
CITY OF KELOWNA

MEMORANDUM

Date: September 13, 2006
File No.: 6530-18
To: City Manager
From: Director of Planning and Development Services
Subject: OUTDOOR FOOD AND BEVERAGE PROGRAMS

RECOMMENDATION

THAT Council endorse a course of action with regard to the provision of entertainment within outdoor seating areas as set out in the Planning and Development Services Department report of September 13, 2006;

AND THAT Council endorse an enforcement procedure with regard to permit holders who are in breach of the terms of the outdoor seating program as set out in the Planning and Development Services Department report of September 13, 2006,

AND THAT Council direct staff to make revisions to the Terms of Reference for the Sidewalk Seating Program and the Sidewalk Café Extension Program as set out in the Planning and Development Services Department report of September 13, 2006;

AND FURTHER THAT amendments to Traffic Bylaw No. 8120 to accommodate revisions to the outdoor seating programs be subsequently forwarded for reading consideration.

BACKGROUND

The Sidewalk Seating Program and the Sidewalk Café Extension Program were initiated as a means to contribute visual interest to, and help diversify activity on Downtown streets. Additionally, the programs are intended to help attract greater numbers of visitors to Downtown and to contribute to a greater sense of safety and surveillance in Kelowna's central business district.

Periodically since the programs were initiated, recommended changes have been brought to Council for consideration. The purpose of the recommendations, and ultimately the changes that have been endorsed, has been to address issues and concerns that have arisen in the intervening months, and to incorporate them into the Terms of Reference of the respective programs.

DISCUSSION

Entertainment Within Outdoor Seating Areas

In August 2005, Council deferred a report from the Planning and Corporate Services Department that would have imposed restrictions on the provision of entertainment within outdoor seating areas. Council's directive to staff was that the situation be monitored until the end of 2005 and to report back regarding the status of the situation.

Towards the end of 2005, as the season for outdoor dining was entering its later stages, it appeared that the issue of sound levels from entertainment within outdoor seating areas had subsided.

However, over the course of summer 2006, complaints have been received regarding amplified music from the restaurant that was the subject of complaints in 2005, and the centre of the discussion regarding entertainment within outdoor seating areas

Currently, the only available means to resolve issues related to excessive sound levels is through prosecution under the City's Noise Bylaw. This process puts the onus on the City to demonstrate that sound levels have been excessive, which, without monitoring, must rely on subjective evaluations. This approach must be pursued through the courts and ultimately has involved significant staff time and produced weak results.

Staff therefore recommend that the City not rely on the court system to resolve situations where complaints have been received regarding sound levels from entertainment on outdoor seating areas. Rather, staff recommend that outdoor entertainment be limited to non-amplified, acoustic stringed instruments.

This approach recognizes that acoustic instruments are often amplified and that as long as amplification is involved, there is the potential that sound levels could be perceived to be excessive. This approach would preclude singing, brass instruments such as saxophones, and percussion instruments.

It is also proposed that entertainment within outdoor seating areas not be allowed between 12:00 P.M. and 8:00 A.M.

Pending approval of the above provision, the following (*italicized*) wording would be added to the Terms of Reference of the respective programs:

Entertainment Within Outdoor Seating Areas.

Outdoor entertainment is restricted to live music with non-amplified acoustic, stringed instruments. All other instruments as well as singing are prohibited.

Entertainment within outdoor seating areas is not allowed from 12:00 P.M. until 8:00 A.M.

Enforcement

Staff propose that a formal procedure be incorporated into the Terms of Reference of each of the outdoor seating programs to deal with situations where a permit holder is in breach of the Terms.

This procedure would set out, with the exception of expired insurance coverage (see below), that where an infraction is observed by staff, or where a complaint is received and where staff deem there is sufficient reason to act, the permit holder will be notified and given ten business days to comply with the terms of the program.

If compliance is not forthcoming, the business in question would be notified that cancellation of its permit is effective immediately, and that it has three business days to remove tables and chairs and any structure associated with the outdoor seating area. If the outdoor seating facility were to still be in place at the end of three business days, the business's damage deposit would be forfeited and the City would remove chairs and tables and disassemble any structure. The City would follow the standard procedure for dealing with goods seized by the City and business owners would be billed for any amount by which the costs of seizure and storage exceeded the value of the damage deposit. Where the costs of seizure did not exceed the value of the damage deposit, there would be no refund of the balance.

Businesses losing their permit would not be allowed to re-apply for a permit for a period of one year starting from the date the permit was revoked. This restriction would apply to any subsequent application by the subject business owner, at any location within Kelowna. Additionally, where the cost of removal and storage of seats, tables, or structure has exceeded the value of the damage deposit, any outdoor seating permit for the former permit holder would not be granted until the outstanding balance was paid.

It is critical that sufficient insurance be provided at all times by permit holders. It is proposed that if the City becomes aware that insurance pertaining to an outdoor seating area has lapsed or that the insurance provided does not otherwise meet the terms of the program, the subject business would be notified in writing that it has ten working days from the post-marked date to provide proof of adequate insurance. It would be allowed to leave any structure assembled in conjunction with the seating area in place until such proof is provided. However, tables and chairs would have to be taken out of use. Failure to adhere to this requirement could trigger the enforcement procedure outlined above.

