

R186 : City's Community Charter Submissions



Corporate NO: R186

Report COUNCIL DATE: September 16, 2002_

REGULAR COUNCIL

TO: **Mayor & Council** DATE: **September 10, 2002**

FROM: **City Solicitor** FILE: **0125-10**

SUBJECT: **City's Community Charter Submissions**

RECOMMENDATION

That Council adopt the recommendations which are summarized in Appendix "A" to this report and authorize the City Clerk to forward a copy of Council's resolution and the report to the Minister of State for the draft *Community Charter* (the "*Charter*").

BACKGROUND

On May 24, 2002 a draft first phase of the proposed *Charter* was tabled by the Minister for public discussion. The draft legislation does not introduce major changes or additions to either general municipal powers or the ability to raise revenues. Most of the *Charter* proposals concern municipal powers, Council governance issues, the accountability of individual members of Council and financial management. Staff have reviewed the comments of other lower mainland municipalities, local government organizations and the UBCM. The recommendations contained in this report are consistent with these submissions and provide some additional comments and proposals.

Part 1 - Charter Principles and Interpretation

Indirect Downloading:

Section 2(2)(c) proposes to lessen the impact of downloading. It states that there must be provision for resources to fulfill responsibilities before new ones are assigned to local government. However, this does not address the issue of indirect downloading nor does the *Charter* contain appropriate fiscal mechanisms to meet all types of downloading and unfunded mandates. Examples of this include withdrawal from highway maintenance and recovery houses.

Recommendation - 1

That the *Charter* broaden the definition of downloading to include indirect or passive downloading in s. 2(2)(c) and provide municipalities with the fiscal resources and revenue raising tools to meet any new downloading role.

Exercise of Local Government Powers:

Section 3(1) states that local government powers be interpreted so as to be given "*adequate*" powers and discretion to fulfill their needs, public interest and purpose. The word "*adequate*" contradicts the concept of "*broad*" powers expressed earlier in the section.

Recommendation- 2

That the *Charter* wording in section 3 replace the word "*adequate*" with the word "*broad*" in describing the manner in which municipal powers may be exercised.

Part 2 - Municipal Purposes and General Powers

Regulation of Business:

The *Charter* actually removes the existing power to prohibit a business and to limit the number of taxi licenses. Both powers are currently provided in the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "*Local Government Act*").

Recommendation - 3

That s. 7 provide the same authority as the *Vancouver Charter* to prohibit as well as regulate a business and that s. 7 provide Council with the power to limit the number of taxicab licenses.

Concurrent Provincial-Municipal Powers

The proposed s. 8(2) requires agreement and approval by a Minister to obtain concurrent authority in four defined areas of shared jurisdiction. These are public health, protection of the environment, building regulation and soils management.

Recommendation - 4

That public health and protection of the natural environment remain areas of provincial jurisdiction and not be downloaded onto local government.

Natural Person Powers:

Section 7(1) proposes that a municipality has the capacity, rights, powers and privileges of a natural person of full capacity. Presently, municipalities are corporations with broad corporate powers (*Local Government Act*, s. 176), including the power to make agreements and deal with property. Natural person powers give the municipality, by common law, the broad rights of contract, property dealing, mortgaging and incorporation of subsidiaries, all subject to limitations imposed by statute. For example, a local government cannot incorporate without the approval of the Inspector of Municipalities unless it is incorporating a non-profit society.

Alberta has adopted the natural person power approach instead of listing in detail permitted corporate powers. Despite these new powers, the Courts in Alberta have not always supported municipal powers unless they are specifically enumerated in the governing statute.

It should be noted that natural person powers do not give Council any new regulatory powers, tax or revenue generating authority.

By-laws Inconsistent with Provincial Laws:

A new s. 10 states that a by-law has no effect if it is inconsistent with a Provincial enactment. "*Inconsistent*" is defined as a circumstance where a person is unable to comply with both the Provincial enactment and the local by-law. These provisions codify in legislation what the Courts have held in cases where provincial and local legislation deal with the same subject matter or different aspects of it.

