

Legal Considerations

1. Background

The Procedure Bylaw gives the City Clerk the discretion to file or dispose of “abusive” submissions from the public thus excluding them from the Council Agenda and the public record. The term “abusive” unfortunately has no specific legal meaning and is deeply subjective. The analysis below discusses the right of freedom of expression enjoyed by every Canadian citizen, some legal limits on that right, and assesses the risks of excluding or including submissions that may fall somewhere along the spectrum of legally prohibited expression to merely offensive expression.

While the public has the right to provide oral or written comment on matters that are the subject of a statutorily mandated public hearing, there is no legal obligation of the City of Calgary, or City Council, to publish abusive materials as part of the public record. The exclusion of abusive materials from the record will not invalidate Council’s processes and in some cases will be perfectly justifiable. The key is to find the correct balance between the public’s right to freely express themselves on an issue or matter, but in a way that respects and furthers the work of Council to make land use decisions based on sound and relevant planning principles.

The right to free expression is deeply contextual and must be assessed within the forum the expression is taking place. In this case, the “forum” is the Council Chamber and the concept of “relevance” to the planning process, can create a natural frame for what expression is acceptable and what may be excluded.

2. Freedom of Expression

Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (the “Charter”) forms part of Canada’s Constitution and guarantees to citizens certain rights and freedoms by ensuring that government entities cannot arbitrarily or capriciously limit or interfere with them. For example, an individual’s right to freedom of expression is considered a “fundamental freedom”. This freedom is not absolute, but can only be limited by government action if certain legal tests are met. The legal test for a reasonable limit on guaranteed rights and freedoms is that the limit can be “demonstrably justified in a free and democratic society.” For example, an individual’s right to freedom of

Legal Considerations

expression does not include the right to promote racism, discrimination or make threats of violence.

It is helpful to view the notion of “expression” as a “spectrum” as different types of expression or speech will attract different justifiable limits. For example, a municipality can control where billboards can be placed which is recognized as a reasonable limit on commercial speech. Political speech, including someone demonstrating peaceably on public lands, would enjoy greater Charter protection. Using the spectrum analogy, political and commercial speech would be toward one end and would receive greater protection whereas discriminatory and defamatory speech would be toward the other end and would receive less protection. At the far end, would be “hate speech”, which is criminalized in Canada.

3. Legal Limits on Freedom of Expression

Hate Speech

The Criminal Code of Canada defines hate speech as expression that incites hatred or advocates or promotes genocide against an identifiable group. Hate speech is not protected by the right to freedom of expression, is prohibited, and is a crime under the Criminal Code of Canada. Filing or disposing of public submissions that constitute hate speech is recommended and would be justifiable as a reasonable limit on speech by a government entity such as the City of Calgary.

Human Rights Legislation

Alberta's Human Rights Act has a broader application than the Charter and would apply to everyone in Alberta, including the City of Calgary. The Human Rights Act prohibits the publication, issuance, or display of any statement that promotes discrimination or an intention to discriminate against a person or class of persons, or is likely to expose a person or class of persons to hatred or contempt based on a number of grounds including race, religious belief, gender, physical or mental disability, among other identifiable characteristics. Filing public submissions that are clearly discriminatory especially based on personal characteristics or a person or class of person is recommended and would justifiable as a reasonable limit on speech by the City of Calgary.

Legal Considerations

Defamation

Finally, the tort of defamation has been defined by the courts to be the publication of a false statement intended to damage an individual's reputation. Clearly defamatory comments ought not be republished in the normal course as to do so may result in a claim for damages against the City of Calgary. A defense to such a claim for Council could be found in "qualified privilege" which the courts would weigh as "reasonably appropriate" for the "legitimate purposes" of the occasion. However, it is hard to conceptualize how defamatory speech would be relevant to public hearing matters and therefore it is recommended that potentially defamatory submission could also be reasonably filed.

4. Offensive Submissions and the Right of Council to Control its Own Processes

While is no legal reason to censor offensive language which falls short of the test for hate speech or discriminatory or defamatory speech, there are strong public policy reasons, coupled with the nature of a public hearing forum, that provides the foundation for a nuanced approach to dealing with other forms of abusive or offensive expression. Essentially, even where Administration has not excluded the submission for legal reasons, Council may still wish to exclude and file certain submissions.

Municipal councils in Alberta have the statutory right to establish procedures for public hearings (section 230 of the MGA). Part of controlling the procedure necessarily allows a Council to ensure that all submissions are consistent with the nature of a public hearing (to debate the merits of a proposed change to the current planning regulation, in this case) and to ensure the efficacy and fairness of the process.

Submissions should be respectful and relevant to the planning issues that are the subject of the debate and decision making. A fundamental principle of planning law is that Council should seek to regulate the use of land and developments, not the individuals who will use the land, especially based on characteristics such as "race, national or ethnic origin, colour, religion, sex, age or mental or physical ability".

Thus in cases where a submission includes comments that are not legally prohibited, but are nevertheless offensive in nature, Council may itself wish to debate and file certain submissions on the record. Based on the concept of

Legal Considerations

relevance as well as the reasonable objective of preserving the dignity of Council Chambers and proceedings, the exclusion of abusive written submissions should present a low legal and reputational risk to the City of Calgary or City Council, should Council wish to file offensive submissions in its discretion.

CONFIDENTIAL