

HALIFAX

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FOIPOP Review - [REDACTED]

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Date - By motion of Council Aug 31/21

Item No. 13.3

Halifax Regional Council

August 17, 2021

August 31, 2021

In Camera (In Private)

TO: Mayor Savage and Members of Halifax Regional Council

Original Signed by 

SUBMITTED BY:

Jacques Dubé, Chief Administrative Officer

DATE:

July 21, 2021

SUBJECT:

Restriction of Animal Acts for Entertainment

PRIVATE & CONFIDENTIAL

ORIGIN

On October 22, 2019 the following motion was PUT and PASSED by Halifax Regional Council:

THAT Halifax Regional Council requests a staff report on restricting all Animal Acts for Entertainment, including Bull Riding, on or in all HRM owned and maintained facilities and property. The restriction is not to prohibit the following:

- Displays or showing of animals in agricultural fairs, exhibitions or pet shows including horse or ox-pulls as traditionally practiced at county fairs and exhibitions within the municipality
- Horse races/dog races
- Performances where individuals ride horses or ponies
- Exhibition of animals for educational purposes

LEGISLATIVE AUTHORITY

Halifax Regional Municipality Charter, R.S.N.S., 2008, c. 39, clause 19(2)(f) "The Council or any committee appointed by the Council may meet in closed session to discuss matters relating to... (g) legal advice eligible for solicitor-client privilege.

Halifax Regional Municipality Charter, 2008, SNS, c.39, subsection 186(2) "A by-law must not be inconsistent with an enactment of the Province or of Canada."

Halifax Regional Municipality Charter, R.S.N.S., 2008, c. 39, 188 (1) The Council may make by-laws, for municipal purposes, respecting

- (a) the health, well being, safety and protection of persons;

RECOMMENDATION ON PAGE 2

Theatres and Amusements Act, R.S.N.S., c. 466, subsection 7(2)

(2) Notwithstanding this Act, the council of any city, town or municipality may from time to time make, amend or repeal by-laws regulating and licensing circuses or other itinerant amusement performances.

RECOMMENDATION

It is recommended that Regional Council maintain the current practice of not restricting animal acts for entertainment on or in HRM owned and maintained facilities and property and release this report to the public.

BACKGROUND

Animal acts for entertainment have been hosted in various HRM facilities and properties over the years and provide entertainment, recreation, cultural connection, and education. Activities have included circuses, fairs, rodeos, exhibitions, horse and dog racing, horse and pony riding, and educational exhibits. More recently, some trends have emerged using animal acts for the purposes of entertainment such as having animals in yoga classes.

The motion from October 22, 2019, seeks to restrict “all Animal Acts for Entertainment, including Bull Riding, on or in all HRM owned and maintained facilities and property. The restriction is not to prohibit the following:

- Displays or showing of animals in agricultural fairs, exhibitions or pet shows including horse or ox-pulls as traditionally practiced at county fairs and exhibitions within the municipality
- Horse races/dog races
- Performances where individuals ride horses or ponies
- Exhibition of animals for educational purposes”

This is assumed to mean that other than the bulleted list of activities in the motion, all other forms of entertainment that include animal acts would be prohibited.

HRM's by-laws “must not be inconsistent with an enactment of the Province or of Canada.” While the *Theatres and Amusement Act* grants Regional Council the power to make by-laws “regulating and licensing circuses or other itinerant amusement performances” under subsection 7(2), HRM must also comply with federal legislation such as the *Canadian Charter of Rights and Freedoms*. One of the rights granted by the *Charter of Rights* is the right to freedom of expression.

Parks and Recreation staff prepared a jurisdictional scan showing the varied approaches to animal acts across Canadian municipalities. This jurisdictional scan can be found in Attachment A to this report.

DISCUSSION

The authority for a municipality to enact a by-law is usually found in the municipality's statute, such as the *Halifax Regional Municipality Charter*, or legislation under a higher level of government that grants the municipality the authority. When creating by-laws, a municipality must ensure the regulation stays within its authority and does not stray into provincial or federal power. When considering whether a by-law is contrary to freedom of expression, the courts attempt to balance the right to freedom of expression with the municipality's interest in maintaining public safety. In striking this balance, the courts will consider whether the proposed restriction on freedom of expression:

- impairs the right as little as possible; and
- is rationally connected to the objective (public safety).

A by-law that either impairs freedom of expression more than is necessary or is not rationally connected to its objective is an unreasonable infringement on such freedom and will be struck down by the courts as unconstitutional.

Can the Municipality restrict animal acts for entertainment?

Subsection 7(2) of the *Theatres and Amusement Act* grants HRM the authority to make a by-law to regulate and license circuses or other itinerant amusement performances. A by-law to regulate and license animal acts for entertainment would likely be upheld by a court if the purpose of the by-law is to protect the public rather than for the general welfare of the animals. A by-law whose purpose is to protect the public must be based on evidence that there is an actual public safety risk associated with the use of animal acts for entertainment.

