



The Corporation of the Town of LaSalle

Date	May 14, 2019	Report No:	AD-03-19
Directed To:	Mayor and members of Council	Attachments:	
Department:	Administration	Policy References:	
Prepared By:	D. Dadalt – Town Solicitor		
Subject:	Validity of a Town By-law restricting e-cigarette advertising in public places		

RECOMMENDATION:

That Council not authorize the drafting and passing of a new By-law restricting e-cigarette advertising in public places.

REPORT:

Background of Request

For ease of reference, in this report the term “e-cigarettes” shall include e-cigarettes, vapour products and any other related items that coincide with the use of e-cigarettes.

At the Town of LaSalle’s Council Meeting on March 26, 2019, a presentation was made by Petar Bratic and Eric Nadalin regarding the prevalence of e-cigarette advertising throughout the Town. Mr. Bratic and Mr. Nadalin provided compelling statistics showing the rise in e-cigarette usage, as well as photographic evidence of the nature and widespread advertising of e-cigarettes in LaSalle. A request was made to pass a new Town By-law to limit or restrict advertising of e-cigarettes in the Town, using the powers afforded to a municipality under the *Municipal Act*, 2001 (the “*Municipal Act*”). This report will outline those sections below. However, there are two pieces of legislation that must be acknowledged before proceeding.

Existing Legislation

At the provincial level, the *Smoke-Free Ontario Act*, 2017 (the “*SFOA*”), as well as its corresponding regulation number 268/18, provides the rules outlining e-cigarette advertising. These pieces of provincial legislation provide the framework within which these products may be displayed or promoted. There are restrictions enumerated, and a list of exceptions as well (particularly in O. Reg. 268/18). In allowing these exceptions, the provincial legislation is explicitly permitting certain types of

advertising for e-cigarettes. Additionally, the Windsor-Essex County Health Unit appears to be the body responsible for enforcing the *SFOA* in the local area.

In many cases, the provincial legislation defers to federal legislation, specifically the *Tobacco and Vaping Products Act* (the “*TVPA*”). The federal legislation allows the Minister of Health to designate any person or class of persons to inspect or analyze potential contraventions of the *TVPA*. In terms of practice, Health Canada has been designated and taken on the inspection and enforcement role.

These pieces of legislation are highlighted here to show that there exists two authorities on the advertising of e-cigarettes, both of which supersede the municipality and therefore provide the framework within which the Town must act under.

Proposed By-law Authority

Mr. Bratic suggested in his presentation that the Town can pass a by-law deeming e-cigarette advertising a “public nuisance” under section 128 of the *Municipal Act*. Typically, the courts will weigh 4 factors to determine a claim of nuisance. Should a Town by-law under this section be challenged, it would be on the Town to show the 4 factors – locality, severity of harm, sensitivity and utility – on the whole merit the restrictions on e-cigarette advertising.

Mr. Nadalin suggested in his presentation that there might be success in passing a by-law using a section of the *Municipal Act*. In LaSalle’s situation, this would be section 11(2)(6), as lower-tier and upper-tier municipalities have the right to pass by-laws which deal with “respecting the health, safety and well-being of persons”. These powers are expanded in section 115 of the *Municipal Act*, but the focus seems to be more on prohibiting smoking in certain places as opposed to prohibiting advertising. It was suggested that this section was effective in the past at banning smoking. In terms of the Town’s no-smoking by-law, it appears that was created in-line with the enactment of O. Reg. 206/ 14 under the *SFOA*, as opposed to countering the overarching legislation.

Concerns

A significant concern with passing a by-law from either of the above noted sections of the *Municipal Act* is receiving a Charter challenge by a store owner. These are lengthy and expensive processes to deal with, even if in-house council quarterbacks the procedure. Due to the fact that the newly proposed by-law runs in opposition to the superseding legislation, rather than piggybacking off of it, it is the position of the Town Solicitor that a proposed by-law could be found *ultra vires* – beyond the scope of – the Town’s authority, opening the door to Charter challenges. There is case law where by-laws that are valid in a vacuum are found to be invalid due to the potential to conflict with provincial or federal legislation. Accordingly, in the Town’s situation, our by-law could potentially be challenged and overturned for conflicts with provincial and/or federal legislation.

A secondary layer of this possibility for conflict exists due to the fact that Health Canada recently issued a Notice of Intent seeking input from interested parties to provide comments on regulatory measures to reduce the impact of vaping product advertising on youth and non-users of tobacco products under the

TVPA. The deadline for submissions was March 22, 2019. As of the date of this report, no conclusions or findings have been issued. However, the potential for changes and revisions at the federal level and possibly the provincial level following that makes attempting to draft a by-law in line with said legislation akin to hitting both a moving and somewhat unknown target. It is entirely possible that new regulations or revised legislation may be passed that addresses the issues raised by Mr. Bratic and Mr. Nadalin or, in the alternative, provide some enforceable measures that move the needle in the right direction. To that end, the Mayor has sent a letter to James Van Loon, Director General of the Tobacco Control Directorate, Controlled Substances and Cannabis Branch, with a copy of the said letter sent to the members of the Association of Municipalities of Ontario.


CONCLUSION:

As the legislation surrounding the advertising of e-cigarette products is already delineated at both the federal and provincial level, creating a municipal by-law which attempts to override the permissions granted by the overriding authority is inviting a challenge to said by-laws validity. Knowing that Health Canada is currently reviewing the concerns raised by Mr. Bratic and Mr. Nadalin, the Mayor writing the letter to the Director General as noted is in an attempt to effect change at the appropriate level of jurisdiction. At this time, it is Administration's position that passing a municipal by-law as suggested is not the appropriate course of action.

Respectfully submitted,



D. Dadalt – Town Solicitor

Reviewed by:							
CAO 	Finance	Council Services	Public Works	DSI	Culture & Rec	Fire	