Prohibition and Regulation of Business:

Section 12 gives very broad powers to regulate and discriminate between areas, times, circumstances, conditions, persons, places, activities, animals or things. It also provides a new ability to make exceptions for classes. It does not, however, allow the prohibition as well as the regulation of a business.

Recommendation - 5

That the *Charter* provide the same power as s. 209 of the *Vancouver Charter*, namely the right to prohibit a business upon a unanimous vote of Council.

Adopting Codes:

Section 13(4) states local governments may adopt a code, standard or rule published by a provincial, national or international body or standards association enacted as or under a law of British Columbia or elsewhere, including a foreign jurisdiction. An example would be the adoption of an ISO standard. Such "*code*" adoption would have to be within the constitutional and legislative authority enjoyed by a local government.

Licensing:

Section 15 allows for a slightly broader power to enact a system of licenses, permits and approvals, including:

- prohibiting any activity or thing until a license is granted
- granting and refusing licenses
- establishing duration periods
- establishing conditions that must be met

Section 15 also states that municipalities may provide for a system of licenses, permits and approvals, including:

- suspending or canceling licenses for
 - failure to comply with a term or condition of the license
 - failure to comply with the by-law
- license terms and conditions may include requirements and prohibitions

Section 15 provides that:

- if Council considers that a by-law would have the effect of prohibiting a business or business activity, it must
 - give notice of the proposed by-law
 - provide an opportunity for persons to make representations to Council
- business licenses may be suspended or cancelled for reasonable cause, following notice and opportunity to be heard

Entering Property:

Section 16 states before entering onto property, reasonable steps must be taken to advise the owner or occupier of the proposed entry, except in the case of an emergency.

Discontinuing Service:

Section 18 states that Council may by by-law, establish circumstances to discontinue providing a service to a person or property for:

- unpaid fees or taxes for the service
- non-compliance with rules in a by-law or contract regarding the use of the service

Section 18 includes requirements for reasonable notice and opportunity to be heard.

Security Requirements:

Section 19 makes explicit that interest on a security becomes part of the security.

Part 3 - Additional Powers and Limits on General Powers

Municipal Franchises:

Section 22 grants authority to allow franchises with electoral approval for public transport, water supply, gas, electric or other energy supplies.

It should be noted that s. 23 states that an agreement with a public authority in another country for the provision and operation of works and services has no effect until approved by the Lieutenant Governor in Council.

Recommendation - 6

That s. 22 be amended to grant authority to provide sewer franchises.

Title to Highways:

Section 35 states title to highways, with some exceptions such as first nations lands, will vest in municipalities. However, the *Charter* is silent on the issue of environmental clean-up liability.

Recommendation - 7

The *Charter* be amended to provide relief to municipalities from environmental liabilities that may arise from the transfer of title to highways.

Section 35(2) provides:

- Possession and control of highways is given to local government with some exceptions

- Exceptions
 - land and improvements where Provincial works are situated
 - arterial highways, intersections and interchanges
 - park, recreation area or ecological reserve highways
 - highways in regional parks
 - regional trails not used by vehicle traffic
 - highways which in the Forest Practices Code are not declared to be public
 - highways through reserves
 - highways vested in the federal government
 - public rights of way on private lands

Encroachments:

Section 35(12) gives specific authority for a municipality to

- grant a license of occupation
- grant an easement
- permit an encroachment

Highway Closures:

Section 41 states:

- where there is highway access to water local government
 - may only close and dispose of highway that provides access to the ocean, a lake, river or other watercourse if
 - there is an exchange for equivalent property providing access to the same body of water; or
 - the proceeds are reserved for the same purpose

That the definition of "*watercourse*" is much too broad. For example, a road end that leads to any drainage ditch would be restricted by s. 41.

Recommendation – 8

Section 41(1)(a) only apply to roads providing access to the ocean, lake or navigable river.

