



ADMINISTRATIVE REPORT

Report Date: November 15, 2010
Contact: Bill Boons
Contact No.: 604.873.7678
RTS No.: 08716
VanRIMS No.: 08-2000-20
Meeting Date: December 2, 2010

TO: Standing Committee on Planning and Environment

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

SUBJECT: Proposed New Board of Variance By-law

RECOMMENDATION

THAT the amendments to the Board of Variance By-law be approved, generally in accordance with Appendix A;

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*. The Board hears appeals from persons seeking “variances” of zoning regulations on the basis of site hardships, and also hears appeals of decisions on a question of zoning by city officials.

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 or updated in many years.

As a result of amendments to the *Vancouver Charter* in 2003 and 2004 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which have considered the jurisdiction of the Board, some of the provisions in the Board of Variance By-law are out of date and need to be amended.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. Although most of the changes are minor in nature, this will entail substantial re-formatting of the by-law 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

On July 9, 2009, Staff presented amendments to the Board of Variance By-law No 3844 for Council consideration. At that meeting speakers raised concerns about some of the proposed by-law amendments. Council ultimately requested that staff meet with interested parties and refine the recommended amendments before returning to Council for consideration of any changes.

On September 17, 2010, staff distributed draft amendments to a number of interested parties (21 in total) and invited them to meet to review the amendments and to provide feedback on any of the proposed changes. On October 5, 2010, five interested parties met with staff and provided their input to the suggested changes. Staff have reviewed those suggestions, made refinements to the wording of some sections, and shared the latest recommendations with the full list of interested parties in advance of finalizing this report. Staff have also met with the Board of Variance members and their legal counsel to discuss the amendments. General agreement has been reached with the Board and interested parties on the new proposed By-law provisions.

The proposed new By-law reflects all of the recommended changes, most of which are very minor in nature. This report will discuss the more significant proposed changes as noted below:

Appointment of Board Members

Current By-law:

Section 2A 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.

Proposed By-law:

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

Current By-law:

Section 3 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.

Proposed By-law:

Section 2.4 recognizes the *Charter* requirement that appointments be made by the Board and also reflects the Memorandum of Agreement providing 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.

Extending Time to File Notice of Appeal

Current By-law:

Under Section 6 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, 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. If, upon filing a development permit application, the permit is not granted, the property owner can appeal that decision to the Board of Variance. If the Board decides to grant an “extension” under Section 7, such an owner may have up to six months to commence an appeal, allowing for an inordinately lengthy extension.

Proposed By-law:

Under Section 3.2 the appeal period could be “extended” by the Board, so that an appellant has up to 75 days to file an appeal. This provides appellants with ample time to file a Notice of Appeal while avoiding undue delay in the circumstances discussed above.

Suggestions from interested parties on this provision varied with some suggesting that the deadlines be “extended” beyond the current 30/180 days. Staff do not recommend that approach. The Board of Variance members are most comfortable with a 75 day maximum extension period. In light of this information and reason noted above, a 75 day maximum period is being recommended.

Grounds of Appeal

Current By-law:

The 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 it is common for new grounds of appeal to be presented. This is problematic for staff and others who wish to make submissions to the Board because they are not prepared to respond to these new grounds of appeal.

Proposed By-law:

Section 5.4 of the 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 be ready to address the new grounds of appeal that are presented. When this new provision was discussed with interested members of the public, some wished to have the grounds question more specifically assigned to the Chair for determination, however staff are satisfied that Section 6.1(c), as proposed, gives the discretion to the Board to make these decisions, and does not preclude the Chair from being a part of this conclusion. Also, the new Section 5.4 will result in a higher degree of certainty that appellants will submit “all” of their grounds with their initial submission before the actual hearing takes place and minimize unnecessary delays.

Appeal Submissions

Current By-law:

On a related matter, Section 4 indicates submission of appeals is to be made to the Secretary on a form approved by the Board, and accompanied by the applicable fee and a statement of the grounds in a simple manner. It is important to have information on all of the grounds, and to ensure that all of the written materials accompanying the appeal are submitted at the time of filing.

Proposed By-law:

Section 3.1 indicates that all “written” material that an appellant intends to submit to the Board be included at the time of the appeal filing. Appellants are still free to bring photos, plans, and other supporting diagrams to the meeting to assist in illustrating their position.

A note to this affect would be included on the Notice of Appeal (See Appendix A). This is consistent with the suggestions of the interested parties who in reviewing Section 3.1, wanted to ensure that appellants would be able to bring additional (non-written) materials to the board hearing to help support their appeal presentations.

Reasons for Decisions of the Board of Variance

Current By-law:

It has not been the practice of the Board to give reasons for the decisions it makes, and there is no by-law provision requiring this.

Proposed By-law:

Section 7.2 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.

This would ensure that Board decisions are transparent to all parties involved, and are consistent with other similar tribunals who make it their practice to provide reasons for their decisions.

Miscellaneous Amendments

The proposed new Board of Variance By-law includes other minor changes most of which are intended to make the By-law consistent with current Board practice and to update the language and format to align with other City by-laws. Amendments consistent with the others noted in this report have also been made to Schedule A- Notice of Appeal which are the forms that appellants fill out when submitting their appeals and which form a part of the new Board of Variance By-law. In order to make these forms more easily understood by potential appellants, and in keeping with suggestions made by the interested parties, staff are recommending that copies of the related Charter provisions be attached to these forms to provide helpful information to appellants.

