

REPORT

Council

Meeting Date: June 19, 2023

FROM: Municipal Enforcement Services Department

DATE: June 6, 2023

SUBJECT: Display and Distribution of Objectionable Images

LOCATION: Town-wide

WARD: Town-wide

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RECOMMENDATION:

1. That Staff be directed to monitor and update Council on Bill 80, the Viewers Discretion Act, once it has been resolved by the province.
2. That Staff develop a priority intergovernmental request document for use by Council to advocate for provincial regulation of the display and distribution of objectionable images.

KEY FACTS:

The following are key points for consideration with respect to this report:

- Council requested a report to assess options to regulate signs in public places and the distribution of print materials to residences that contain extremely graphic images
- Any restriction on signs will engage Charter rights, including consideration of reasonable limits on freedom of expression

BACKGROUND:

Citizens have expressed concerns to councillors about the display of advocacy messaging with graphic imagery located in various public places and distributed through flyer delivery to residences.

On August 7, 2018, Town Council adopted a resolution as follows:

THEREFORE, BE IT RESOLVED that Council direct the Director of Municipal Enforcement, in consultation with the Town Solicitor, to assess options to:

- a. regulate the display of banners/signs in public places as well as the distribution of print materials to private residences that contain extremely graphic images intended to shock, alarm, or cause dismay, including the potential for the prohibiting of the public display and distribution of such print materials for the purposes of addressing the potential of such displays to cause harm to members of the public, especially children; and
- b. report back to Council in 2019.

The purpose of this report is to provide Council with information on the potential options for regulating graphic signs.

COMMENT/OPTIONS:

Freedom of Expression

Any restriction on the display, form or content of an advocacy sign or advertisement (including flyers) would generally constitute a *prima facie* infringement of the constitutional right to freedom of expression. However, such rights are subject to reasonable limits.

This report has been prepared in consultation with the town's Legal Department. A separate confidential report from the Legal Department also appears elsewhere on the agenda.

Criminal Code

Halton Region Police Services has previously confirmed that unless it can be shown that certain "objectionable" images being portrayed amount to undue exploitation of sex and one or more of crime, horror, cruelty or violence, graphic signs cannot be deemed to amount to obscenity under the Criminal Code.

Provincial Legislation

On March 8, 2021, a private member's bill was introduced in the Legislature, which provides that no one shall send a graphic image of a fetus by mail or otherwise distribute such an image unless the image is contained in an opaque envelope, the exterior of the envelope includes a description of the contents, and the exterior of the envelope clearly identifies the sender. The proposed penalty for violating this prohibition is a fine of \$100 per image. It is unclear who would be responsible for enforcement. Although the original iteration of the Bill did not move beyond First Reading, it was reintroduced on March 20, 2023 and has moved through First Reading again, but there is no indication if it will move beyond that.

Flyer delivery

Several Canadian municipalities prohibit delivery of flyers at or on a residential property if a sign states that the owner does not wish to receive flyers. For example, the Calgary Community Standards by-law prohibits flyers delivered to private homes

where a homeowner has posted notice clearly visible at the entrance. The stated purpose of this regulation is to limit the volume of flyers blowing loose and creating public litter, support privacy rights of homeowners to limit the purpose for which members of the public can enter their property, and support rights of parents to control their children's access to materials. The Calgary Community Standards by-law is akin to a property standards by-law in Ontario. While the town's property standards by-law does not limit flyer delivery, it does regulate debris on properties, such flyers, and a homeowner can be required to ensure debris does not accumulate and blow onto adjacent properties.

Oakville's Licensing By-law previously regulated distributors of "handbills," which was defined to include "*flyers or any advertising material.*" However, handbill distributors were removed from the Licensing By-law in 2015 primarily because small business owners raised concerns about not being able to comply with the requirement that handbills be placed in mail slots or like receptacles due to the virtual elimination of private mail slots. Staff were also concerned that continuing to license such distributors would foster public expectation that the Town could regulate the content of flyers.

Display in Public Places

Demonstrations or protests on public property are protected by freedom of peaceful assembly as well as freedom of expression rights guaranteed by the Canadian Charter of Rights and Freedoms.

There have been some instances where courts have granted injunctions to restrain protest activities at certain defined public locations, such as an airport or in the vicinity of clinics or doctors' office, where there are concerns regarding the safety and security of visitors and employees, as well as physiological, psychological and privacy interests.

On October 23, 2017, the provincial government passed the *Safe Access to Abortion Services Act, 2017*, which came into force on February 1, 2018. The Act prohibits informing a person, or performing an act of disapproval, concerning issues related to abortion services by any means, including oral, written or "graphic" means in certain access zones for clinics/facilities providing abortion services.