Animal Control

The new definition states:

- animal means "*any member of the animal kingdom, other than a human being*"
- New provisions for seizure and regulation (s. 47)
 - allows licensing of cats
 - animal control officers may seize animals (on private property) if
 - unlicensed
 - unlawfully at large
 - on unfenced land and not tethered or contained

Building Regulation Liability Issues:

The City of Vancouver enjoys immunity under the *Vancouver Charter* with respect to building claims. The Province should not continue to discriminate against all of the other municipalities of the Province who de facto have become the insurers of damages caused in part by a defective provincial building code. Ironically it is the City of Vancouver with the greatest financial strength in the Province and the largest number of potentially affected units which enjoys legislated claims immunity.

In respect of all other liability claims, the rule of joint and several liability should be abolished. A modified form of proportionate liability could be crafted to address the issue of damage claims other than those four building construction defects. There should be a 10 year limit on all claims against a local government.

Recommendation – 9

Eliminate joint and several liability for all claims against any municipality and provide a 10 year time limit on all claims.

Recommendation - 10

The *Charter* must limit liability for municipalities in connection with all buildings and construction related liability claims and place all municipalities on the same legal basis as the City of Vancouver.

Section 54 has essentially the same wording as contained in the *Local Government Act*. The wording, however, does result in some concerns in that it refers to certification of compliance of plans with current Building Code and other applicable enactments respecting safety. The reference to only plans and not construction, as well as the reference to unqualified compliance, is inconsistent with the current wording of the code in requiring Letters of Assurance for substantial compliance of design and field review.

Recommendation – 11

The term "*certification*" and "*implied unconditional compliance*" is of major concern for the Architectural Institute of B.C. and the Association of Professional Engineers and Geoscientists of B.C. Sentence (b) of Section 54 should also be consistent with the code requirement for certification of field review as well as design. This issue must be considered in conjunction with proposed changes to legislation dealing with liability.

Building Code Board of Appeal:

This body is proposed to be abolished. This proposal is opposed by professional associations and the UBCM. The Appeal Board should continue as it is the only mechanism by which an owner can file an appeal regarding a difference of opinion in the application of the Building Code to a specific property.

Recommendation – 12

Include the Building Code Board of Appeal in the *Charter*.

Business Regulation

Business Regulation:

There is vagueness in these provisions. It should be noted that Sunday/holiday shopping hours are not addressed and the ability to regulate shopping hours may be retested in the Courts.

Recommendation - 13

Amend ss. 56 - 58 to be consistent with the *Vancouver Charter*, s. 209 regarding the power to prohibit a business and regulate hours of operation.

Nuisances:

Section 60 describes Council's authority in relation to nuisances, including graffiti and unsightly premises. However, the powers are not as broad as the existing s. 725 of the *Local Government Act* in relation to nuisances. S. 725(1)(m), for example, allows Council to prohibit the carrying on of a noxious or offensive trade, business or manufacture. Surrey Council has used this power to prohibit drug manufacturing facilities and mushroom plants.

Recommendation – 14

That Section 60 of the *Charter* be amended to restore existing powers granted in relation to nuisances.

Elector Approval:

Section 71 states:

- Alternative approval process (s. 71)
 - counter petition renamed
 - new minimum of 10% of elector signatures in a counter-petition replaces the existing 5%

Council Meetings

In Camera Meetings:

Section 75 states:

- New grounds for closed meetings (s. 75) include:
 - administrative tribunal hearing or potential hearing
 - preliminary stages of proposed municipal service

- discussions with officers and employees regarding municipal objectives, measures and accomplishments for purpose of a municipal report
- information received in confidence regarding intergovernmental negotiations (including with third party)

Section 76 states:

- Attending meetings (s. 76)
 - at closed meetings, Council may allow municipal officers and employees to attend or exclude them, and hold confidential retreats
 - at closed meetings, Council may allow another person to attend if appropriate

Recommendation - 15

That the grounds for closed meetings be broadened to enable more flexibility in Council meetings with staff and the holding of confidential work sessions.

Nomination Fees:

Nomination fees are not required for candidates except in the City of Vancouver. Nomination fees assist in making the ballot easier to consider and vote on.

