



Report Date: April 5, 2011
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TO: Standing Committee on Planning and Environment
FROM: General Manager of Engineering Services
SUBJECT: Structures for Public Expression on City Streets

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 non-commercial public 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 non commercial public expression in appropriate locations, generally as outlined in this report.

COUNCIL POLICY

There is no applicable Council Policy.

PURPOSE AND SUMMARY

In response to the decision and direction provided by the British Columbia Court of Appeal, and allowing the City to continue to safely manage street rights-of-way, this report contains recommendations for changes to the Street and Traffic by-law and recommendations for additional street furniture in order to better support non-commercial public expression on City streets.

BACKGROUND

In Vancouver there are typically hundreds of protests that occur each year, ranging from individual expressions to organised group marches. Generally these protests are peaceful, and last for perhaps a few hours, often with hand held signs being used to convey information. The City supports the right to protest, and larger protests are routinely managed by the Vancouver Police force in a respectful manner. The recommendations contained in this report will not have any impact on this right to protest, but are intended to support and regulate those protests that wish to place structures on City streets as part of making informational material more visible to the public.

Beginning in 2001, Falun Gong practitioners (Sue Zhang and others) erected, maintained and occupied structures in the 3300 block of Granville Street on the grassy boulevard outside of the Chinese Embassy. The structures consisted of large billboards (8' X 100') covered with photos, painted messages and a small shelter for meditation (the "structures"). The boulevard is part of the city street and the structures were placed on the boulevard without the city's approval.

In 2006, the city commenced injunction proceedings in B.C. Supreme Court to have the structures removed pursuant to section 71 of the city's Street and Traffic Bylaw (the "provision"), which consists of a general prohibition on the placement of structures on city streets and sidewalks without the approval of City Council or the City Engineer.

Sue Zhang argued that the provision violated her freedom of political expression guaranteed by the Canadian Charter of Rights and Freedoms and, as a result, was unconstitutional. On January 29, 2009, the BC Supreme Court ruled in favour of the city. It found that the provision did not violate freedom of political expression, and ordered that the structures be removed. The structures were removed without incident.

Sue Zhang appealed the decision to the BC Court of Appeal.

The Court of Appeal judgement was pronounced on October 19, 2010.

The Decision:

The Court of Appeal disagreed with the B.C. Supreme Court and allowed the appeal. It found that the provision violates freedom of political expression in that the provision, in effect, consists of a complete ban on structures conveying political expression on city sidewalks.

To illustrate its point, the Court of Appeal made reference to numerous instances where the city (by way of policy or by-law amendment) already provides for exceptions to the general prohibition by regulating the placement of structures which convey artistic and commercial expression (public art displays, sidewalk cafes, produce stands, street vendors,) on city sidewalks. The Court found that the city could have developed a similar by-law and/or policy allowing for the administrative regulation of political expression on city streets and sidewalks, and that the absence

of such a by-law and/or policy in the overall regulatory scheme is unconstitutional as it amounts to a complete ban.

The BCCA did not simply strike down the by-law. It also provided some guidance as to what may pass constitutional muster. As 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.”

It is important to point out that while the provision was ruled to be unconstitutional as it relates to the effective ban on the use of a structure for political expression, the Court of Appeal made it clear that the city is not precluded from prohibiting the kind of structures erected by the Falun Gong practitioners if the city sees fit to do so (by by-law or policy). However, it must be done in a manner that is constitutionally sound, that is, by regulating the placement other than with a complete ban.

The Court also ruled that the provision, while unconstitutional, would remain in full force and effect for a period of six months ending April 19, 2011.

Since that decision, Engineering staff, with the support of Legal Services, have been working to develop new by-law provisions and a public program of free city sponsored structures on streets in order to respond to the court decision and to strike a balance between the important constitutional value of freedom of expression and the various other valid and competing public interests of citizens in using the finite public resource which constitutes our streets.

DISCUSSION

Following on the decision of the BC Court of Appeal there is an opportunity for the City of Vancouver to initiate an innovative program that will facilitate free political expression on City streets. The goal of this program is to encourage this expression by providing a range of opportunities for individuals or groups with differing means and needs, to express their opinions in a public area. The goal is to also ensure that public access, and the quality of public experience on our sidewalks and streets is not compromised, and that adjacent private property is not inconvenienced or obstructed. A program (“Speak Up Vancouver”) will be designed to allow, through a permitting process, individuals or groups to erect structures on City streets as an aid in the expression of their message. Complementing this permitted process, the City will provide a number of designated structures at strategic locations that can be used to display these expressions in areas with excellent public exposure.

Proposed By-law amendment

The proposed by-law amendment is intended to replace the unlawful section 71 with a regulatory framework and permitting system that protects both freedom of expression and the public interest.

