EMERGENCIES ON STREETS

- 71D. In the case of an emergency, the City Engineer may temporarily remove a structure that is permitted on a street.

EXPIRY OR CANCELLATION OF PERMIT

- 71E. The City Engineer must cancel a permit issued under section 71A, if the holder of the permit fails to comply with any of the provisions in section 71B.

CONSTRUCTION OF SIDEWALKS ON STREETS

- 71F. A person must not lay, construct, or reconstruct any sidewalk on any street, without having first obtained a permit issued by the City Engineer in accordance with this By-law.

DEBRIS ON STREETS

- 71G. The owner or occupier of real property adjacent to a street, must not allow or permit any earth, rock, stones, trees, logs, stumps or similar substances or things from the property:
- (a) to cave, fall, crumble, slide, accumulate or be otherwise deposited on to a street; or
 - (b) to remain on a street.

WATER ON STREETS

- 71H. The owner or occupier of real property adjacent to a street, must not allow or permit water to flow from the property on to a street."

7. In section 85A, Council repeals:

- (a) "." in the first paragraph;
- (b) the words "This section shall not apply to:"; and
- (c) paragraphs (a) through (e),

and substitutes:

", except that this section does not apply to a person:

- (a) installing signs authorized by the City Engineer on or over City streets, and intended to control traffic or parking, or to provide directions or street identification;
- (b) putting up or installing street decorations authorized by the City Engineer;
- (c) putting up or installing any public notice or other temporary sign, which is authorized by by-law or by provincial or federal legislation;
- (d) installing advertising devices, which are integral with public conveniences as covered by special agreements with the City,

such as bus shelter advertising, map stand advertising or automated public toilet advertising; or

- (e) placing a sign or notice on a free standing kiosk or other structure on a street, which is provided or authorized by the City Engineer, specifically for free public use for the posting of notices or for the purpose of political expression.”

8. Council inserts as section 103 (6) the following:

“Every person who commits an offence against the provision of section 71A, 71B(4), 71B(5) or 71B(6) is liable to a fine of not less than \$1,000.00 and not more than \$5,000.00.”

9. After Schedule E, Council inserts the following:

“Schedule F

RA-1 District
RS-1 District
RS-1A District
RS-1B District
RS-2 District RS-3 and RS-3A Districts
RS-4 District
RS-5 District
RS-6 District
RS-7 District
RT-1 District
RT-2 District
RT-3 District
RT-4, RT-4A, RT-4N and RT-4AN Districts
RT-5, RT-5A, RT-5N and RT-5AN Districts
RT-6 District
RT-7 District
RT-8 District
RT-9 District
RT-10 and RT-10N Districts
RM-1 and RM-1N Districts
RM-2 District
RM-3 District
RM-3A District
RM-4 and RM-4N Districts
RM-5, RM-5A, RM-5B and RM-5C Districts
RM-6 District
FM-1 District
FSD District ”

10. A decision by a court that any part of this By-law is illegal, void, or unenforceable severs that part from this By-law, and is not to affect the balance of this By-law.

EXPLANATION

By-law to amend Street and Traffic By-law No. 2849 regarding political expression on structures on streets

On April 19, 2011, Council approved a recommendation to amend the Street & Traffic By-law, regarding political expression on structures on streets. Enactment of the attached By-law will implement that resolution.

Director of Legal Services
April 19, 2011