Recommendation - 16

That the *Charter* require the same nomination fee as the *Vancouver Charter*.

Financial Reporting and Annual Reports:

- Section 83 reporting requirements are cumbersome and costly
- Annual report regarding financial matters will include, as an indication of Council's intentions for the coming years
 - the municipal objectives for the reporting year and the following year
 - the measures to be used to determine if objects are being met
 - a report on municipal accomplishments for the reporting year
 - declarations of disqualification

Recommendation - 17

Reduce the proposed annual reporting requirements.

Summary of New Proposals on Bias and Conflicts of Interest:

Generally contravention of these provisions could result in the by-law or resolution authorizing the action being declared illegal.

- Bias (s. 85)
 - interest other than pecuniary interest recognized
- Post-declaration (s. 85)
 - following declaration of a conflict of interest, Council member may return to the meeting if he or she, following legal advice, determines they are not in conflict
- Participating if in conflict (s. 86)

- if there is a pecuniary interest, a Council member may not remain or attend at any part of meeting while the matter is under consideration
- Influence (s. 87, 88)

These provisions will also apply to local government officers holding delegated authority

- where direct or indirect pecuniary interest, Council member must not attempt to influence, directly or indirectly a decision, recommendation or other action to be made or taken
 - at a Council meeting
 - by an officer or employee
 - by a delegate
 - by any other person or body
- contravention is basis for disqualification
- Conflict exceptions (s. 89)
 - ability for exceptions for pecuniary interest to be established by regulation
 - if Council member has a right to be heard but is excluded by conflict, may appoint representative to exercise that right

Recommendation - 18

That a graduated form consisting of penalties, fines and suspensions with public censure be imposed as a means of dealing with breaches of conflict and influence rules.

Recommendation - 19

That the proposed *Charter* provision s. 85(4) be amended to allow Council members to make the conflict determination based on whatever advice they choose to seek, legal or otherwise.

Summary of New Proposals on Gifts

- Accepting Gifts (s. 90)
 - Council members must not, directly or indirectly, accept a fee, gift or personal benefit connected with performance of his or her duties
 - exceptions
 - where incident of protocol or social obligations that accompany office
 - compensation authorized by law
 - election contribution
 - basis for disqualification
- Disclosing Gifts (s. 91)

This will include meals and other gratuities.

- if Council member received gift or personal benefit that
 - exceeds \$250 in value
 - total value of gifts and benefits in 12 month period exceeds \$250

- Council member must file disclosure statement stating
 - nature of gift or benefit
 - source
 - when received
 - circumstances under which it was given and accepted
- failure to disclose is basis for disqualification

Recommendation - 20

Meals should be excluded from the definition of gifts or personal benefits.

Use of Municipal Information:

- Insider information (s. 92)
 - a member or former member must not use information
 - obtained in performance of office
 - not available to the general public
 - for purpose of gaining and furthering a direct or indirect pecuniary interest
- basis for disqualification unless inadvertent or error in judgment made in good faith

- Contract Restrictions (s. 93)
 - member or former member must not, directly or indirectly
 - enter into a contract, or
 - accept a benefitthat is awarded, approved or granted by Council
- except where
 - 6 months has expired after the Council member leaves office
 - benefit is authorized by legislation
 - contract or benefit awarded on conditions same for all similar contracts or benefits
 - Council considers contract or benefit is in best interest of the municipality and adopts a by-law for that purpose
 - no Council member must knowingly vote to award contract or approve benefit that would contravene section

- Financial Gain (s. 94)
 - if Council member or former Council member has received a gain from contravening
 - conflict of interest requirements
 - internal or external influence when in conflict
 - gift and disclosure requirements
 - use of insider information
 - contracts and benefits requirements
 - the municipality or elector may commence an application for a Supreme Court order requiring member to pay to the municipality an amount equal to the gain

- if the elector brings the successful action, the municipality must pay the elector's costs
- Disqualification Application (s. 96)
- can be initiated by 10 or more electors, or
- municipality, if
 - resolution adopted by 2/3 of all Council members
 - resolution identifies s. 95 grounds for disqualification
- application must be made within 45 days after alleged basis of disqualification comes to the attention of electors or Council member
- cost of successful application by electors to be paid by municipality
- court may order municipality to recover from person disqualified

