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ADMINISTRATIVE REPORT

Report Date: June 29, 2009
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Meeting Date: July 7, 2009

TO: Vancouver City Council

FROM: Deputy General Manager, Community Services in consultation with the Director of Legal Services

SUBJECT: Proposed New Board of Variance By-law

RECOMMENDATION

- A. THAT the amendments to the Board of Variance By-law be approved, generally in accordance with Appendix A;
- B. FURTHER THAT the Director of Legal Services be instructed to bring forward the necessary by-law, generally in accordance with Appendix A, for enactment,

GENERAL MANAGER'S COMMENTS

The General Manager of Community Services RECOMMENDS approval of the foregoing.

CITY MANAGER'S COMMENTS

The City Manager RECOMMENDS approval of the foregoing.

COUNCIL POLICY

Under Section 572(9) of the *Vancouver Charter*, the by-law establishing the Board of Variance must provide for the procedures to be followed by the Board.

PURPOSE

The purpose of this Report is to seek Council approval for a proposed new Board of Variance By-law, as discussed in this Report.

BACKGROUND

The Board of Variance is a statutory tribunal established by Council in accordance with the requirements in Section 572 of the *Vancouver Charter*. Prior to 2003, two members of the Board were appointed by the Province, two members were appointed by Council and these four members appointed a fifth member who acted as the Chair of the Board. Section 572 was amended in 2003 and 2004, and now Council appoints all five members of the Board. Under Section 572(2), Board members are appointed for a three-year term.

Under Section 572(9) of the *Vancouver Charter*, Council is required to establish, by by-law, the procedures to be followed by the Board. The current Board of Variance By-law No. 3844 sets out the specific procedures governing the filing of appeals and giving notice of the hearing of appeals that are followed by the Board. The By-law also includes some provisions relating to the procedure to be followed by the Board when it hears appeals, but these are not comprehensive and have not been reviewed and revised in many years.

As a result of the amendments to the *Vancouver Charter* referred to above and some court decisions which have considered the jurisdiction of the Board, some of the provisions in the Board of Variance By-law are out of date and need to be amended. In addition, amendments are required to reflect current Board practice, and the Board of Variance By-law would also benefit from an overall updating in format, to bring it in conformity with contemporary standards. This will entail substantial revisions of a housekeeping nature and will be more readily achieved by the repeal of the current By-law and the enactment of a new Board of Variance By-law. The proposed new By-law is attached as Appendix A.

DISCUSSION

Staff from Community Services have met with the current Board of Variance members and staff to discuss the proposed changes and Legal Services staff have provided a copy of the proposed new Board of Variance By-law to the independent legal counsel for the Board of Variance. General agreement has been reached on the provisions contained within the new proposed By-law.

The significant proposed changes to the Board of Variance By-law are discussed below:

Appointment of Board Members

Section 2A of the current Board of Variance By-law refers to the appointment of the members of the Board. It is out of date because it does not reflect the amendments made to the *Vancouver Charter* in 2003 and 2004 discussed above. Section 2A has been deleted in the proposed new Board of Variance By-law to reflect the fact that the *Charter* now provides that all five members of the Board are appointed by Council.

Secretary and other Board Officials

Section 3 of the current Board of Variance By-law refers to the Board Secretary and provides that the Secretary must be an employee of the Planning Department.

Currently, the Board has a Secretary, an Assistant Secretary, and a Recording Secretary. Under s. 572(1.2) of the *Vancouver Charter*, these officials are appointed by the Board; however, pursuant to a Memorandum of Agreement with CUPE Local 15 dated May 1, 1996, the Board officials are required to be employees of the City. Section 2.4 of the proposed new Board of Variance By-law recognizes the Charter requirement that appointments be made by the Board. It also reflects the Memorandum of Agreement and provides that the appointees must be City employees. The new Section 2.4 removes the requirement that the Board Secretary must be an employee of the Planning Department and instead merely requires that Board officials must be City employees.

Frequency of Meetings of the Board of Variance

Section 8 of the current Board of Variance By-law currently states that the Chair need not convene the Board more than once in any two-week period. For many years, the Board has generally convened every second Wednesday. In recent years, the Board has not convened during the Christmas period.

The timely disposition of appeals is important. Board of Variance staff follow a tight schedule of activities preparing for and following from the Board's normal bi-weekly meetings in order to facilitate expedient appeal processing. The capacity of staff to maintain this schedule can be stressed when any one of the three staff is on vacation or otherwise absent. As a result, staff vacations tend to be limited to short duration, compromising the possibility for a meaningful break from work.

