

Is Your Business Licensing By-Law About to Die?

August 1, 2007

You should be aware that the by-laws of your municipality licensing and regulating various businesses may be about to expire.

The broad general power to license businesses and to license, regulate and govern persons carrying on or engaged in businesses, contained in sections 10(2).11, 11(3).11 and Part IV of the *Municipal Act, 2001*, provides a substantial arsenal of powerful tools to municipalities to enact by-laws in the public interest addressing a wide variety of activities and issues.

Generally, the courts have supported such by-laws (see, for instance, decisions of the Supreme Court of Canada in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, and of the Ontario Court of Appeal in *Commodore Grill v. Dunville (Town)*, [1943] O.R. 427, *Toronto Taxi Alliance Inc. v. Toronto (City)* (2005), 77 O.R. (3d) 736 (C.A.) and *Adult Entertainment Association of Canada v. Ottawa (City)*, [2007] ONCA 389).

Municipalities and their solicitors will remember January 1, 2003 as the date upon which the "new" *Municipal Act, 2001* came into force. Bill 130 brought about important amendments, effective January 1, 2007.

Among other things, the previous legislation imposed specific requirements and restrictions on the municipal power to enact licensing by-laws, limiting them to three specific purposes: health and safety, nuisance control and consumer protection. Such by-laws were also required to state why the class of business in question was being licensed and how the by-law fit within the purpose or purposes being addressed.

Specific limitations were also imposed on the calculation of licensing fees, requiring them to refer to the costs directly related to the administration and enforcement of the by-law or portion of the by-law licensing the particular class of business (see *Municipal Act, 2001*, as amended, s. 150(8)(k), (9) and (10)).

Most importantly, section 150(13) provided that, "a by-law licensing a business under this Part expires five years after it comes into force or the day it is repealed, whichever occurs first".

This produced a situation in which many of the municipalities in Ontario enacted business licensing by-laws which may be subject to a five-year sunset clause.

It is therefore likely that many licensing by-laws enacted by Ontario municipalities prior to January 1, 2007 have become, or will become in the next year, of no force and effect.

This is a problem which appears to have been removed by the Province with respect to future licensing by-laws, in view of the fact that the amendments to the *Municipal Act, 2001* which took effect January 1, 2007 include repeal of the former section 150(13), together with some of the other problematical provisions of the former Act, such as the requirement of the three exclusive purposes for the exercise of licensing powers.

There is no provision, however, which would automatically continue a by-law which would otherwise be repealed. Nothing contained in Bill 130 would have that effect.

Accordingly, it is strongly recommended that municipalities whose by-laws licensing businesses were enacted prior to January 1, 2007 review such by-laws as to their present status, and, in light of the current provisions of the *Municipal Act, 2001*, as amended by Bill 130, consider enacting or re-enacting provisions which the municipal council wishes to create or maintain in good standing.

It may also be useful to review, at the same time, provisions of such by-laws relating to adult entertainment establishments, which, until the enactment of the *Municipal Act, 2001*, were provided for under two distinct headings, “Adult Entertainment Parlours” and “Body Rub Parlours”, both of which are now included within the definition of “adult entertainment establishment”.

Important considerations may arise by reason of this fact, particularly with respect to the enactment of by-laws under section 151(1)(a) and principles of municipal law relating to prohibition and discrimination.

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