

Report to/Rapport au :

Community and Protective Services Committee
Comité des services communautaires et de protection

and Council / et au Conseil

June 21, 2012
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Submitted by/Soumis par :

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CITY WIDE / À L'ÉCHELLE DE LA VILLE

Ref N°: ACS2012-CMR-LEG-0008

SUBJECT: SMOKING OF WATER-PIPES AND NON-TOBACCO PRODUCTS ON MUNICIPAL PROPERTY

OBJET : FUMER DES PIPES À EAU ET DES PRODUITS SANS TABAC SUR LES PROPRIÉTÉS MUNICIPALES

REPORT RECOMMENDATION

That Community Protective Services Committee recommend that Council enact the amendments to the Parks and Facilities By-law, attached as Document 1, to prohibit the smoking of water-pipes and non-tobacco products on outdoor municipal property including all City parks, beaches and facilities.

RECOMMANDATION DU RAPPORT

Que le Comité des services communautaires et de protection recommande au Conseil la mesure suivante adopter les modifications apportées au Règlement sur les parcs et les installations (voir Document 1 ci-joint) visant à interdire de fumer les pipes à eau et les produits sans tabac sur les propriétés municipales extérieures, incluant les parcs, les plages et les installations de la Ville.

BACKGROUND

On February 22, 2012, Council directed staff to review the Parks and Facilities By-Law and to report back on the appropriate methods to prohibit lighted water-pipes and similar smoking implements at all City parks, beaches and facilities, including

administrative buildings. The City of Ottawa currently prohibits smoking tobacco on all outdoor municipal property through the Parks and Facilities By-law amendments that came into force on April 2nd, 2012. For purposes of the by-law, outdoor municipal property means the outdoor area of all property owned or leased by the City of Ottawa but does not include property leased to a third party, long term care facilities, and properties managed by certain local boards as defined under the *Municipal Act, 2001*. This By-law prohibition currently applies regardless of the type of tobacco smoking equipment that an individual uses but does not explicitly extend to the smoking of non-tobacco products.

DISCUSSION

Smoking of non-tobacco substances using water-pipes has become increasingly prevalent in the City of Ottawa and other municipalities in Ontario. Smoking of non-tobacco substances produces smoke and odours which can irritate the eyes, nose, and throats of members of the public. These can sometimes be noxious and adversely affect the public's enjoyment of municipal parks, beaches and facilities.

Challenges that the City of Ottawa has encountered from a public health and regulatory standpoint in respect of addressing this issue were first identified in a Report submitted by the Medical Officer of Health entitled "Enforcement Strategies with Ottawa's Water-Pipe Smoking Establishments" that was received by the Board of Health for information on June 20, 2011 ([ACS2011-OPH-HPDP-0002](#)). These issues were subsequently discussed in the Report entitled "Expanding Smoke-Free Spaces- Let's Clear the Air: A Renewed Strategy for a Smoke-Free Ottawa" that was considered by Council on February 22, 2012 ([ACS2012-COS-EPS-0012](#)). In short, these concerns included the effects of water-pipe smoke on air quality and the process for enforcement whereby City of Ottawa Tobacco Enforcement Officers must conduct joint inspections with Ministry of Finance Inspectors to ascertain whether the products smoked at water-pipe establishments do not contain tobacco and consequently are not regulated under the *Smoke Free Ontario Act*.

The City's Smoke Free By-laws are currently focused on tobacco use. The Parks and Facilities By-law prohibits smoking in City parks and facilities and specifically defines "smoke" or "smoking" as the carrying of a lighted cigar, cigarette, pipe, or any other lighted smoking equipment." Accordingly, should Council seek to ensure that the prohibition on smoking on outdoor municipal property includes the smoking of non-tobacco products, it is recommended that the definition of "smoke" or "smoking" in the Parks and Facility By-law be amended as outlined in Document 1.

Council has the authority to approve the recommended amendments to the Parks and Facility By-law under Sections 128 and 129 of the *Municipal Act, 2001*. These statutory provisions allow the City to enact prohibitions in relation public nuisances and odours respectively. Council's authority is also based on its right as property owner or lease holder to restrict activity on its own property. Further details these three sources of legal authority are outlined below.

Public Nuisances – Section 128 of the *Municipal Act, 2001*

A public nuisance is typically an activity that constitutes an unreasonable interference with the public interest in relation to health, safety, morality, comfort, or convenience. Section 128 of the *Municipal Act, 2001*, provides that municipalities may prohibit or regulate nuisances and those which Council deems are or could become a public nuisance. Subsection 128(2) provides that the opinion of Council with respect to what constitutes a nuisance is not subject to review by a Court, provided that the opinion is arrived at in good faith. A decision of council is presumed to be in good faith and the onus to establish otherwise falls upon the party contesting the decision.

Under the statutory authority of Section 128, municipalities across Ontario have designated a variety of acts as public nuisances, including:

- Public urination and defecation;
- Knocking over structures such as mailboxes, newspaper boxes and benches;
- Holding, attending or permitting boisterous parties;
- Loitering;
- Littering; and
- Carrying open liquor.

Similar to those activities described above, Council has the authority to regulate or prohibit the smoking of non-tobacco products due the potential adverse effect on members of the public who are exposed to the smoke and odours of non-tobacco smoke.