In considering the interests of appellants, staff and Board members, it is recommended that the Board be provided with greater flexibility to depart from its traditional bi-weekly meeting schedule on two occasions each year. Section 2.6 of the proposed new Board of Variance By-law provides that the Board need only meet once in December to allow for a break over the Christmas period and also enables (but does not require) the Board to eliminate one of the regularly scheduled meetings in another month, to be determined by the Chair.

Extending Time to File Notice of Appeal

Under Section 6 of the current Board of Variance By-law, a Notice of Appeal must be filed within 30 days of the date of the decision being appealed. Under Section 7, however, the Board has discretion, in some circumstances, to "extend" the period for filing the Notice of Appeal so that an appellant has as much as 180 days to file an appeal. Allowing the appeal period to be extended for up to 6 months has been problematic in some circumstances. For instance, some property owners are in breach of the Zoning and Development By-law because they have developed their property without obtaining a development permit. To avoid enforcement action, the City requires them to apply for a development permit which will determine whether or not the unauthorized development can be legalized. If the development permit is not granted, the property owner can appeal that decision to the Board of Variance. Under the current By-law provision, such an owner may have up to six months to commence an appeal, if the Board decides to grant an "extension" under Section 7. In these circumstances, allowing for such a lengthy extension seems inappropriate. Under Section 3.2

of the proposed new Board of Variance By-law, the appeal period could be “extended” by the Board, so that an appellant has up to 45 days to file an appeal. This should provide appellants with ample time to file a Notice of Appeal while avoiding undue delay in the circumstances discussed above.

Grounds of Appeal

The current Notice of Appeal form used by the Board of Variance requires an appellant to identify the specific *Vancouver Charter* section(s) under which the appeal is being advanced and provides space for the appellant to give a brief explanation of the grounds or reasons for the appeal. Appellants frequently do not fully complete the latter portion of the form to provide notice of all the grounds or arguments they wish to be considered by the Board in support of their appeals. Consequently, when appeals are heard by the Board, it is common for new grounds of appeal to be presented. This can be very problematic for staff and others who wish to make submissions to the Board because they are taken by surprise by these new grounds of appeal. Section 5.4 of the proposed new Board of Variance By-law precludes the Board from considering a ground of appeal that the appellant has not stated in the Notice of Appeal. This provision is subject, however, to Section 6.1(c) which gives the Board the discretion to adjourn a hearing to allow an appellant to amend the Notice of Appeal to add new grounds of appeal. This will create a procedure which is flexible while, at the same time, ensuring that persons wishing to make submissions to the Board will not be caught off guard by new grounds of appeal they have not had notice of.

Reasons for Decisions of the Board of Variance

It has not been the practice of the Board to give reasons for the decisions it makes, and there is no provision in the current Board of Variance By-law requiring this. Section 7.2 of the proposed new Board of Variance By-law would require members of the Board to give reasons which will allow those affected to understand the basis for the decisions made by the Board.

Miscellaneous Amendments

The proposed new Board of Variance By-law includes numerous other changes most of which are intended to make the By-law consistent with current Board practice and to update the language and format of the By-law to make it conform to current standards of City by-laws generally.

FINANCIAL IMPLICATIONS

There are no financial implications.

CONCLUSION

The current Board of Variance By-law is out of date. This report recommends that the current By-law be repealed and that a new Board of Variance By-law be enacted which reflects the amendments made to Section 572 of the *Vancouver Charter* in 2003 and 2004, current Board of Variance practice and which, with respect to language and format, conforms to current City by-law standards.

* * * * *

CITY OF VANCOUVER



BRITISH COLUMBIA

BOARD OF VARIANCE BY-LAW NO. _____

BOARD OF VARIANCE BY-LAW

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SCHEDULE

- Schedule A - Notice of Appeal

BY-LAW NO. _____

A By-law to establish the Board of Variance
and to set out its procedure

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

SECTION 1
INTERPRETATION

Name of By-law

1.1 The name of this By-law, for citation, is the "Board of Variance By-law".

Definitions

1.2 In this By-law:

"appellant" means a person who has filed a notice of appeal under section 3.1;

"Board" means the Board of Variance established under section 2.1;

"Chair" means the chair of the Board elected by its members;

"material" means information recorded graphically, mechanically, electronically, digitally, or otherwise;

"record" means a record, regardless of physical form or characteristics, recorded or stored graphically, mechanically, electronically, digitally, or otherwise; and

"secretary" means the secretary to the Board.

Table of contents

1.3 The table of contents for this By-law is for convenient reference only, and is not for use in interpreting or enforcing this By-law.

