Minute No. 273
Report – Standing Policy Committee on Protection, Community Services and Parks – March 6, 2018

Item No. 2 Outdoor Patio Music

On March 6, 2018, the Standing Policy Committee on Protection, Community Services and Parks laid over the matter to its meeting on April 10, 2018.

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DECISION MAKING HISTORY:

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On March 14, 2018, the Executive Policy Committee submitted the matter to Council.

STANDING COMMITTEE RECOMMENDATION:

On March 6, 2018, the Standing Policy Committee on Protection, Community Services and Parks laid over the matter to its meeting on April 10, 2018.

COUNCIL DECISION:

On November 15, 2017, Council concurred in the recommendation of the Standing Policy Committee on Protection, Community Services and Parks Committee and adopted the following:

1. That the Winnipeg Public Service be directed to review and report back within 120 days on the following

    A. Amendments to Part 5 of the Neighbourhood Liveability By-law No. 1/2008, to include specific restrictions for outdoor patio music emanating from outdoor patios at restaurants, drinking establishments, micro-brewery, distillery or winery, or any commercial enterprises, between the hours of 11:00 p.m. and 8:00 a.m.

    B. Measures to enforce compliance and ensure that establishments follow the regulation with minimal impact on surrounding neighbourhoods.

    C. Consultation with the Liquor and Gaming Authority of Manitoba.

2. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

ADMINISTRATIVE REPORT

Title: **Outdoor Patio Music**

Critical Path: Standing Policy Committee on Protection, Community Services and Parks

AUTHORIZATION

Author	Department Head	CFO	CAO
W. Yee	C. Fernandes	n/a	D. McNeil

EXECUTIVE SUMMARY

Patio music, when it is determined to be a nuisance, is regulated through the City of Winnipeg's Neighbourhood Liveability By-law under Part 5 – Noise; and if those patios are licensed, *The Liquor and Gaming Control Act* of Manitoba.

Three options have been outlined to address music coming from patios. The first provides clarity on existing legislation and the means to leverage existing processes to effectively address citizen concerns. Second and third options provide possible amendments to City by-laws and approval processes to restrict when music would be allowed on outdoor patios.

The Public Service is recommending no changes be made to City by-laws and approval processes as the existing legislation provides effective tools to respond to citizen complaints on a situation by situation basis. Amending City by-laws may have a negative effect on compliant businesses and does not provide an effective deterrent to non-compliant operators. However, scripting will be provided to 311 operators so that concerns with excessive noise on licensed patios can also be referred to The Liquor and Gaming Authority of Manitoba.

RECOMMENDATIONS

1. That this report be received as information.

REASON FOR THE REPORT

The Standing Policy Committee on Protection, Community Services and Parks concurred in the Council Motion dated October 25, 2017, as amended, and recommended to Council that the Winnipeg Public Service be directed to review and report back within 120 days on the following:

1. Amendments to Part 5 of the Neighbourhood Liveability By-law No. 1/2008, to include specific restrictions for outdoor patio music emanating from outdoor patios at restaurants, drinking establishments, micro-brewery, distillery or winery, or any commercial enterprises, between the hours of 11:00 p.m. and 8:00 a.m.
2. Measures to enforce compliance and ensure that establishments follow the regulation with minimal impact on surrounding neighbourhoods.
3. Consultation with the Liquor and Gaming Authority of Manitoba.
4. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

IMPLICATIONS OF THE RECOMMENDATIONS

There are no implications of the recommendation as it is to receive the report as information.

HISTORY/DISCUSSION

Discussion

Current legislation:

Patio music, when it is determined to be a nuisance, is regulated through both the City of Winnipeg's Neighbourhood Liveability By-law (the "NLB") under Part 5 – Noise; and *The Liquor and Gaming Control Act* of Manitoba (the "Act") (if those patios are licensed). Relevant sections have been reproduced in Appendix "A" to this report.

Under the NLB, broadly speaking, noise is regulated in two ways. The first is prohibiting certain activities (mechanical, construction, air moving equipment) at specified times, outlining actual noise levels that are allowed measured by sound pressure levels in decibels. The second is through regulating noise that is a nuisance. This latter item would apply to all types of noise (people generated) in all types of environments and situations.

Enforcement of nuisance noise under the by-law is generally enforced by the Winnipeg Police Service (WPS), although both police and Community By-law Enforcement Services ("CBES") officers have authority to enforce.

Patio music is subject to section 67 of the NLB. Loud patio music could be considered as nuisance noise. In this regard, there are a number of factors to consider under enforcement, including:

1. If the noise is "unreasonably loud, unnecessary or excessive";
2. If the noise unreasonably disturbs an individual of "ordinary sensitivity";

3. The time of day, and day of the week;
4. The nature and use of the area in which the noise emanates and the nature and use of the area at which it is received;
5. The nature of the event or activity; and
6. The volume, duration and nature of the sound.

