



MEMORANDUM

DATE: March 31, 2022

TO: Mayor and City Council

FROM: Nena Cook, Chief Assistant City Attorney

RE: **Potential changes to VMC 7.05.010, VMC 7.04 and VMC 2.46.020**

CC: Eric Holmes, City Manager

Background

Recently, Council heard testimony about concerns for the personal safety of community members, including the safety of City officials, employees and volunteers in their homes and at their workplaces. In response, Council asked staff to review the Vancouver Municipal Code (“VMC”) to determine what changes, if any, Council could make to better protect community members experiencing targeted noise disturbances, protests at their homes, and threats arising from their service to the City. This memo:

- Describes the scope of changes available in light of constitutional time, place and manner limitations posed by the First Amendment
- Outlines various permissible changes to the Public Disturbance section of VMC 7.05 that would constitutionally balance free speech while limiting the targeted attacks and threats directed at community members in their homes.
- Identifies a proposed change to VMC 7.04 to restrict picketing in front of homes.
- Sets forth proposed amendments to VMC 2.46.020 to enhance the legal protections currently afforded City officials, employees and volunteers acting on behalf of the City.

First Amendment to the United States Constitution.

The First Amendment guarantees the right of free speech, but the City may impose restrictions on that speech as long as those restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. The United States Supreme Court has held that local governments have a substantial and justifiable interest in banning public speech directed at a private residence in order to protect those who are presumptively unwilling to receive it. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). In *Frisby*, the Supreme Court upheld the constitutional validity of an ordinance passed by the town of Brookfield, Wisconsin that declared it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The Supreme Court reasoned that “[t]he type of picketers banned by the ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover,

even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt: To those inside... the home becomes something less than a home when and while the picketing... continue[s]... [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.” *Frisby*, 487 U.S. at 486.

As a result, City Council has discretion to abridge speech as long as it does so in a manner that is **content neutral, narrowly tailored and leaves open ample alternative channels of communication**. One way that this may be accomplished is by limiting the **level** of noise and **location** of noises during certain **times of the day and night** through VMC Chapter 7.05.

[Ch. 7.05 Public Disturbance | Vancouver Municipal Code](#)

Currently, VMC 7.05.010 restricts activities based on the sounds made (“yelling, shouting, hooting, whistling, singing” (“Certain Noises”)) and based on the time of day that they are made, “between the hours of 10:00 pm to 7:00 am.” Notably, other communities have regulated sound based upon audio qualities capable of objective measurement. To this end, Council’s options include:

Adding objective levels above which, certain sounds would constitute a *per se* violation of City ordinance, such as:

- Sounds registering at or above forty-five dBA measured from any adjacent parcel or public right of way; and/or
- Sounds that exceed the maximum permissible noise levels (EDNA) for a given area.

Refining the manner and time restrictions contained within the VMC as it is currently written by:

- expanding the hours when those Certain Noises are restricted;
- applying the same restrictions to additional types of noise;
- expanding the definition of “public disturbance” to include vibrations from those sounds

Additionally, as Council evaluates the intended scope of this ordinance, it may be desirable to evaluate whether restrictions remain focused in residential districts or expanded to other parts of the City. Currently, VMC 7.05.010 restricts Certain Noises within “residential districts.” Staff would value Council’s feedback on whether it is desirable to restrict:

- Certain Noises citywide or based on zoning districts;
- Certain Noises and/or other noises in other districts like in Commercial, Mixed Use and/or Industrial Zones;
- Certain Noise and/or other noises within a set distance of any residence

[Ch. 7.04 Pedestrian Interference | Vancouver Municipal Code](#)

Under VMC 7.04.020, a person is guilty of pedestrian interference if s/he intentionally “obstructs pedestrian or vehicle traffic.” Section 7.04.040(1) however, makes an exception to this prohibition for a person who is exercising “one’s constitutional right to picket or legally protest.” Under the US Supreme Court case of *Frisby v. Schultz*, Council could consider changes to these code sections that would make it illegal for a person to picketing in front of residential homes.

[Ch. 2.46 Defense of Officials, Employees, and Volunteers | Vancouver Municipal Code](#)

Currently, VMC 2.46.020 authorizes the City to defend (and ultimately indemnify) an official, employee or volunteer of the City if those individuals are sued in their official capacity for conduct, acts or omissions they take (or do not take) on behalf of the City. However, currently this authorization does not permit the City Attorney's Office to initiate a civil action on behalf of an individual – even for the sake of obtaining a protective order. Council may wish to determine if the City should go beyond mere defense and indemnity under those circumstances and instead *initiate* a claim on the behalf of those individuals. Any type of affirmative relief would need to further a “fundamental public purpose of government” so as not to run afoul of the Gift of Public Funds Doctrine, which prevents the City from using money or resources to aid any one individual.

Council may wish to authorize the City Attorney's office to take certain action on behalf of an official, employee or volunteer for threats arising out of their work for the City, including:

- seek a restraining order or an anti-harassment order against the alleged perpetrator;
- seek an order of removal (trespass) of an unauthorized person;
- hiring outside counsel on behalf of the individual if the City has a conflict of interest

In addition to these proposed changes, the City Manager currently has the authority to craft a administrative policy that would allow the City to provide financial assistance to an official, employee or volunteer experiencing targeted noise disturbances, protests at their homes, or threats arising from their service to the City. The assistance could include reimbursement for reasonable expenses including deployment of private security and/or costs of alternative housing and rental cars. No action by Council is required to establish such a policy, which is currently under development.

Process

Amendments to the applicable titles of the municipal code do not require any review by advisory bodies but rather can be changed at the discretion of Council subject to Charter compliant public hearing provisions. Depending on the degree of changes, Council may expect some level of community engagement to understand community concerns or interests associated with the potential of more stringent limits on expressive speech. Staff would seek guidance from Council on such expectations. The scope of community engagement would inform the timing of when changes could be brought forward for Council consideration.

Staff is available to answer any questions and looks forward to additional discussion on these topics at the April 4 meeting under City Manager communications before returning to City Council with specific code revision proposals.