

PUBLIC HEARING SUBMISSION PROCEDURES

EXECUTIVE SUMMARY

Pursuant to the *Municipal Government Act* (MGA), members of the public have a right to make, and Council has an obligation to receive, written or oral submissions on planning and land use items that are required by law to go through a public hearing process. Through The City of Calgary's Procedure Bylaw 44M2006, as amended (Procedure Bylaw), Council has created procedures for public hearings. The underlying fundamental principle is that members of a municipal council must hear from parties affected by the proposed change in policy or regulation in advance of making a decision on the item. The obligation to facilitate public participation in the planning process must be balanced with The City and Council's obligation not to circulate or publish comments that are legally problematic that may be contained in a submission. This report outlines proposed procedures to achieve this balance by creating a two pronged and nuanced approach to the issue such that:

- submissions the publication of which might expose The City to legal or reputational risk are filed by Administration; and
- Council still retains the ability to file submissions included on the agenda that it deems offensive.

ADMINISTRATION RECOMMENDATIONS

That Council:

1. Endorse the protocol contained on page 3 of this report for Administration's management of legally problematic public submissions.
2. Direct Administration to propose new provisions in the upcoming Procedure Bylaw review to clarify what is an "abusive" submission and to reflect the business protocol as referred to in recommendation 1.
3. Direct that Attachment 2 remain confidential pursuant to Sections 24(1)(a)(b) and (f) and 27(1)(a) of the *Freedom of Information and Protection of Privacy Act*.

RECOMMENDATION OF THE PRIORITIES AND FINANCE COMMITTEE, DATED 2017 MARCH 07:

That Council:

- 1(a) Endorse the **Proposed Business Protocol** contained on page 3 of this report for Administration's management of legally problematic public submissions, **with respect to the Submissions that are Offensive but not of Legal Concern**.
- (b) Endorse the **Proposed Business Protocol** contained on page 3 of this report for Administration's management of legally problematic public submissions, **with respect to the Submissions that Create a Legal Concern**;
2. Direct Administration to propose new provisions in the upcoming Procedure Bylaw review to clarify what is an "abusive" submission and to reflect the business protocol as referred to in recommendation 1; **and**
3. Direct that Attachment 2 remain confidential pursuant to Sections 24(1)(a), 24(1)(b), 24(1)(f) and 27(1)(a) of the *Freedom of Information and Protection of Privacy Act*.

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Oppositions to Recommendations:

Recommendation 1(a)
Opposed: S. Keating, W. Sutherland

PREVIOUS COUNCIL DIRECTION / POLICY

At the 2016 March 07 combined meeting of Council, after considering Report CPC2016-031, Council adopted the following motion:

That Council direct Administration to report back, through the Legislative Governance Task Force, on what the protocols should be with regard to written public submissions for public hearing matters.

BACKGROUND

Following Calgary Planning Commission's review and recommendation and prior to the public hearing, statutory plan and land use bylaw items are advertised for the purposes of notifying the public of the proposed changes and to advise them of their opportunity to make submissions to Council on each item. The MGA requires the advertisement of statutory plans and land use changes in a newspaper or other publication for two consecutive weeks (and five days prior to the meeting), providing an approximate three week period for the public to submit written comments or make plans to attend at the public hearing to make oral submissions.

The City Clerk's Office collects public submissions for inclusion in the Council agenda in accordance with deadlines prescribed by the Procedure Bylaw. The Procedure Bylaw sets out criteria under which communications must be accepted and affords the City Clerk's Office the discretion to dispose of written submissions considered abusive in nature rather than include them in the Council agenda. Unfortunately the notion of what constitutes an "abusive" submission is not defined in the Procedure Bylaw and has lead to some confusion about what should be filed (disposed of) or not.

Timelines between the review of public submissions and the printing of the Council agenda are extremely tight. Written submissions are not accepted after 10:00 am on the Thursday prior to the Tuesday print deadline of the Council agenda. After the 10:00 am deadline, the City Clerk's Office completes a high level content review of each written submission and then attaches them to the relevant Council agenda item. In some instances, a Council agenda item will receive significant public input which makes the comprehensive review of submissions by the City Clerk's Office challenging, however, the expectation is that the review is completed to the best of staff's ability under existing resource and time constraints. In other words, although the City Clerk's Office will use its best efforts to isolate "abusive" submissions in accordance with the proposed business protocol outlined in this report, it is possible that such a submission could be missed.