Part 5 - Municipal Government and Procedures

Summary of *Charter* Proposals:

Section 100 states that Council member duties include:

- consider well-being and interests of municipality and its community
- contribute to the development and evaluation of policies and programs
- participate in Council meetings, Committee meetings and meetings of other bodies where appointed
- carry out other duties assigned by Council
- carry out other duties assigned by legislation

Section 101 states that the Mayor's duties include:

- provide leadership to the Council, including recommending by-laws, resolutions
- communicate information to Council
- preside at Council meetings
- direct management of policies and programs of municipality (note this will conflict with the CAO's authority)

Recommendation - 21

That s. 101(2)(d) allowing the Mayor to direct the management of policies and programs be removed in order to maintain clear accountability of the functions of the CAO.

Use of Confidential Information:

Section 102 requires that a Council member or former Council member must, unless specifically authorized otherwise by Council

- keep in confidence any record held in confidence by the municipality, until record is released as lawfully authorized or required
- keep in confidence information considered in Closed Council meetings, until the Council publicly discusses or releases the information

There is no statutory penalty or disqualification remedy, however, personal liability for individual members of Council remains an issue.

Section 108 states that each Council member present at the time of a vote must vote on the matter and if there is no indication of how that Council member votes, it is an affirmative vote.

Section 113 states that Closed Council meetings may be conducted by electronic communication means, and a Council member who is unable to attend a Council meeting may participate by electronic means.

Section 116 states that the Mayor may require Council to reconsider any matter, whether previously adopted or rejected at the same Council meeting or within 30 days except where the matter has had approval or assent of the electors, or has had a previous reconsideration.

A sunset provision, Section 121, states that a by-law may include provisions that, at a future date set by the by-law, it is amended or repealed.

Recommendation - 22

That s. 102(b) be amended to require Council to pass a resolution to release in-camera information before it becomes public and that unauthorized release of the information be made an offence under the *Offence Act*, R.S.B.C. 1996, c. 338.

Officers and Employees:

Section 138 states that no person may interfere with, hinder or obstruct municipal officers or employees in the exercise of their powers or performance of their duties and there is no penalty indicated.

Recommendation - 23

That the *Charter* define interference in the duties of employees and provide a mechanism to resolve interference issues.

Part 6 - Financial Management

Financial Matters:

Section 158 dealing with liabilities under agreements, provides a new ability for the Province to prescribe exclusion by regulation from the five year rule. Elector consent or counter-petition process would not apply to those liabilities exceeding five years that are excluded by regulation. There are many types of agreements and leases that can fall within the broad generally accepted accounting concept of a "liability".

Section 170 states that a municipality may incorporate a society without the Inspector's approval.

Section 171 states that land sale funds in reserve may be used to acquire land, improvements and other assets of a capital nature.

Recommendation - 24

- (a) That the requirements for the five year financial plan be in conformity with the Public Sector Accounting Board ("PSAB") accounting rules.
- (b) That amendments to the financial plan be able to be made by Council resolution without the requirement for public consultation for items less than a specified amount or levy.
- (c) That determination of an item as a liability be based on PSAB accounting rules.
- (d) That there be no requirement for elector consent, counter-petition or Ministry approval for new liability provided
 - (i) the new liability will not put the municipality above 20% of both of the stated liability limits; or
 - (ii) the liability is deemed to be of a health concern nature where a public health order has been issued to address the concern such as water quality or a requirement for work under the *Waste Management Act*.
- (e) That the long term borrowing process be simplified to require creation of only one borrowing by-law with approval by the Ministry that can be drawn on as required to cover multiple financial needs.

Part 7 - Municipal Revenue

The draft *Charter* does not include any new revenue sources.