Xentel DM Inc. v. Windsor (City), (2004), O.J. 3656

The City of Windsor had its circus By-law, By-law 298-2002, successfully challenged in court. In 2002, the City of Windsor passed the By-law prohibiting the conducting, operating, taking part in, or carrying on of any entertainment whatsoever which involved the participation of exotic animals. In 2004, Justice Gates of the Ontario Court of Justice struck down the By-law for a number of reasons including: (1) the purpose of the By-law was not related to public safety but the welfare of animals (improper purpose), (2) the By-law's animal welfare purpose was a matter of public morality falling within the criminal law authority of the Government of Canada and not a municipality, and (3) circuses were protected forms of expressions under the *Canadian Charter of Rights and Freedoms*.

Improper Purpose/Bad Faith

The court struck down the By-law for being passed in bad faith. The City argued before the court the purpose of the By-law was to protect the public from exotic animal performances. However, an examination of the process leading up to the passing of the By-law showed the purpose of the By-law was not public safety but for the welfare of the performing animals. Before passing the By-law, the City did not examine the risk exotic animal performances posed to public safety. Rather, the Council considered the complaints about the general welfare of the animals from animal right groups and individuals. The court concluded Council's decision to pass the By-law was made in bad faith as the stated purpose of the By-law was to protect the public while the real purpose was to address the welfare of the animals.

Criminal Law Power

The court also struck down the By-law for being beyond the power of the municipality. An intention to legislate for the safety of the public was within the power of the Council. An intention to legislate with respect to the welfare of the animals was beyond the power of the Council. Justice Gates determined the By-law was primarily motivated by considerations of animal welfare, a matter of public morality, and any evidence of public safety was ignored by the Council. By attempting to regulate public morality, the Council exceeded its power as such matters fell within the criminal law power of the Government of Canada and beyond the power of a municipality.

Charter of Rights

The court also struck down the By-law as being contrary to freedom of expression under the *Canadian Charter of Rights and Freedoms*. Circus performances, including those performances featuring animals, are protected expressions. These "expressions" included the process by which animals and humans cooperated, and human mastery over animals. Any regulation or law that curtailed these performances restricted these expressions.

For the law to stand, the City of Windsor had to prove why the restriction was justified. The City argued the restriction was justified to protect the residents and visitors by prohibiting certain animal performances within its boundaries. The City had no evidence of any causal relationship between the ban of exotic animal performances in circuses and public safety. The City conceded there was no evidence of any harm suffered by a resident or visitor of Windsor by a circus animal.

During its discussion of the By-law, Justice Gates noted the incident of injury in a circus environment was insignificant when compared to reported dog bites to the general population. In North America in 1999 approximately 30,000,000 people attended circuses with no reported incidents of injury to any patrons whereas in the same year 4,700,000 people suffered a dog bite. Justice Gates also noted that the commercial insurance market had concluded that the risk of potential spectator injury was so low that it did not warrant a special insuring risk category to be charged to its circus operator clients. The circus industry as a whole enjoyed the same risk rating as the general commercial insurance market.

Banning exotic animals, without analysis of the potential risk to the public, did not satisfy restricting freedom of expression. There must be a connection between the By-law's ban of exotic animal performances and its objective of public safety. There was no such connection in the City of Windsor case.

Effect of City of Windsor Decision on Restricting Animal Acts for Entertainment in HRM

Any regulation of circuses or other itinerant amusement performances by the HRM must be based on public safety and not on the general welfare of the animals. If the intent of the regulation is to address the welfare of animals, such regulation enters into the realm of criminal law power which is a federal and not a municipal power.

The courts have determined that performances of animal acts are a form of freedom of expression protected by the *Canadian Charter of Rights and Freedoms*. Restricting animal acts for entertainment through by-law must be based on evidence that demonstrates the risk posed by the animal act to the public is such that the infringement on the freedom is warranted.

Can HRM restrict animal acts for entertainment on or in all HRM owned and maintained facilities and property?

HRM cannot restrict or refuse to rent HRM owned and maintained facilities and property to an act that uses animals for entertainment, based on animal welfare.

Justice Brown of the Ontario Superior Court considered this issue in *Xentel DM Inc. v. Newmarket (Town)*, (2009), O.J. 6145. In this case, a circus producer applied to the Town of Newmarket to stage two performances of the Shrine Circus at the Town's recreation complex. The Council denied the application on the basis of the animals listed in the application. Xentel challenged the decision of the Council in court. The Town provided no evidence to show a risk to the public from animal performances in circuses justifying the refusal. Justice Brown noted the City of Windsor decision and found that the Town violated the Applicant's right to freedom of expression and quashed the Council's refusal.

Effect of Newmarket Decision on HRM

The Newmarket and City of Windsor decisions would apply to the rental of any HRM owned and maintained facility or property by an act that uses animals for entertainment. If the facility or property is available for rent for some animal acts, then it must be available to all animal acts. As noted previously, the refusal must be based on a public safety issue that is based in fact and not based on a concern for the general welfare of the animals.

Conclusion

In the absence of any support of a valid public safety concern, a by-law to restrict animal acts for entertainment, including bull riding, on or in all HRM owned and maintained facilities and property is not recommended as it will likely be found to be: 1) unconstitutional as it infringes the right of freedom of expression more than is necessary and is not rationally connected to its objective; and, 2) if based on the welfare of animals, falls within the realm of criminal law power which is a federal power.