INVESTIGATION: ALTERNATIVES AND ANALYSIS

As noted above, pursuant to the MGA and the Procedure Bylaw, members of the public have a right to make, and Council has an obligation to receive, written and oral submissions on public

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hearing items. When submissions are made orally, the Chair has the ability as well as the responsibility to control the hearing, to ensure that submissions are relevant, and may sanction or disallow abusive comments. Abusive, inflammatory or offensive comments that target personal attributes of the applicants or the future users of a potential development are always irrelevant to the planning decisions made by Council, which is charged with making their decisions based on sound planning concepts. For the purposes of this report Administration intends to establish an equivalent control for written submissions that include abusive language. However, with written submissions, there is added complexity in that the circulation or publication of such comments in the Council Agenda could bring legal and reputational consequences to The City.

In order to develop a protocol for the management of abusive written submissions, Administration undertook a review of best practices of other jurisdictions and the investigation of the legal implications for the treatment of such submissions. A summary of the best practices review is contained in Attachment 1. All jurisdictions contacted provided some control of abusive submissions and all jurisdictions to varying degree of formality, had a method for “disposal” where the material submitted was deemed abusive or otherwise inappropriate. The disposal of such submissions was most often exercised by Administrative discretion acting on behalf of elected officials. In debate on the Motion Arising that gave rise to this report, Council asked for some analysis of relevant law to guide how abusive submissions might be handled. Legal considerations in the exclusion of abusive materials are set out in Attachment 2.

Given the required balance between the legislated obligation to entertain comments from the public and having Administration act as a censor, it is recommended that Administration err on the side of inclusion in creating a record of public submissions. Therefore, only written submissions that clearly cross the line into the realm of defamation, discrimination or hate speech should be disposed of by Administration and not included on the record. Given past experience, written submissions that fall into this category will be exceedingly rare.

Through the investigation of other jurisdictions’ best practices and as a result of a review of legal implications, Administration proposes the following for consideration in the management of abusive submissions. It is recommended that this proposed process be supported by clear criteria for acceptable public submissions by:

- strengthening the language included in the advertisement that requests public submissions so that it is clear that abusive or offensive submissions will not be accepted; and
- asking that Council direct Administration to include strong and clear language in the Procedure Bylaw as to what is meant by an “abusive” submission and any other provisions that will support the business protocol approved by Council pursuant to this report.

Proposed Business Protocol – Filing Submissions that are Defamatory, Discriminatory or that would Constitute Hate Speech

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Submissions that Create a Legal Concern

Upon receipt of a public submission that can be categorized as defamatory, discriminatory or constituting hate speech, the City Clerk's Office will, as a first step, consult with the Law Department and make an initial determination as to whether the submission should be excluded from the council agenda package and filed.

The City Clerk, or its designate, will contact the Chair and advise of the name of the individual whose item was excluded from the Council agenda. The content of the submission will not be shared but the knowledge of the name of the individual may be valuable should this person attend the public hearing to verbally address Council or request a written submission be added to the corporate record. This option leaves the decision making on the tight schedule with Administration but best alerts the Chair to be prepared with an explanation if required should the submitter appear to make a verbal submission raising the concern that their submission was not included in the Council agenda.

Submissions that are Offensive but not of Legal Concern

Administration's intention is that written submissions will rarely be excluded because a high threshold must be met in making the decision to exclude. The result of such a high threshold may be that objectionable submissions still appear on the Council record. In those instances where a submission did not meet the legal test for exclusion but is still deemed objectionable by Council, Council will have the option to file a particular submission itself. Such an action by Council would send a clear message that abusive language will not be tolerated, especially where the comments are about proposed "users" not "uses". A filing by Council could also serve to underscore the requirement for appropriate and respectful discourse within the Council Chamber.

Stakeholder Engagement, Research and Communication

City Clerk's conducted a policy review of the City of Edmonton, Red Deer and Hamilton (see attachment 1).

Strategic Alignment

The evaluation of public submission protocols aligns with Council's priority of a well-run city: "Calgary's government is open, responsive, accountable and transparent, delivering excellent services at a fair price. We work with our government partners to ensure we have the tools we need" (*ActionPlan* 2015-2018).

Social, Environmental, Economic (External)

None

Financial Capacity

Current and Future Operating Budget:

None

Current and Future Capital Budget:

None

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Risk Assessment

In striking a balance between the public's right to comment on public hearing items and maintaining a high threshold for exclusion of submissions to discriminatory, defamatory of expression of hatred, there is little risk of a successful legal challenge to Council processes and decisions. By providing Council the opportunity to dispose of submissions that are offensive but not legally problematic, Council can reinforce the requirement for appropriate and respectful submissions and debate that are befitting the Council Chamber, thus protecting its reputation as a dignified and democratic space.

REASON(S) FOR RECOMMENDATION(S):

This recommendation best manages the City of Calgary and Council members' obligations to provide a fair and transparent public submission process while considering the legal implications of those actions. Amending the Procedure Bylaw will provide fair notice of the expectations of the criteria expected in public submissions.

ATTACHMENTS

1. Legislative Review of Public Submissions Procedures
2. Legal Considerations