The proposed bylaw amendment is part of a two-pronged response to the appeal court decision.

First, the proposed amending bylaw would permit structures to be erected for the purpose of communicating non-commercial public expression, provided that the applicant complies with the regulations in the by-law.

Second, staff proposes establishing designated structures where persons are free to install or display posters, signs or other materials that communicate non-commercial public messages. The designated sites would be established and maintained by the city. The intent of these sites is to provide structures that would facilitate political expression within Vancouver, for those who would prefer not to use the permit process.

The reason for this two pronged approach is that the concept of “expression” has been interpreted very broadly in the case law dealing with freedom of expression. A structure can have expressive content without using language: for example, a sculpture can convey a message without words. Structures on sidewalks need to be regulated for many reasons, including liability concerns, safety concerns, sharing of public resources and aesthetic concerns. To effectively balance all these important municipal objectives, it is necessary to set out the various factors in a by-law amendment. For those who have a message to convey, but cannot meet the requirements of the “code” set out in the by-law, free standing structures are made available by the city in areas chosen carefully to balance maximum public exposure of the message with considerations of public safety and public convenience.

One difficulty is the definition of political structures or political expression. It is not a simple task to distinguish between political and non-political speech. Therefore the city is proposing to distinguish between commercial and non-commercial public expression. This distinction is intended to preserve the designated city structures for non-commercial messages, while ensuring that the city otherwise remains neutral regarding the content of those messages.

The proposed by-law only regulates city streets, and does not prevent a person from erecting structures on private lands, an activity governed by other city by-laws.

Political protests that do not require structures are unaffected by the amendment.

The pressing and substantial municipal goals that the city is seeking to further in recommending the amendments bylaw include:

- Promoting public non commercial expression
- Preserving the city’s character
- Preventing unsightliness

- Minimizing distractions to traffic
- Protecting public safety
- Minimizing detrimental impacts on city businesses
- Minimizing interference with public utilities and transit
- Protecting the city from liability and costs
- Ensuring adequate vehicular, pedestrian and emergency access to streets
- Protecting use and enjoyment of private property

The proposed bylaw amendment keeps the general prohibition against structures on city streets because the city still needs to preclude competing uses, reduce dangers to other users, and preserve the aesthetic appearance of the street. However, the proposed bylaw amendment also introduces a clear set of criteria that must be met in order to qualify for a permit to erect a structure.

Safety

A number of elements have been built into the bylaw in this area; the prohibition against obstructing pedestrian or vehicular traffic is aimed at preserving the use of the street as a public thoroughfare. The restriction on electrical components and on gas appliances is aimed at protecting public safety. The permit system also ensures that no structure will be too big, too close to the roadway or otherwise unduly interfere with other installations or activities on the street.

Location

The By-law will permit structures in non-residential, mixed use and commercial areas. One of the more significant restrictions in the by-law amendment is that structures cannot be erected in an area adjacent to property zoned for residential purposes. This is intended to apply to residential zoning districts and multiple family dwellings which have residential units at ground level, but not to buildings which contain commercial at grade and residential above. This ensures that purely residential areas maintain a quiet and pleasant residential character as well as preserve the aesthetic appearance of the street, consistent with Council policies and as reflected in the Zoning and Development By-law.

The By-law provides for limitations on how close a structure can be to a bus stop, curb and building entrance.

Size

The By-law limits a structure to no more than 2.1 meters high, 2 meters wide and 1 meter deep; in addition the base can be no larger than two square meters in size.

General

Other key restrictions are the requirements that the structures be attended at all times by the permit holder, and be removed on a daily basis. This helps ensure safety, and will ensure the permitting conditions are met throughout the permitted hours (0800 - 2000 H) It also ensures that the structure is not otherwise too heavy, bulky or complicated to prevent easy and efficient removal.

Proposed permit process

It is proposed that permits be issued by the Street Activities Branch of the Engineering Department to any person desiring to erect a structure on City street for the purpose of political expression, provided that a number of conditions generally relating to public safety and City security are satisfied:

- Refundable security of \$1,000 for removal of the structure,
- a release and indemnity of the City
- no obstruction of pedestrians, adjacent business or residential frontage, no restriction of access to street furniture, utilities, construction works, or impediment to the general operation of the public sidewalk
- the structure and surrounding area is kept safe and in good repair
- the structure is removed from City street between 8pm and 8am
- the permit holder is in attendance at all times when the structure is present on City street
- the structure is not adjacent to any ground level residential development
- payment of \$200 application fee to cover costs of application review (\$50 fee for permit renewal of same structure and location)
- temporary removal of the structure in cases of emergency.