If proof of adequate insurance is not forthcoming within the specified time, the business in question would be notified in writing that cancellation of its permit is effective immediately, its damage deposit has been forfeited, and that it has three business days from the date of postmark to remove tables and chairs. If the outdoor seating facility were to still be in place at the end of three business days, the City would remove chairs and tables and disassemble any structure. The City would follow the standard procedure for dealing with goods seized by the City.

It is proposed the following wording be added to the Terms of Reference of the two outdoor seating programs:

Enforcement

With the exception of a breach of the terms related to insurance coverage (see below), where a permit holder is in breach of the Terms of Reference of the program, the permit holder will be notified in writing and given ten business days from the date of postmark, to comply with the terms of the program.

If compliance is not forthcoming within this time, cancellation of the permit will be effective immediately, and the business will be notified in writing and given three business days from the date of postmark, to remove tables and chairs and any associated structures.

If the facility is still in place at the end of the specified time period, the business's damage deposit will be forfeited and the City will remove chairs, tables, and any other items within the confines of the seating area belonging to the business, as well as remove any structures assembled in conjunction with the seating area. These items will be stored at the owner's expense and the City will follow its standard procedure for dealing with seized goods and business owners will be billed for any amount that the costs of seizure, teardown, removal and storage exceed the value of the damage deposit. Where the costs of seizure do not exceed the value of the damage deposit, there will be no refund of the balance.

It is critical that sufficient insurance be provided at all times by permit holders and the City will require proof of insurance upon permit approval and upon renewal of a permit, and reserves the right to request proof of coverage from time to time.

Upon becoming aware that insurance on an outdoor seating area has lapsed or that the insurance provided does not meet the terms of the program, the subject business will be notified in writing that it has ten working days from the postmarked date to provide proof of adequate insurance. It will be allowed to leave any structure in place until such proof is provided. However, tables and chairs must be taken out of use. Failure to adhere to this requirement could trigger the enforcement procedure outlined herein.

If proof of adequate insurance is not forthcoming within the specified time, the business in question will be notified in writing that cancellation of its permit is effective immediately, and that it has three business days from the date of postmark to remove tables and chairs. If the outdoor seating facility is still in place at the end of three business days, the business's damage deposit will be forfeited and the City will remove chairs, tables, and any other items within the confines of the seating area belonging to the business, as well as remove any structures assembled in conjunction with the seating area. The City will follow its standard procedure for dealing with seized goods and business owners will be billed for any amount that the costs of seizure, teardown, removal and storage exceed the value of the damage deposit. Where the costs of seizure do not exceed the value of the damage deposit, there will be no refund of the balance.

A business losing its permit will not be allowed to re-apply for an outdoor seating permit for a period of one year starting from the date the permit is revoked. This restriction will apply to any subsequent application by the subject business owner, at any location within Kelowna. Any subsequent application will require the mandatory application fee and damage deposit.

Additionally, where an unpaid amount is outstanding with respect to the seizure and storage of seats, tables, or structure, a new permit will not be granted to the former permit holder until the outstanding balance has been paid.

Other Proposed Changes to the Terms of Reference

Use of Alleys

On March 1, 2006, dumpsters were removed from Phase 1 of the implementation area of the Downtown Kelowna Association's Dumpster Removal Program, and it appears that the program is functioning successfully. As a result of this change, interest was expressed by a Downtown property owner and one of his tenants, to use a portion of an alley for outdoor seating.

The City has the ability to grant use of an alley, or portion thereof, the same as it may grant use of a portion of sidewalk or roadway under the existing program. Staff therefore granted a permit for an outdoor seating area in the alley immediately adjacent to 223 Bernard Avenue under the terms of the Sidewalk Café Extension Program. The RCMP, the Fire Department, and Transportation Division were all consulted about the proposed facility and each gave a positive response. A pedestrian access through the alley has been maintained but the alley will remain closed to vehicles until October 1, 2006 at which time the outdoor seating area will be dismantled.

Vehicles still have access to the portions of alley to the south of the area that has been closed. Additionally, the south leg immediately north of the closed portion has been converted to two-way access (formerly only one-way heading south) to allow greater flexibility for deliveries and access to adjoining properties.

Staff propose that wording be added to the Terms of Reference of the Sidewalk Café Extension Program to formally incorporate a provision for the use of alleys:

Permits for outdoor seating areas within alleys may be allowed if in evaluation by staff, use of the alley for such purposes does not restrict access by pedestrians or restrict or compromise access by delivery or emergency services vehicles. In the event that an alley is closed to vehicles, a minimum two-meter wide access route must be maintained for pedestrians.

Notification to Adjacent Businesses

Experience with outdoor seating applications indicates that many businesses are unaware of pending plans for outdoor seating areas by adjacent food and beverage operators. To help facilitate better dialogue on issues and concerns associated with the creation of new outdoor seating areas, staff recommend that merchants adjacent to proposed outdoor seating areas be notified by the City of applications received. Notification in the form of a letter would be sent to all businesses located immediately adjacent to the business proposing the outdoor seating area.

