To: Committee of the Whole  
Date: February 9, 2016  
From: Chris Coates, City Clerk  
Subject: Gorge Waterway Park Zone

RECOMMENDATION

That Council direct staff to:

1. Proceed with a city initiated zoning process to amend the Gorge Waterway Park Zone to allow anchoring for a period of up to 48 consecutive hours, but not exceeding 72 total hours in a 30-day period.  
2. Hold a community meeting to receive comments on proposed changes to the zoning regulations for the Gorge Waterway Park District Zone.  
3. Prepare a bylaw to implement the changes after the community meeting has been held to bring forward for Council’s consideration.

EXECUTIVE SUMMARY

In August 2014, Council rezoned the Gorge Waterway as the Gorge Waterway Park District (“GWP Zone”) to better regulate the area in response to concerns from the public in connection with the use of the waterway for recreational purposes; environmental issues in the waterway; abandonment of vessels; nuisance and noise issues from live aboard vessels; impacts on Park users, and damage to shoreline and riparian areas where access to anchored vessels occurs. The GWP Zone limits the use of the Gorge Waterway to recreational activities more compatible with surrounding land uses. It specifically prohibits live-aboard use or overnight anchoring or mooring of vessels. Enforcement of the new regulations was delayed while the City sought a Licence of Occupation from the Province. This was received in October of 2015 and allows the City to manage the licence area for community use, recreation and the public interest.

Municipal authority over zoning includes the power to regulate land covered by water. However, the regulation of navigation and shipping falls within exclusive federal jurisdiction. This sets up an inevitable conflict when municipalities regulate land covered by navigable waters. Court decisions have confirmed that municipalities may regulate, through zoning, use of land covered navigable waters and recognized that some incidental interference with navigation and shipping has to be allowed.

A 2015 BC Court of Appeal judgment confirmed that municipal bylaws may regulate use of land covered by water but must allow for some short-term anchoring to avoid intruding on federal jurisdiction over navigation. The current GWP Zone makes no allowance for short-term anchoring and it may not be consistent with the Court of Appeal judgment. Therefore, an amendment to the
GWP Zone is recommended for council’s consideration in order to be able to successfully enforce the provisions for moorage in the GWP Zone.

This matter is of high interest to the immediate neighbours and community as a whole. There is growing community interest in this matter and specific interest from harbour interest groups. There are over thirty vessels currently anchored in the City’s Zoned area of the Gorge Waterway. Several vessels are being used for living aboard.

The process to move the recommended amendments forward would involve the City initiating a rezoning application; consulting with the public a community meeting to receive input on proposed changes and bringing forward proposed Zoning Bylaw for council’s consideration. Following this process, changes to the Zoning Bylaw, if approved could be in place by the summer of 2016.

PURPOSE

The purpose of this report is to seek Council’s direction to move forward with the previous direction to enforce the regulations in the GWP Zone by initiating amendments to the GWP Zone regulations to make them consistent with the BC Court of Appeal judgement.

BACKGROUND

The Gorge Waterway is a sheltered waterway that has become a popular area for vessel anchoring by adjacent onshore residents and residents who live-aboard their vessels. Long term vessel anchoring in the Gorge Waterway is not compatible with the neighbouring land uses in the area or the recreational nature of the waterway near Banfield Park and presents the following additional concerns:

- interference with recreational activities of the general public
- discharge of sewage effluent and garbage from live-aboard vessels
- discharge of fuel and lubricants from unseaworthy vessels
- noise and nuisance activities from live-aboard vessel residents
- abandonment of unseaworthy vessels and vessel debris,
- obstruction of the waterway that affects recreational use by the public
- erosion of shoreline and riparian areas from occupant access routes.

Responding to these concerns City Council enacted zoning regulations to better regulate more appropriate use of this area, in a manner consistent with the neighbouring land uses and the Official Community Plan. The City also proceeded to obtain a License of Occupation over the area to establish further management authority over the waterway. During these processes the City consulted with Esquimalt and Songhees First Nations and area residents. The Zoning was completed in August of 2014, the Licence of Occupation received in October 2015. Appendix A shows the area of the Zoning and License of Occupation within the white line superimposed on the aerial photo. The GWP Zoning regulations currently in place are attached as Appendix B.

The District of Saanich, Township of Esquimalt and Township of View Royal also border the Gorge Waterway. In late 2015, Saanich Council approved amendments to the regulations for the P-1 Assembly Zone that covers the portion of the Gorge waterway within Saanich’s municipal boundary. These regulations prohibit floating homes or the use of other floating vessels as residences in that zone. Saanich’s bylaw amendments also prohibit the anchoring or moorage of any vessel in the P-1 zone for a continuous period exceeding 72 hours.
The portion of the Gorge Waterway that lies within the boundaries of the Township of Esquimalt is zoned Marine Navigation [M-4]. This zone prohibits “Boat Moorage”. Staff understand Esquimalt is reviewing their zoning regulations in light of the BC Court of Appeal judgement.

ISSUES & ANALYSIS

It is well established that municipal authority over zoning includes the power to regulate land covered by water. However, the regulation of navigation and shipping falls within exclusive federal jurisdiction. This sets up an inevitable conflict when municipalities regulate land covered by navigable waters. Court decisions have confirmed that municipalities may regulate, through zoning, use of land covered navigable waters and recognized that some incidental interference with navigation and shipping has to be allowed. The exact balance between legitimate exercise of municipal zoning power and exclusive federal jurisdiction can be difficult to achieve in practice and there are numerous court decisions dealing with this issue in BC and across Canada. The most recent BC judgment, a 2015 Court of Appeal decision in West Kelowna (District) v. Newcomb confirms the municipal authority to regulate use of land covered by water even if such regulations interfere with rights of navigation. However, this case also confirms that a blanket prohibition on all anchoring, including short-term anchoring, would exceed municipal competence by interfering with navigational rights to impermissible degree. Therefore, the City Solicitor recommends amending the GWP Zone to expressly allow for some short-term anchoring before any attempt to enforce the GWP Zone regulations against any of the vessels anchored in the area.