Schedules

1.4 Schedules to this By-law form part of this By-law.

Severability

1.5 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.

SECTION 2 ADMINISTRATION

Establishment of Board

2.1 Council establishes the Board of Variance.

Election of Chair by majority

2.2 The members of the Board must elect the Chair by resolution passed by a majority of the members.

Term of Chair

2.3 The Chair is to hold that position for a one year term, and the members of the Board may re-elect that individual as Chair for one or more further terms.

Qualification of secretary and other officials

2.4 The secretary and other officials appointed by the Board must be employees of the city.

Duties of secretary

2.5 The secretary must:

- (a) prepare a record of each decision of the Board;
- (b) prepare a record of the oral reasons of each member for his or her decision;
- (c) prepare a record of the minutes of each meeting of the Board that include the disposition of each appeal;
- (d) arrange for publication or service of each notice of appeal and each meeting of the Board as directed by the Board or its Chair;
- (e) give written notice of each decision of the Board to the appellant, any applicant for a development permit for the property, and the Director of Planning;
- (f) keep custody of the records and minutes of the Board; and
- (g) perform other duties customary to the office of a secretary or set out in this By-law.

Meetings of Board

2.6 In each calendar year, the Board must meet at least twice each month except that the Board need only meet once in December and in one other month chosen by the Chair.

Expenses

2.7 Board members are to receive reimbursement for expenses they incur necessarily in the conduct of their duties including the cost of transportation between their homes or offices and Board meetings, or for inspection trips to view sites that are the subject of appeals.

Procedures of Board

2.8 Subject to this By-law, the Board may determine its own procedures.

SECTION 3 NOTICE OF APPEAL

Filing notice of appeal

3.1 A person who wishes the Board to hear and determine an appeal must submit concurrently to the secretary:

- (a) the notice of appeal;
- (b) all material such person intends to submit to the Board at the hearing; and
- (c) the fee established under the Miscellaneous Fees By-law for filing the notice of appeal.

Deadline for filing certain notices of appeal

3.2 A person who wishes to appeal a decision under section 573(1)(a), (e), or (f)(i) of the Vancouver Charter must file the notice of appeal, in accordance with section 3.1, within 30 days after the date of the decision, except that if:

- (a) the Board is satisfied as to the good faith of such person, and the sufficiency of public notice; and
- (b) such person files the notice of appeal, and all such material, within 45 days after the date of that decision;

the Board may hear the appeal.

Contents of notice of appeal

3.3 A notice of appeal must state, in a simple manner, the grounds of appeal, and must be in substantially the form attached to this By-law as Schedule A.

Examination of notice of appeal

3.4 The secretary must examine each filed notice of appeal, and may request the appellant to submit such further material as the secretary may deem necessary for the Board to understand the nature of the appeal.

SECTION 4 PREREQUISITES TO HEARING

Time and place of hearing

4.1 The Chair must fix a convenient time and place for the hearing of an appeal.

Notice of hearing

4.2 At least five days before the date of a hearing of an appeal, the secretary must give written notice of the time and place of the hearing:

- (a) by mail to the appellant;
- (b) by mail to any applicant for a development permit for the property; and
- (c) to the Director of Planning, and such other city officials as the Chair directs.

Advertisement of notice of hearing

4.3 If required by the Board, the secretary must arrange for publication of notice of the time and place of a hearing in not less than two consecutive issues of a newspaper circulating in the city not less than three days nor more than 10 days before the date of the hearing.

SECTION 5 THE HEARING

Proceedings at hearing

5.1 Proceedings at a hearing are to be informal.

Opportunity to be heard

5.2 At a hearing, the Board must afford the opportunity to be heard to:

- (a) the appellant;

- (b) the Director of Planning;
- (c) if the appeal is under section 573(1)(e) of the Vancouver Charter, the Development Permit Board; and
- (d) any witnesses or other persons whose information may assist the Board in deciding the appeal.

Other requirements of Board

5.3 Before deciding an appeal, the Board may:

- (a) view the site; and
- (b) require the submission of further information to:
 - (i) corroborate statements made by the appellant or other witnesses,
 - (ii) explain the wording or intent of any by-law relevant to the appeal, or
 - (iii) determine more fully the effect upon neighbouring properties affected by the appeal.

Non-stated ground of appeal

5.4 Subject to section 6.1(c), the Board must not hear or consider a ground of appeal that the appellant has not stated in the notice of appeal.

Absence of appellant

5.5 If the appellant has requested the Board to proceed with a hearing in the absence of the appellant, the Board may do so, may hear any other interested persons, and may decide the appeal.