(See Appendix A)

FINANCIAL IMPLICATIONS

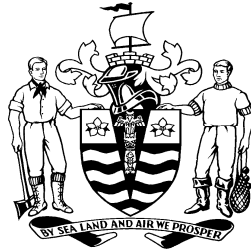
There are no financial implications.

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 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 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 written 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 75 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. _____
SEE ATTACHED VANCOUVER CHARTER PROVISIONS	

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)	
SEE ATTACHED VANCOUVER CHARTER PROVISIONS	

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)

SEE ATTACHED VANCOUVER CHARTER PROVISIONS

PARKING VARIANCE BOARD

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

SEE ATTACHED VANCOUVER CHARTER PROVISIONS

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. INTRODUCING NEW GROUNDS OF APPEAL AT THE HEARING MAY RESULT IN AN ADJOURNMENT OF THE HEARING BY THE BOARD.

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

NOTE: ALL WRITTEN MATERIAL YOU INTEND TO SUBMIT TO THE BOARD OF VARIANCE MUST BE ATTACHED TO THIS NOTICE OF APPEAL. YOU MAY PRODUCE OTHER SUPPORTING MATERIALS, INCLUDING PHOTOGRAPHS, PLANS OR DIAGRAMS AT THE APPEAL HEARING

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: _____

VANCOUVER CHARTER
SBC 1953, CHAPTER 55
Part XXVII --
Planning and Development
Zoning

SECTION 568

Non-conforming buildings

568. (1) Non-conformity shall be divided into two types: --

- (a) Non-conformity with respect to the use which is made of the premises;
- (b) Non-conformity arising out of change in the regulations governing matters other than the use which may be made of the premises.

(2) A building lawfully under construction at the time of coming into force of a zoning by-law shall for the purpose of that by-law be deemed to be a building existing at that time. For the purposes of this subsection, a building shall be deemed to be lawfully under construction if a development permit has been issued and such permit remains valid.

(3) A lawful use of premises existing at the time of coming into force of a zoning by-law, although such use is not in accordance with the provisions of the by-law, may be continued; but, if such non-conforming use is discontinued for a period of ninety days, any future use of those premises shall be in conformity with the provisions of the by-law. The Board of Variance may extend the aforesaid period of 90 days to a maximum of 180 days.

(4) No additions or structural alterations except those required by Statute or by-law shall be made to a non-conforming building without

- (a) the approval of the Board of Variance if the non-conformity is in respect of use;
- (b) the approval of the Director of Planning if the non-conformity is in respect of regulations only.

Fire damage to non-conforming building

(5) Where a non-conforming building is damaged or destroyed by fire to the extent of sixty per centum or more of its value above its foundations as determined by the City Building Inspector, whose decision shall be subject to review by the Board of Variance, it shall not be repaired or reconstructed without the approval of

- (a) the Board of Variance if the non-conformity is in respect of use;
- (b) the Director of Planning if the non-conformity is in respect of regulations only.

SECTION 573

Appeals to Board of Variance

573. (1) The Board shall hear and determine appeals

- (a) by any person aggrieved by a decision on a question of zoning by any official charged with the enforcement of a zoning by-law;

- (b) by any person who alleges that the enforcement of a zoning by-law with regard to siting, size, shape, or design of a building would cause him undue or unnecessary hardship arising out of peculiarities in the site or special circumstances connected with the development. In any such case the Board may, to the extent necessary to give effect to its determination, exempt the applicant from the applicable provisions of the zoning by-law;
- (c) by any person who alleges that due to special circumstances or conditions the provisions of subsection (3) of **section 568** will result in undue or unnecessary hardship to him;
- (d) with respect to matters arising under subsections (4) and (5) of **section 568**;
- (e) by any person aggrieved by a decision by any board or tribunal to whom Council has delegated power to relax the provisions of a zoning by-law;
- (f) by any person who, by reason of Part XXIX [Protection of Trees], is
 - (i) unable to obtain a permit authorizing tree cutting or removal, or
 - (ii) unable to comply with the requirements of a by-law or permit under that Part.

(2) The Board shall not allow any appeal solely on the ground that if allowed the land or buildings in question can be put to a more profitable use nor unless the following conditions exist: --

- (a) The undue or unnecessary hardship arises from circumstances applying to the applicant's property only; and
- (b) The strict application of the provisions of the by-law would impose an unreasonable restraint or unnecessary hardship on the use of the property inconsistent with the general purpose and intent of the zoning by-law; and
- (c) The allowance of the appeal will not disrupt the official development plan.

(2.1) The Board shall not allow an appeal that would apply to a property for which an authorization for alterations is required under Part XXVIII.

(3) The Board shall give notice to such owners of real property as the Board may deem to be affected by the appeal, and public notice of the hearing shall be given, if the matter is deemed by the Board to be of sufficient importance. For the purpose of determining the names of the owners deemed to be affected, reference shall be made to the records kept by the Assessor.

(4) The Board shall conduct its hearings of appeals under this section in public.

(5) The decision of a majority of the members of the Board present at a hearing shall constitute the decision of the Board, which shall be rendered in open meeting and shall be recorded in writing by the secretary. In the event of the members of the Board being equally divided, the appeal shall be disallowed.

(6) No appeal shall lie from a decision of the Board.

(7) In allowing an appeal, the Board may impose such restrictions, limitations, or conditions as may seem to it to be desirable and proper in the circumstances.

(8) Council may by by-law provide that failure to comply with any restrictions, limitations, or conditions imposed by the Board pursuant to subsection (7) shall constitute an offence against the by-law.