



Drafting by-laws – part II

by Glen R. Peters, Fillmore Riley

In the winter 2001/2002 issue of *The Municipal Leader*, I wrote an article entitled 'Drafting By-laws,' that provided some practical tips on drafting municipal by-laws. That article generated a significant level of interest, as I've received a number of calls commenting on it and asking me to expand upon some of the topics raised. As a result of these inquiries (and a few recent legislative changes), I thought it would be useful to publish a follow-up article expanding on two of those topics – resources for drafting by-laws and the recitation of statutory authority for the by-law.

Resources for by-laws

In discussions with municipal officials, it is apparent that one of the most difficult tasks faced by some municipal administrators is finding a template or precedent document from which to create a by-law. Particularly in small municipalities that do not have access to in-house counsel, nor funds to consistently retain an outside counsel for drafting, the CAO is often tasked with creating a working draft for council to review. In this situation, the following are examples

of some of the resources that are available as a starting point.

A. AMM generic by-laws.

Over the past four-to-five years, the Association of Manitoba Municipalities (AMM) has identified a number of areas with a common need for standardized resource materials and has taken steps to create standard form or generic by-laws for consideration by member municipalities. The writer has worked for and with AMM on a number of these projects. Examples of some of these generic by-laws that have been completed to date include *Animal Control*, *Building*, *Fire Prevention and Emergency Services*, and *Unightly Property*. In developing these generic by-laws, input was generally sought from a variety of sources, including the Province of Manitoba municipal affairs branch, by-law enforcement officers, selected municipalities and other interested parties. For example, the *Animal Control* by-law included extensive drafting and input from the Veterinary Services branch of the Province of Manitoba. The *Building* by-law and the *Fire Prevention and Emergency Services* by-laws involved considerable input

from the Office of the Fire Commissioner. These generic by-laws can be found on the AMM web site at www.amm.mb.ca under the links 'Resources' and 'Sample by-laws.' While local issues will obviously warrant consideration for revisions by a municipality prior to adoption, these generic by-laws do provide an excellent starting point for consideration.

B. AMM web site generally

In addition to the generic by-laws developed by or through AMM, the AMM web site also contains sample by-laws from different municipalities in a number of different areas. Generally, there is a good cross-section of material that can be used as a starting reference point and municipalities are encouraged to send additional samples in to update or supplement the directory from time to time. As with the generic by-laws, users must always be cautioned to consider local issues as well as the date and historical context of the sample by-law before implementation.

C. City web sites

Web sites for both the City of Winnipeg and City of Brandon include on-line access to at least certain by-laws from those municipalities. While the issues facing larger urban centres may vary from those of less populated municipal districts, some of the by-laws may meet a common purpose, and can provide a useful resource.

D. Out-of-province resources

All of the resources cited above come from within the Province of Manitoba. At times, it can also be useful to look at existing by-laws from municipalities in other provinces, particularly in an emerging area that Manitoba municipalities may be in need of addressing for the first time. Whenever reviewing a by-law from a jurisdiction outside of Manitoba, the context of the relevant provincial legislation must always be considered. Municipalities derive their authority through enabling provincial legislation and to the extent that it varies from province to province, this can impact upon the scope and enforceability of a by-law.

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While existing by-laws are a useful resource, it is important to consider the age of the by-law and the context within which it was passed before adopting any of its provisions. Like most provincial jurisdictions, the municipal legislation in Manitoba has changed considerably over the years. Both *The Municipal Act* of Manitoba and the new *City of Winnipeg Charter* have adopted a much less prescriptive approach to municipal powers. While the powers have been greatly expanded, they are now stated in broad, general terms rather than the specific listing of powers that existed under predecessor legislation. In the case of *The Municipal Act*, these changes occurred in 1997. The new *City of Winnipeg Charter* replaced the former *City of Winnipeg Act* effective from January 1, 2003.

In addition to the changes to the general scheme of municipal legislation, there are always new statutes that may impact upon and/or effect the enforceability of certain provisions of by-laws. One example is *The Freedom of Information and Privacy and Protection Act*, which was recently enacted in Manitoba. I have encountered two or three situations recently where provisions of municipal by-laws may well violate the provisions of this new legislation.

The evolution of municipal legislation also has an impact on the second main point that I will discuss below, that being the desirability of reciting of powers and/or statutory authority in the preamble to a by-law.

By-law recitals

Historically, most by-law draftspersons have included a preamble, or a series of recitals at the front end of a by-law that sets out the specific statutory authority for the enactment of the by-law. Indeed, in my previous article, I indicated my view at that time that it was generally a good idea to include statutory authority as part of a recital if, for no other reason, than to serve as a check and balance. This is part of the diligence in creating a by-law to ensure that the appropriate statutory authority exists. While I still believe that this is a useful part of diligence in by-law enactment, a strong argument can be made that practical considerations (including the new legislative scheme) may render it unnecessary, or even inappropriate, to include detailed recitals of statutory authority.

I'm told that the City of Winnipeg Legal Department, operating under the new *City of Winnipeg Charter*, as a policy, does not include such statutory authority in recitals to City of Winnipeg by-laws. I understand their view to be that such recitals are unnecessary

(particularly in light of the less prescriptive statutory scheme) and that they may, in fact, cause confusion over time.

Personally, I do not believe that there is a right or wrong approach here. Whichever method one chooses, the most important factors for the municipal draftsperson to consider are ensuring that the relevant statutory authority is identified as part of diligence, and ensuring that any statutory recitals in an old by-law used as a precedent template are reviewed and updated where appropriate. Failure to address these two

points can lead to uncertainty in interpretation and potential enforcement issues for the by-law.

I hope that the expanded analysis and commentary on resources and by-law recitals set out above will be of interest to readers and useful to those who are tasked with creating municipal by-laws. Thank you to those who took the time to call and raise these questions. As with any article that I write, I invite your thoughts and comments at any time. ●

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