The notification would be intended to give such businesses the option of communicating any concerns to the City, so that these concerns might be considered in the siting and design of the seating facility in question.

Proposed wording to be added to the Terms of Reference of the Sidewalk Seating Program and the Sidewalk Café Extension Program is as follows:

Merchants adjacent to proposed outdoor seating areas will be notified by the City that an application has been received. This notification is intended to give such businesses the option of

communicating any concerns to the City related to a proposed seating area, so that these concerns might be considered in the siting and design of the proposed seating facility.

Changes to Permit Area

It is recommended that the following wording be added to the Terms of Reference of both outdoor seating programs:

Any permit holder proposing physical changes to an existing outdoor seating area must re-apply to the City. The application must include plans and any elevations describing the proposed changes. A \$50.00 application fee must also be submitted. An updated Certificate of Insurance may be required as deemed necessary by City staff. The existing deposit of \$500.00 held by the City as part of the initial application will continue to apply. Additionally, a new risk assessment of the facility may be carried out if deemed necessary by staff.

Permit Fees

It is proposed that the following changes be made to the Terms of Reference to reflect changes to the billing process:

Sidewalk Permit Program

Existing wording:

Permit Fee

The permit fee is \$8.00 per square meter of designated area. The permit fee will be due upon issuance of a permit, and at the first of each subsequent month.

Where outdoor seating operations are discontinued during a permit period, the permit fee will be refunded by the City on a pro rata basis. Where a fee has not been paid within 30 days of the date upon which it is due, the City reserves the right to cancel the operator's permit and to remove the outdoor facility, including confiscation of tables and chairs, at the operator's expense and to hold such properties until the fees in arrear are paid.

Proposed wording:

Permit Fee

The permit fee is \$8.00 per square metre per month of the area utilized by the permit holder. The permit fee will be invoiced by the City. Billable use of an outdoor seating area will begin on the date a permit is granted. The permit fee for permit areas that commence operation after the first day of a calendar month will be pro-rated, based on the total days remaining in the month.

Where an invoiced fee has not been paid within 30 days of the invoice date, interest will be charged to the permit holder on the outstanding balance. Accounts that remain unpaid after 60 days from the invoice date will potentially have their outdoor seating permit revoked according to the provisions set out herein.

Sidewalk Café Extension Program

Existing wording:

Permit Fee

The permit fee is \$8.00 per square metre per month of the area utilized by the permit holder. This area excludes walkways as described in Part Two of the Terms of Reference.

The permit fee, at minimum, must equal the amount of any revenue foregone as a result of parking spaces de-commissioned in conjunction with construction of any parking facility.

The permit fee will be invoiced by the City and will be due upon issuance of a permit, and at the beginning of any subsequent permit periods. Where outdoor seating operations are discontinued during a permit period, the permit fee will be refunded by the City on a pro rata basis. Where a fee has not been paid within 30 days of commencement of the permit period, the City reserves the right to cancel the operator's permit and if deemed necessary, to remove the outdoor facility at the operator's expense.

Proposed wording:

Permit Fee

The permit fee is \$8.00 per square metre per month of the area utilized by the permit holder. The area excludes walkways as described in Part Two of the Terms of Reference.

The permit fee, at minimum, must equal the amount of any revenue foregone as a result of parking spaces de-commissioned in conjunction with construction of any seating facility.

The permit fee will be invoiced by the City. Billable use of an outdoor seating area will begin on the date a permit is granted. The permit fee for permit areas that commence operation after the first day of a calendar month will be pro-rated, based on the total days remaining in the month.

Where an invoiced fee has not been paid within 30 days of the invoice date, interest will be charged to the permit holder on the outstanding balance. Accounts that remain unpaid after 60 days from the invoice date will potentially have their outdoor seating permit revoked according to the provisions set out herein.

SUMMARY

Council is asked to:

1. Restrict entertainment within outdoor seating areas to non-amplified, stringed instruments and to approve associated changes to the Terms of Reference of the respective outdoor seating programs;
2. Approve an enforcement procedure regarding permit holders in breach of the terms of either of the outdoor seating programs and direct staff to make the associated changes to the terms of the respective programs;
3. Approve addition of wording regarding use of alleys for outdoor seating areas to the Terms of Reference to the Sidewalk Café Extension Program;

4. Approve notification by letter to businesses adjoining food and beverage operations applying for an outdoor seating permit, and to approve addition of wording to the Terms of Reference for the Sidewalk Seating Program and the Sidewalk Café Extension Program explaining this procedure;
5. Approve a change to the terms of the respective programs requiring permit holders proposing physical changes to the permit area to submit a new application to the City;
6. Approve a change in text of the respective Terms of Reference to reflect changes to the billing procedure, and
7. Direct staff to bring forward any revisions to Traffic Bylaw No. 8120, necessitated by the above changes, for reading consideration.

Signe K. Bagh, MCIP
Manager, Policy, Research, and Strategic Planning

PJM/pm

Approved for inclusion	
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Director of Planning