Recommendation - 25

That Section 175 include the following new revenue sources:

- (a) transfer of all traffic fine revenue
- (b) require tax payments for Crown Corporations
- (c) allow a defined percentage of the provincial sales tax to be collected by local government
- (d) allow flexible entertainment and hotel taxes
- (e) allow "*fees*" as taxes to avoid constitutional problems with imposition of business license fees and proceeds from sales of intangible property rights such as taxi licenses
- (f) provide a wide definition for "*utility*" and "*franchise fees*"
- (g) allow a defined percentage of land transfer taxes to be collected by a local government

The *Charter* process provides the opportunity to correct many of the problems that have been encountered with the 1% utility levy that is collected, in lieu of property taxes, under s. 353 of the *Local Government Act*. The levy is currently based on 1% of the gross revenues of the utility companies.

The *Local Government Act* provides local government with the authority to collect 1% of gross revenues from the utility companies in recognition of the difficulty of assessing the value of wires, cables, poles and other equipment used by the utilities. Gross rentals have been interpreted, by the utilities, as simply the basic telephone line rental, which is to the exclusion of many other revenue sources such as phone packages and long distance charges.

Ideally, the levy would be replaced with a property assessment basis of taxation, providing consistency with the other rules for property taxpayers.

Recommendation – 26

The 1% utility levy should be replaced with property taxation of the same.

Property Tax Exemptions:

Section 207 allows for:

- broader exemptions for charitable, philanthropic and not for profit corporations
- land or improvements owned by a municipality, regional district or other local authority and used for the purpose of the local authority
- majority vote for permissive exemptions, not 2/3 vote
- may exempt for up to 10 years without electoral assent
- notices required in advance of adoption that identifies the property, describes proposed exemption, states the number of years of exemption, and estimates foregone tax for each of the first three years

Section 209 allows a permissive tax exemption to class 4 or 5 properties by by-law where:

- Council considers this to be a new business in B.C.
- expansion of an existing business
- existing business that Council considers requires assistance to continue in operation

Tax reductions and exemptions for an industry (class 4 or 5 properties) will result in the following adverse impacts:

- (a) reduced overall tax revenue for local governments as they compete for industry;
- (b) higher taxes for those other classes of property required to subsidize those given reductions;
- (c) subsidizing failing industries that distorts the optimal allocation of resources in the economy;
- (d) introducing an unfair and unmanageable competitive advantage for some industries over other industries.

Recommendation - 27

That s. 209 respecting tax exemptions to class 4 or 5 properties under certain conditions not be included in the *Charter*.

Indemnification:

Section 249 states Council may:

- indemnify municipal officials by by-law generally or by resolution in a specific case
- the indemnification includes payment of amounts required or incurred
 - to defend an action or prosecution

- to satisfy a judgment, award or penalty, except a fine for a criminal offence that is not a strict or absolute liability offence
- in relation to an inquiry
- majority vote, rather than 2/3 vote
- member in a conflict of interest may vote

Part 9 - Government Relations

Consultation and Dispute Resolution

Section 276 states the Minister must:

- consult with UBCM prior to amending/repealing legislation
- consider comments provided
- respond to comments, if required

The Minister may:

- enter into a memorandum of understanding with UBCM regarding consultation

Section 279 states that no letters patent may be issued for a municipality that would include two or more existing municipalities unless there is a separate vote in each municipality and there are more than 50% of the votes in favour from each municipality.

Section 284 states:

- where a dispute arises between a municipality and another local government, the Provincial government or a Provincial agency, or one or more parties may apply to a designated officer for help to resolve the dispute
- parties may agree to voluntary binding arbitration
- there is mandatory binding arbitration provision for disputes between municipalities regarding intermunicipal boundary highway, intermunicipal transecting highway, intermunicipal bridge and intermunicipal watercourses

Recommendation – 28

Each local government should be able to negotiate directly with the Province without the intervention of UBCM or a Community Charter Council.

CONCLUSIONS

This report includes proposed submissions to the Province on the *Charter*. A summary of the recommendations is included as Appendix "A" to this report.

CRAIG MacFARLANE

City Solicitor

CM:lab/mlg

Encl.

APPENDIX "A"

Recommendation - 1

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