Proposed free city structures

There are currently over 300 poster cylinders installed on utility poles around the City which can be used for placement of protest material. In an effort to increase the ability of the public to communicate non-commercial expression on structures on streets, it is proposed that the Engineering Department install large freestanding cylinders at a number of high visibility areas around the City. Each of these structures will provide approximately 5 square metres of area for placement of larger posters and other expressive material. The cylinders will be placed strategically on City sidewalks in areas which will maximise public exposure to the message, while balancing the needs for public safety and other competing uses. Possible locations include sidewalk adjacent or near:

- Vancouver Art Gallery
- Canada Place
- Vancouver Public Library
- Main Street and Terminal Avenue, near Thornton Park and the Main Street Skytrain Station
- Commercial Drive north of Broadway

The kiosks will be approximately 2.1 m (7 feet) high, with a cylinder 0.9 m (3 feet) in diameter. These large cylinders will be managed by the Engineering Department similarly to the poster cylinders, with posters and informational material removed from the cylinder approximately every 2 weeks. Any structural maintenance would be undertaken by the City's Street Furniture contractor, as it is proposed to provide these cylinders as part of that contract. The Street Furniture contractor (CBS/JCDecaux) is agreeable to this arrangement.

COMMENTS OF B.C CIVIL LIBERTIES ASSOCIATION

This report has been discussed with BC Civil Liberties Association, who although generally supportive of the initiative, did have reservations that daily removal of permitted structures would preclude a longer term vigil which they felt could be an essential component of some protests.

FINANCIAL IMPLICATIONS

As the kiosks are being provided at no cost to the City under the existing Street Furniture contract, there are no financial implications.

PERSONNEL IMPLICATIONS

It is anticipated that the proposed permitting process and kiosks can be managed with existing resources.

ENVIRONMENTAL IMPLICATIONS

There are no environmental implications.

SOCIAL IMPLICATIONS

Implementation of the actions recommended by this report will improve facilities for free non-commercial expression in public places within the City of Vancouver.

IMPLEMENTATION PLAN

Applications for permits for erection of public expression structures can be received immediately following approval of this report; acquisition and installation of the freestanding kiosks can be undertaken over a 2 to 3 month period following report approval.

CONCLUSION

Council approval of this report will facilitate non-commercial public expression on City streets thus responding to the direction provided by the BC Court of Appeal. Report recommendations include changes to the Street and Traffic by-law and the addition of street furniture within a managed program.

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BY-LAW NO. _____

A By-law to amend Street and Traffic By-law No. 2849
regarding public non-commercial 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 non-commercial 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 “Combination of Vehicles”, Council adds:

“ “Commercial Expression” means any form of expression which is designed to promote, advertise or sell a product or a service , or to promote or advertise an event for which admission is charged.”
3. 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.”
4. Council re-numbers section “71A” as “71H”.
5. 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, substance, or thing 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 or authorized by the City Engineer, specifically for free public use for the purpose of non-commercial public expression.

STRUCTURES CONVEYING NON-COMMERCIAL PUBLIC EXPRESSION

- 71B.
- (1) A person seeking a permit under section 71A for any structure, object, substance or thing, which conveys non-commercial public 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:
 - (a) plans and specifications for any proposed structure, object, substance or thing, detailing the construction methods and materials to be used;
 - (b) proposed traffic management plans for any vehicular and pedestrian traffic, which may be affected by the construction, installation or removal of any proposed structure, object or thing;
 - (c) security for potential City costs in the amount of \$1,000.00, for removal of any proposed structure, object, substance or thing, in a form satisfactory to the Director of Finance;
 - (d) an executed full release and indemnity, in a form satisfactory to the Director of Legal Services; and
 - (e) a non-refundable permit application fee of:
 - i) \$200 for an application for a structure or location for which the City Engineer has not previously issued a permit, and
 - ii) \$50 for an application for a structure and location for which the City Engineer has previously issued a permit.
 - (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, substance or thing:

- (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, thing 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 in front of or adjacent to 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;
 - (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 2.1 meters in height at the highest point;
 - (m) measures more than 2 meters in width at the widest point;
 - (n) measures more than 1 meter in depth at the deepest point;
 - (o) has a base area larger than 2 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 block applied for, within the previous sixty days.
- (4) The holder of a permit granted under section 71A, or their authorized representative, must:

- (a) remain at the structure, object, substance or thing continuously between the hours of 8 a.m. and 8 p.m. daily;
 - (b) remove the structure, object, substance or thing from the street between the hours of 8 p.m. and 8 a.m. daily; and
 - (c) keep the structure, object, substance or thing 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 barbeques
- at or near the structure, object, substance or thing 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 block or location;
 - (c) more than one permit every sixty days, for any 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.”

6. 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 and 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 non-commercial public expression.”

7. 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

8. 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.

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