Authority to Regulate Odours – Section 129 of the *Municipal Act, 2001*

Under the authority of Section 129 of the *Municipal Act, 2001*, Council can prohibit and regulate with respect to noise, vibration, odour, dust and outdoor illumination, including indoor lighting that can be seen outdoors. Accordingly, the City could prohibit the smoking of non-tobacco products due to the odours that are produced when an individual smokes a non-tobacco substance as it can be an irritant to those members of the public in close proximity, as well as those people who are particularly sensitive to smoke in general.

Authority as Property Owner/Lease Holder

Finally, Council also has the authority to amend the Parks and Facilities By-Law to regulate or prohibit the smoking of non-tobacco products on outdoor municipal property by virtue its right as property owner or lease holder to regulate or prohibit types of activities and conduct on its property. This legal authority arises from both the Common Law and the *Occupiers' Liability Act*.

Accordingly, it is recommended that the Parks and Facilities By-law be amended to prohibit the smoking of water-pipes and non-tobacco products on outdoor municipal property including all City parks, beaches and facilities. as detailed in Document 1.

RURAL IMPLICATIONS

There are no specific rural implications associated with the recommendation.

CONSULTATION

As Ottawa Public Health completed a public consultation process in conjunction with the development of the report entitled “Expanding Smoke-Free Spaces- Let’s Clear the Air: A Renewed Strategy for a Smoke-Free Ottawa” that was considered by Council on February 22, 2012 (ACS2012-COS-EPS-0012) and Community and Protective Services Committee may receive public delegations, no further public consultation was undertaken in the preparation of this report.

LEGAL IMPLICATIONS

There are no legal impediments to the implementation of recommendation in this report. Pursuant to Sections 128 and 129 of the *Municipal Act, 2001*, the City of Ottawa has the statutory discretion to adopt a by-law that prohibits or regulates public nuisances and odours. Furthermore, the municipality as a property owner can regulate and prohibit activities and conduct on its property.

There is a possibility that there may be a legal challenge to this by-law either directly or in the course of a prosecution under the by-law. Two possible bases for these challenges have been identified at this time. The first would arise from a member of the community that claims the use of water-pipes for cultural reasons and the second from an individual who has been granted authorization to possess marijuana for medicinal purposes pursuant to the *Federal Marihuana Medical Access Regulations* that have been promulgated under the *Controlled Drugs and Substances Act*. Currently, Legal Services is not aware of a successful challenge to a smoking by-law prohibition on either of these grounds. However, there is one decision from the Ontario Human Rights Tribunal that upheld a provincial prohibition against smoking medicinal marihuana on patios licensed under the provincial *Liquor Licence Act*, a summary of this decision is included in Document 2 of this report.

RISK MANAGEMENT IMPLICATIONS

There are no risk management implications associated with this report.

FINANCIAL IMPLICATIONS

There are no financial implications associated with this report

ACCESSIBILITY IMPACTS

There are no accessibility impacts associated with this report.

ENVIRONMENTAL IMPLICATIONS

There are no environmental implications associated with the recommendations.

TECHNOLOGY IMPLICATIONS

There are no technological implications associated with the recommendations.

TERM OF COUNCIL PRIORITIES

The recommendation, if approved, serve to promote *Healthy and Caring Communities* (HC1) as one of Council's priorities – specifically, to “help all residents enjoy a high quality of life and contribute to community well-being through healthy, safe, secure, accessible and inclusive places”.

SUPPORTING DOCUMENTATION

DOCUMENT 1 – Proposed Amending by-law

DOCUMENT 2 – Summary of Ontario Human Rights Tribunal Decision

DISPOSITION

Legal Services, in consultation with By-law & Regulatory Services will develop and process to Council for enactment the amending by-law, should the recommendation be approved by Council.

BY-LAW NO. 2012-

A by-law of the City of Ottawa to amend By-law No. 2004-276 to prohibit the smoking of non-tobacco products in city parks and around facilities.

The Council of the City of Ottawa enacts as follows:

1. The definition of “smoke” or “smoking” in Section 1 of By-law No. 2004-276, entitled A by-law of the city of Ottawa to regulate and to promote responsible enjoyment and use of parks and facilities”, as amended is repealed and the following definition is substituted therefor:

“smoke” or “smoking” includes the carrying of a lighted cigar, cigarette, pipe, or any other lighted smoking equipment used to smoke any tobacco or non-tobacco substance;

ENACTED AND PASSED this day of , 2012.

CITYCLERK

MAYOR

Ivancicevic v. Ontario (Consumer Services), 2011 HRTO 1714

Background:

The Applicant in this matter alleged that provincial regulations made under the Liquor Licence Act which prohibited him from smoking or possessing marijuana on premises licensed to sell liquor, including their outdoor patios, discriminated against him on the basis of disability given that he was authorized by the federal government to possess and smoke marijuana for medicinal purposes.

Decision:

The Tribunal found that the provincial regulations were *prima facie* discriminatory on the basis that they effectively barred the Applicant from premises he would otherwise be entitled to attend but for his need to treat his serious health concerns. However, relying upon extensive expert evidence concerning the potential for “sidestream inhalation” of smoke containing THC, the active ingredient in marijuana, the Tribunal found that the Province’s defence that the regulations were reasonably necessary to ensure public safety were made out. In particular, the Tribunal noted that there existed too many variables to monitor the potential for harm to others, and as a result no individualised assessment was possible in the circumstances which could be relied upon to create an exemption from the regulation for medicinal use.

As a result, the Application was dismissed with respect to the issue of permitting the smoking of marijuana on licensed patios. The Applicant was successful in his challenge with respect to the issue of possessing marijuana on licensed premises, on the basis that possession alone constituted no foreseeable harm to others, although no damages were awarded with respect to this claim.