It is recommended that this report be released to the public to provide an explanation and educate the public on the legal limitations and reasons for Regional Council's decision should Regional Council approve the recommendation.

FINANCIAL IMPLICATIONS

There are no Financial Implications to this report.

RISK CONSIDERATION

There are no risks associated with this report.

COMMUNITY ENGAGEMENT

No community engagement was required.

ENVIRONMENTAL IMPLICATIONS

No environmental implications were identified.

ALTERNATIVE

No alternative is provided as an alternative to the recommendation would likely be unenforceable. Should Council direct otherwise then it is not recommended that this report be made public.

ATTACHMENT

Attachment A – Jurisdictional Review

If the report is released to the public, a copy can be obtained by contacting the Office of the Municipal Clerk at 902.490.4210, or Fax 902.490.4208.

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Attachment A – Jurisdictional Scan

All jurisdictions were scanned for any by-laws pertaining to animal control. Information is valid to January 2021.

By-Laws pertaining to animals with no specific mention of Animal Acts for Entertainment		
Charlottetown, Moncton, Fredericton, Saint John, Laval, Montreal, Toronto, Brandon, Saskatoon, Regina, Calgary, Edmonton, Victoria		
By-Laws or Policy banning specific Animal Acts for Entertainment		
St. John's	Corporate and Operational Policy Manual Policy 09-14-02	Will not issue an operating license to any promoter of a circus using exotic and/or wild animals. The exceptions following are permitted provided there is no cruelty to the animal: exhibitions or performances in which individuals ride horses or ponies, exhibitions involving dogs, displays or showing of animals in agricultural fairs, exhibitions or pet shows, horse or dog races, the use of animals in magic acts.
Winnipeg	Responsible Pet Ownership 92/2013 - previously Exotic Animal Bylaw (1983) repealed.	Outlines designated list of exotic animals that are not allowed. Circuses and travelling exhibitions are not able to apply for exemption to prohibited animals.
Vancouver	Business Prohibition By-Law 5156	Bans specific activities that are cruel to animals and are generally used in bull riding. Includes list of exotic and wild species banned in the city.
Surrey	Wild/Exotic Animal Performances By-Law 11767	Outlines a specific list of exotic animals that are banned. Bans circuses, exhibitions, carnivals, and performances in which wild or exotic animals accompany amusement or entertainment of an audience. Excludes the riding of horses or ponies, agricultural fairs, pet shows, or other animal shows not showing exotic or wild animals, horse and dog races, rodeos and any activities associated with rodeos including the use of any or all wild or exotic animals, the use of animals in magic acts that are not wild or exotic, and the operation of a registered aquarium or zoo.
Yarmouth	By-Law No. 48 Circus Animal Prohibition By-Law	No person shall operate or carry on in the Town of Yarmouth a circus in which animals perform tricks or participate in performances of any kind for the amusement of an audience. Nothing contained in this by-law shall prohibit or restrict the following: exhibitions or performances in which individuals ride horses or ponies; exhibitions of performances involving dogs, displays or showing of animals in agricultural fairs, exhibitions or pet shows, and including horse or ox pull competitions; horse races or dog races; rodeos; the use of animals in magic acts.

Town of Digby	Circus Performance By-Law #1997-01	No person shall operate or carry on a circus, public show, exhibition, carnival, or performance in which animals are required to perform tricks, fight or participate in exhibitions or performances for the amusement or entertainment of an audience. Nothing contained in this by-law shall prohibit or restrict the following: exhibitions or performances in which individuals ride horses or ponies; exhibitions of performances involving dogs; displays or showing of animals in agricultural fairs, exhibitions or pet shows, and including horse or ox pull competitions; horse races or dog races; rodeos; the use of animals in magic acts.
Bridgewater	Chapter 181 Circus Exotic Animal Prohibition By-Law	No person shall operate or carry on in the Town of Bridgewater a circus in which wild or exotic animals perform tricks, or participate in performances of any kind for the amusement of an audience. Nothing contained in this by-law shall prohibit or restrict the following: exhibitions or performances in which individuals ride horses or ponies; exhibitions of performances involving dogs, excluding dog fights; displays or showing of animals in agricultural fairs, exhibitions or pet shows, and including horse or ox pull competitions; horse races or dog races; rodeos; the use of animals in magic acts.
By-Laws allowing specific Animal Acts for Entertainment		
Hamilton	Responsible Animal Ownership By-Law 12-031	Lists specific list of prohibited animals. The provisions of this by-law do not apply to a temporary public display of animals including a circus, carnival or classroom display.
London	Animal Control By-Law PH-3	Outlines the keeping of animals and exempts public parks with licensed zoos, fairs, exhibitions, and circuses.
Windsor	By-Law-8156 A By-Law for Prohibiting Regulating and Restricting the Keeping of Animals Within the City of Windsor or Defined Areas Thereof and By-Law-395-2004 Schedule C1 to Business Licensing By-Law	By-Law-8156 provides a list of animals not to be kept. By-Law-395-2004 allows circuses with permits.