When by-law officers or police attend they must consider all six factors as well as zoning and land use considerations.

In all circumstances police or by-law officers must determine if a breach of the NLB has occurred for enforcement action to be taken (issuance of tickets).

Similarly, through the Act, the Liquor and Gaming Authority (LGA) has the authority to enforce any conditions it may have established at the time of issuing the liquor license for nuisance patio music.

The Act provides the LGA with broad level regulatory authority to address nuisance music on licensed patios. The Act empowers the Executive Director to "…impose, rescind or vary a term or condition on a licence at any time after a licence has been issued." Non-compliance with sections of the Act or its regulations can be enforced through ticketing under the *Provincial Offences Act* (POA), or through an administrative process which includes fines, suspensions, revocation of license, and/or conditions imposed on a license.

There is further authority within the LGA licensing and enforcement process to restrict music on a licensee by licensee basis. Page 14 of the LGA's Liquor Licensee Policy Manual (dated June 16, 2017) states:

3.3.5. If the LGA receives noise complaints once the patio is approved, approval may be withdrawn or additional conditions such as restricted service or vacating hours may be imposed to prevent noise nuisance to nearby residents and the public.

Existing Enforcement Options:

Enforcement under NLB is through the issuance of tickets, which carry a fine ranging from $200-$400 per offence. NLB enforcement is through CBES officers or Police Officers.

Enforcement of the Act and its regulations include administrative warnings, fines, suspensions, imposing conditions, cancellation of licenses, and tickets. Enforcement of the Act is through Liquor and Gaming Inspectors or Police Officers. The disposition options for police are generally more limited to ticketing.

The Act provides the LGA with the authority to license a premise for the sale and service of liquor. In this regard a licensing regime authorizes the regulator to impose an escalating series of consequences, leading up to suspension or even potential revocation of a license.

Ticketing of noise violations under the NLB can now be processed through the *Municipal By-law Enforcement Act* (the "MBEA"). The process under the MBEA allows for more expedient dispositions of tickets than the previous process under *The Summary Conviction Act*.

The processes governing administrative actions to address breaches of a licensing operation are not as rigorous as the processes around rules of evidence or procedure for common offence notices under POA or MBEA.

Below is a summary of the enforcement authority and various agencies involved in regulating nuisance noise (nuisance patio music):

CBES	WPS	LGA
Authority to Enforce Loud Music from Unlicensed Patios		
Yes under NLB	Yes under NLB	No authority
Authority to Enforce Loud Music from Licensed Patios		
Yes under NLB	Yes under NLB and Liquor Act and Regulations	Yes under Liquor Act and Regulations
Enforcement Disposition Actions Available		
Ticket under MBEA/POA	Ticket under MBEA/POA	*If Licensed premises Ticket under POA Impose condition on licence Restrict hours of music Restrict hours of liquor service Vacating of premises or area Administrative warnings Administrative fines Suspending a licence Cancelling a licence
Burden of Proof / Rules of Evidence Required		
Court – based on conditions found on incident by incident basis – at time of incident	Court – based on conditions found on incident by incident basis – at time of incident	*If Licensed premises Quasi-Judicial (Administrative/Board) – based on overall observations and impact to community. At any time, based on information collected through investigation. Not bound by technical rules of evidence or procedure. Court – if POA - based on conditions found on incident by incident basis – at time of incident
Impact of Enforcement Action / Corrective Action		
Short term – offence under by-law results in ticket issued (daily)	Short term – offence under by-law results in ticket issued (daily)	Both short term and long term. Short term – action based on incident by incident basis. Long term – addresses the root problem, the operation of the licensed premises.

Opportunities to address loud music:

Option 1 – Status quo - Leverage the existing legislation to respond to citizen concerns.

Currently the NLB and the Act address noise nuisances. The LGA is specifically more effective in addressing loud music emanating from licensed patios when that operation is impacting the surrounding community.

Analysis:

Ticketing of noise violations under the NLB can now be processed through the MBEA. However, fee amounts in and of themselves may not be sufficient to change the behaviour of non-compliant operators, particularly when the revenue or perceived value of continuing the non-compliance is much higher than the potential fine. Additionally, the ticketing process requires consistent enforcement resources to monitor compliant operators.

The priority level of the call for service and resourcing at the time of the alleged offence are considerations for response times. There are high demands on police resources, and it can be reasonably assumed that most nuisance calls may not be dispatched within hours of the complaint. In those circumstances, charges could not be laid as the offence is not occurring at the time of police attendance.