SECTION 6 ADJOURNMENT AND WITHDRAWAL

Adjournment

6.1 The Board may adjourn a hearing:

- (a) if the appellant has given the secretary written notice requesting such adjournment;
- (b) if the appellant fails to appear at the hearing, and has not requested an adjournment;

- (c) to allow the appellant to amend the notice of appeal to include one or more new grounds of appeal; or
- (d) as the Board may deem advisable, and may require the secretary to mail notice of the adjourned hearing to such owners of real property as the Board deems affected by the appeal.

Withdrawal

6.2 An appellant may:

- (a) before a hearing, file with the secretary a written request withdrawing the appeal; or
- (b) before the Chair polls the members of the Board for their decision on an appeal, orally withdraw the appeal at a hearing.

SECTION 7 DECISION OF THE BOARD

Decision

7.1 At the conclusion of a hearing, the Board may render its decision, or may adjourn the appeal and render its decision at a later meeting.

Reasons for decision

7.2 The Board must give reasons for its decision concerning the appeal.

No re-hearing of appeal

7.3 The Board must not re-hear an appeal covering the identical grounds or principles upon which the Board has previously rendered a decision.

SECTION 8 REPEAL AND ENACTMENT

Repeal

8.1 This By-law repeals By-law No. 3844.

Force and effect

8.2 This By-law is to come into force and take effect on the date of its enactment.

SCHEDULE A

NOTICE OF APPEAL

To: The Secretary
Board of Variance/Parking Variance Board
Vancouver City Hall
453 West 12th Avenue
Vancouver, B.C. V5Y 1V4
(604) 873-7723

I/We file an Appeal to the Board of Variance/Parking Variance Board.

The Property

Address: _____

Legal Description: _____

Type of Appeal

BOARD OF VARIANCE

Appeal for Variance

<input type="checkbox"/> <i>Vancouver Charter</i> , s.573(1)(b)	Zoning and Development By-law, section(s) _____ Sign By-law, section(s) _____
<input type="checkbox"/> <i>Vancouver Charter</i> s. 573(1)(f)(ii)	Private Property Tree By-law, s. _____

Appeal of Decision

<input type="checkbox"/> Decision of Director of Planning <i>Vancouver Charter</i> , s. 573(1)(a)	Development Application No. _____ <input type="checkbox"/> Appealing refusal <input type="checkbox"/> Appealing approval <input type="checkbox"/> Appealing condition(s) of approval
<input type="checkbox"/> Decision of Development Permit Board <i>Vancouver Charter</i> , s. 573(1)(e)	Development Application No. _____ <input type="checkbox"/> Appealing refusal <input type="checkbox"/> Appealing approval <input type="checkbox"/> Appealing condition(s) of approval
<input type="checkbox"/> Refusal of Tree Cutting/Removal Permit <i>Vancouver Charter</i> , s. 573(1)(f)(i)	

Non-Conformity

- Extension of Discontinued Non-conforming Use
Vancouver Charter, s. 57(1)(c), s. 568(3)
- Additions/Structural Alterations to Non-conforming Building
Vancouver Charter, s. 573(1)(d), s. 568(4)(a)
- Fire Damaged Non-conforming Building
Vancouver Charter, s. 573(1)(d), s. 568(5)(a)

PARKING VARIANCE BOARD

- Decision of Director of Planning
Building Board of Appeal By-law, s. 7.3
- Parking By-law, Section(s) _____

This Appeal is based on the following grounds (*please print or type, attaching additional pages if required*): _____

NOTE: YOU MUST STATE ALL GROUNDS OF APPEAL THAT YOU INTEND TO RAISE AT THE HEARING OF THE APPEAL. THE BOARD OF VARIANCE CANNOT CONSIDER A GROUND OF APPEAL THAT IS NOT STATED IN THIS NOTICE OF APPEAL.

The following material is attached and made part of this Appeal: _____

NOTE: ALL MATERIAL YOU INTEND TO SUBMIT TO THE BOARD OF VARIANCE MUST BE ATTACHED TO THIS NOTICE OF APPEAL.

I/WE declare that the statements contained in this Notice of Appeal and all attachments are, to the best of my/our belief, true and correct in all respects.

I/WE acknowledge that this Notice of Appeal and all attachments are available to the public.

Signature(s) of Appellants: _____

Name(s) of Appellant(s) (*please print*): _____

Name of Company (*if applicable*): _____

Mailing address: _____

Telephone: _____

Fax: _____

Email: _____

TO BE TO BE COMPLETED BY STAFF DATE: _____

APPEAL # _____ RECEIPT# _____ SIGNATURE: _____