There are currently four anchored wharves, 22 vessels and 12 small vessels (e.g., dinghies) anchored in the Gorge Waterway. There are also two sunken vessels and one partially submerged vessel located in the waterway. It is estimated that between five to eight vessels are used for living aboard.

In late December 2015 a large sunken vessel began releasing diesel fuel into the water and was removed by the Canadian Coast Guard Service with support from the Victoria Fire and Police Departments. Coast Guard has sole jurisdiction when it comes to polluting vessels. Otherwise the removal of polluting vessels is not undertaken by any other agency. The City could assume the responsibility for the removal of floating and sunken (non-polluting) vessels. Given the cost associated with the removal of sunken vessels, addressing the removal of vessels while still afloat is significantly more cost effective.

There are ongoing concerns from neighbours and environmental groups due to pollution related issues that have occurred and may occur. City staff are undertaking a preliminary analysis of potential contaminant risks to environmental and human health.

To enable the original intention of removing anchored vessels in the waterway, for Council’s consideration, staff recommend Council consider undertaking the following process:

- City to initiate a rezoning process;
- consult with the public at a community meeting to obtain feedback on the proposed new zoning regulations;
- bring forward Zoning Bylaw amendments to initiate the changes;
- After holding a public hearing, Council may consider approving the adoption of the Zoning Amendment Bylaw.
From an enforcement perspective, if the regulations are implemented by Council, the City would follow its standard practice of education, notification and legal action if necessary, to ultimately remove any vessels that remain anchored in contravention of the regulations. A copy of a notice to boaters to move anchored vessels is attached as Appendix C. Timelines for the process could be as follows:

**Phase 1**
Media relations and advertising, website materials, signage and direct outreach to boat owners (May 2016).

**Phase 2**
Notices posted on vessels and floating wharves requesting owners to remove (June/July 2016)

**Phase 3**
Legal Action - Injunctions to remove remaining vessels (August/September 2016)

Additionally, compliance monitoring on an ongoing basis will require regular inspections to ensure that compliance is maintained.

2015-2018 Strategic Plan

Better management of the Gorge Waterway is included in the 2015 Operational Plan and will be recommended to carry forward to 2016 when Council considers the 2016 Operational Plan.

**Impacts to 2016-2019 Financial Plan**

Estimated costs related to enforcement are not clear and will depend on the degree of success with voluntary compliance. Legal costs as well as cost to remove could exceed $100,000.00. There is funding set aside in the current Financial Plan for this enforcement if it becomes necessary.

**CONCLUSION**

The City had awaited taking the enforcement steps until such time as the Licence of Occupation was received. The BC Court of Appeal judgement was reached and has impacted the City’s ability to effectively carry out enforcement of the Zoning Regulations. The proposed changes to the zoning regulations to allow for limited, short term anchoring are recommended to be considered to enable the City to move forward on achieving compliance aiding in the continued health of the Waterway.

Respectfully submitted.

Chris Coates
City Clerk

Jocelyn Jenkyns
Deputy City Manager

Report accepted and recommended by the City Manager: ____________________________

Date: Feb. 11, 2016
List of Attachments

Appendix A – Area of City Management for Waterway
Appendix B – Existing Gorge Waterway Zoning Regulations
Appendix C – Notice to Boaters
PART 9.3 – GWP ZONE, GORGE WATERWAY PARK DISTRICT

9.3.1 Permitted Uses in this Zone

The following uses are the only uses permitted in this Zone:

a. Parks and uses accessory to parks
b. Water related recreational activities

Without limiting the generality of any Section or Part of the Zoning Regulation Bylaw, including Section 17 of the Introduction and General Regulations, the following uses are not permitted in this Zone:

i. The anchoring or mooring of vessels between the hours of 11 p.m. and 6 a.m.

ii. Live-aboard or float home as defined in Part 7.54.1 in the FWM zone, Fisherman’s Wharf Marine District

iii. Docks, wharfs and piers
NOTICE OF BYLAW CONTRAVENTION

To the owner(s) of the vessel occupying the Selkirk Waterway and Gorge Waterway, and may be moored to a floating dock that has been placed contrary to the Zoning Regulation Bylaw, please be advised that your vessel is occupying an area of the Selkirk Waterway and Gorge Waterway contrary to the City of Victoria's Zoning Regulation Bylaw.

Zoning Regulation Bylaw, Amendment Bylaw No. _______ created the Gorge Waterway Park District prescribing the following uses for this Zone:
1. Parks and uses accessory to parks; and
2. Water related recreational activities.

The following uses are not permitted in this Zone:
1. The anchoring or mooring of vessels between the hours of 11 p.m. and 6 a.m.
2. Live-aboard or float home as defined in Part 7.54.1 in the FWM zone, Fisherman's Wharf Marine District
3. Docks, wharfs and piers

Your vessel is occupying the waterway contrary to City's Zoning Regulation Bylaw. By service of this Notice you are requested to remove your vessel from the waterway by ____________, 2016.

Failure to remove your vessel by this date may result in further enforcement action by the City of Victoria.

Further information respecting this Notice may be obtained from Bylaw & Licensing Services by contacting their office at 250.361.0215

City Clerk

2016