Current enforcement techniques from CBES officers such as warning letters, by-law violation orders, and Common Offense Notices are cost and time intensive; when the remedy of non-compliance can be imposed through a condition of the operators' licence to run the business. These methods can be considered more effective in the case of repetitive non-compliance.

Enforcement options and tools available to the LGA under the Act are significant and the processes involved provide agility for site specific situations. For example, conditions may be placed on a specific licensee given the circumstances of a specific issue versus a blanket prohibition across the entire city under new or amended by-laws.

One can reasonably assume that issues related to loud noise (music) from patios are highly correlated to that patio being licensed. Amplified music is part of the operation of the licensed premises and can vary in and out of compliance on a daily and hourly basis.

A licensing structure offers the opportunity to manage repeat non-compliance in a more straight forward manner, by establishing an escalating series of consequences, leading up to suspension or even potential revocation of a license.

Option 2 – Amend the Zoning By-law and/or Approval Process

All licensed patios require a development permit from Zoning and Permits as well as occupancy permits to be established. There are two Zoning by-laws that apply: the Winnipeg Zoning By-law No. 200/2006 and the Downtown Winnipeg Zoning By-law No. 100/2004. All licensed patios exceeding 100 square feet in size (outside of the downtown) require Conditional Use approval by way of an advertised public hearing through the Board of Adjustment. During this approval

process, conditions can be placed on those orders (Development Conditional Use (DCU) Orders).

If the licensed patio is in the downtown, the Downtown Zoning By-law applies and DCU's apply to patios that are over 1000 square feet in the Character Sector only; the remaining part of the downtown is exempt from this requirement and the licensed patio use is permitted without limitations.

Typical "conditions" placed on DCU's often include restrictions on amplified music and hours of service.

Analysis:

An amendment to the Zoning By-laws or approval process could include blanket condition restrictions on music and possible closing times at those patios. Amendments to one or both Zoning By-laws require formal approval at Council and include advertising for the public hearing, potential public consultation and stakeholder input.

However, there are several drawbacks to this option. Primarily, that there would be no impact to existing licensed patio operations as they have been established legally through previous conditional use approvals. It should be noted that the impetus for this report is that there are some existing operators causing concerns for nearby residents and this approach would not address those situations.

A second drawback is that land use processes are intended to focus on the actual use and do not inherently have the agility to be an effective tool in controlling (activity) operational non-compliance issues that can occur regularly, such as loud noise / disturbances to the adjacent context. And since rights under zoning *run with the land*, a patio approval issued for a French café, as an example, would continue to be in place without a new application if the premises converted into a livelier bar and grill with a patio.

In addition, zoning by-law enforcement officers, since their focus is on land-use versus operational activity generally do not work evenings and weekends, when most if not all compliance issues occur. A significant shift in work time and resources would need to be made to address a handful of concerns.

Option 3 – Amend Part 5 of the NLB

Currently the activity of playing loud music anywhere at any time is investigated as a "Noise Nuisance" and enforced under Section 67 of the NLB, which allows for considerations to be made on a situational basis.

Section 69 of the NLB prohibits certain activities at specific times within 150 Meters of a residential property. This section currently regulates activities related to the use or operation of mechanical tools, machines, and engines or motors.

Should an amendment to the NLB be made, this section would be amended so that it prohibits the activity of any property owner or establishment operator to allow outdoor patio music (amplified) to emanate from outdoor patios at restaurants, drinking establishments, micro-brewery, distillery or winery, or any commercial enterprises between the hours of 11:00 p.m. and 8:00 a.m.

Enforcement of this by-law is shared between Winnipeg Police Service and Community By-law Enforcement Services which includes attending at the time of the offense to determine if a violation has occurred and issuing a Penalty Notice as required.

Analysis:

Currently all nuisance noise complaints are investigated by Winnipeg Police Officers (people related) and CBES Officers (mechanical and air moving devices) under the existing by-laws. This specific amendment option has a few implications ranging from enforcement to expected results for the amendment itself.

Enforcement of the NLB can be handled by Police Officers but is subject to priority screening which affects the ability for an officer to attend to a complaint while the possible violation is in progress. CBES Officers could attend but resourcing considerations must be made in relation to hours of work, training, and potential health and safety factors that can exist when liquor consumption is involved.

A major drawback to this option is that it would affect one law abiding business owner's ability to provide a certain level of table service, regardless of their location and neighbourhood, but will not necessarily stop another business owner from treating any subsequent fines or penalties as a cost of doing business and choose to continue violating the NLB, as the operator can only be charged once per day. From the complainants' point of view, in this circumstance it would give the appearance that the City has not responded to their complaint even though the officers have already attended and dealt with the matter.

Summary

Based on the Public Service's review of the mechanisms to address nuisance noise, we have determined that there are sufficient measures in place and that no changes to City by-laws are required. To provide greater responses to the public, scripting will be provided to 311 operators so that concerns with excessive noise on licensed patios can also be referred to The Liquor and Gaming Authority of Manitoba.