In addition, the courts have frequently accepted that municipal advertising policy requiring adherence to the Canadian Code of Advertising Standards (CCAS) meets the necessary requirements for determining whether an advertisement should be prohibited based on its content. The CCAS has generally been held to provide a clear set of standards and ensures that it is not unduly vague, uncertain, or open to the exercise of arbitrary discretion in its application and enforcement.

Options

1. Adherence to CCAS

Town policies and procedures, such as the Advertising Sales Procedure, already incorporates compliance with the CCAS, which includes among other things, “unacceptable depictions and portrayals”. This would apply to advertising signs on public transit or in various town facilities, such as recreation centres or arenas.

While it may be possible to require compliance with the CCAS as a condition of being a licensed flyer distributor, if Council opted to licence flyer distributors, this would be a very onerous regulation to enforce given the potential broad scope of the CCAS¹. In addition, enforcement of such a regulation would be extremely difficult since officers would be required to locate the person responsible for the flyer delivery. Often flyers are left at a home, with the deliverer unseen and many times untraceable. As an alternative, the Town could refer such public complaints to Advertising Standards Canada, but there seems to be no enforcement of their decisions.

2. Sign By-law

The town’s Sign by-law regulates signs on private property and public property, including prohibiting certain signs, including “any signs on overpasses” or signs that create a traffic hazard.

Following stakeholder engagement and research, the City of Calgary passed a by-law to restrict ‘advocacy’ messaging by external interest groups located on public property within the immediate vicinity of schools during days in which schools are in session. Specifically, the by-law prohibits the placement of signs within playground and school zones and restricts advocacy messaging on public property within 150 metres of a school (if larger than 3.5” by 5” in size). Advocacy messaging is defined in the by-law as “messaging that publicly expresses an opinion on an issue or cause.” The by-law restrictions do not impose a *ban* on advocacy messaging, but rather *restrict* the size of the sign within a 150-metre distance from the school, thereby mitigating the issue of unwanted messaging. The by-law carries a fine of \$1,000 for any person found to be displaying or carrying a sign with advocacy messaging:

- Within 150 metres of the school boundary
- Larger than 3.5” by 5”
- During school days

¹ “Accuracy and clarity; disguised advertising techniques; price claims; bait and switch; guarantees; comparative advertising; testimonials; professional or scientific claims; imitation; safety; superstition and fears; advertising to children; advertising to minors.”

Town Council could adopt a similar approach as Calgary through stakeholder and public consultation regarding potential amendments to the town's Sign by-law to address advocacy signs on public property. That said, enforcement of such a regulation would be problematic. Town enforcement officers do not have the authority to demand identification from the public, and as such, even if an officer observed a violation, obtaining information to issue a charge is very unlikely. In addition, enforcing such a regulation would put enforcement staff in the position of confronting protesters, often in a large group, which would create a safety concern and may escalate tempers and protester action.

CONCLUSION

After reviewing options available to address concerns of objectionable images raised by residents, staff do not believe options available to the municipality in this circumstance would achieve intended results. The Charter allows for Freedom of Expression and any limitation would need to be reasonable. In addition, the lack of authority for town officers to obtain identification limits the town's ability to enforce any new regulation contemplated. Finally, officers entering a crowded protest to gather information and issue charges may further incite protesters and cause additional safety concerns.

On the other hand, while using the CCAS as an arbiter is possible, there does not appear to be any enforcement of their decisions.

In reviewing this matter, regulation, and enforcement of limitations on Freedom of Expression may be best dealt with at the provincial level. Staff would recommend that Council request provincial intervention, regulation, and enforcement.

CONSIDERATIONS:

(A) PUBLIC

Should Council wish to pursue potential amendments to the town's Sign by-law, a comprehensive public consultation process would need to be undertaken.

(B) FINANCIAL

There are no financial impacts of this report, but should Council wish further public consultation and future amendments those amendments may result in additional operational costs.

(C) IMPACT ON OTHER DEPARTMENTS & USERS

This report has been prepared in consultation with the Legal Department.

(D) CORPORATE STRATEGIC GOALS

This report addresses the corporate strategic goal(s) to:

- Be the most liveable town in Canada

(E) CLIMATE CHANGE/ACTION

N/A

APPENDICES:

Appendix A: Calgary by-law to regulate temporary signs on highways

Prepared by:

Nadia Chandra, Assistant Town Solicitor

Submitted by:

Doug Carr, Town Solicitor

Prepared and submitted by:

Jim Barry, Director, Municipal Enforcement