FINANCIAL IMPACT

Financial Impact Statement **Date:** February 5, 2018

Project Name:

Outdoor Patio Music

COMMENTS:

There are no financial implications with respect to this report as it is being received as information.

Original signed by K. Lemoine
Kelly Lemoine, CPA, CA
Manager of Finance & Administrative Services
Community Services Department

CONSULTATION

This Report has been prepared in consultation with:

Winnipeg Police Service
Planning, Property, & Development
Legal Services (as to legal issues)
Liquor and Gaming Authority

OURWINNIPEG POLICY ALIGNMENT

Direction 1 Develop and apply direction strategies
Ensure effective implementation efforts through integration, partnerships and collaboration cross the City of Winnipeg organizational structure and with external organizations.
Page 52 Direction 7 Create favourable conditions for development that is consistent with the principles and goals of Complete Communities.
Page 50 Direction 2 Provide a predictable and cost-effective business environment that promotes investment and growth.
Page 50 Direction 3 Maintain strong intergovernmental cooperation.
Pursue collaborative approaches to crime prevention, infrastructure renewal, competitive taxation, regulatory overlap and regional economic development.
Page 44: Direction 7 Implement an approach to safety and security that is collaborative and involves the community
Continue to enhance access to safety and law enforcement services through technology, streamlined processes, partnerships and other methods as appropriate.
Page 34: Key directions for the downtown
Pursue a focused district, destination and cluster approach to Downtown development that will seek to:

- help achieve a critical mass of people-oriented activity that is vital to ongoing economic success.

Page 34: Promote and enable a mix of residential development options as part of a mixed-use strategy seeking to:

- accommodate the residential needs of a large cross section of the population.
- establish a number of thriving ‘complete’ communities Downtown.
- attract additional commerce to the area, leading to active – and safer – Downtown streets.

Page 35: Support the expanded presence of arts, culture, sports, entertainment and leisure throughout Downtown together with complementary services and attractions seeking to:

- draw more people and create more extended hour activity strategically throughout Downtown.

Implement strategies to expand the City’s policing capacity.
Page 43: Direction 4 Promote safety on streets and sidewalks
Create pedestrian-oriented streetscapes downtown and on neighbourhood corridors and centres and those streets where a high level of transit service operates.

SUBMITTED BY

Department: Community Services
Division: Community By-law Enforcement Services
Prepared by: John Lorbis, Enforcement Coordinator, Community By-law Enforcement Services
Date: February 7, 2018
File No: CMS-2018-1

APPENDIX A

Neighbourhood Liveability By-law:

Noise nuisance prohibited
67(1) Except to the extent permitted under this By-law, a person must not make or continue, or cause to be made or continued, or own or harbour an animal that makes:
(a) an unreasonably loud, unnecessary or excessive noise or sound;

(b) a noise or sound which unreasonably disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable individual of ordinary sensitivity; or

(c) a noise or sound which is so harsh, prolongued, unnatural or unusual in time and place so as to occasion unreasonable discomfort to any individual or so as to detrimentally affect residential properties or places of business.

67(2) In determining whether a noise or sound has been made which contravenes subsection (1), the following factors, among others, may be taken into account:
(a) the time of day and day of the week on which the noise or sound was made;

(b) the nature and use of the area from which the noise or sound emanates and the nature and use of the area at which it is received;

(c) the nature of the event or activity producing the noise or sound;

(d) the volume, duration and nature of the sound, including whether it is recurrent, intermittent or constant; and

(e) the 'A' weighted sound level of the noise or sound and the ambient sound level, if measured, but not 'B', 'C' or 'linear' weighted sound levels.

Certain activities prohibited
68. A person must not
(a) except in any emergency, engage, operate, apply or otherwise use an engine retarder brake in any vehicle driven within the City of Winnipeg;
(b) offer for sale or sell anything by shouting or amplified sound within any residential or commercial district;

Certain activities prohibited at specific times
69(1) A person must not do any of the following before 7:00 a.m. and after 9:00 p.m. on weekdays or before 9:00 a.m. and after 9:00 p.m. on Saturdays, Sundays and statutory holidays:
(a) operate or permit the operation of any mechanical powered saw, drill, sander, grinder, lawn or garden tool, snowblower, or similar device out of doors within 150 m of a residential property;
(b) operate or permit the operation of heavy equipment, machinery or tools used in construction, drilling or demolition within 150 m of a residential By-law No. 1/2008 42

property;
(c) repair, rebuild, modify or test out of doors any motor vehicle, motorcycle, motor boat, outboard motor or recreational vehicle within 150 m of a residential property.
69(2) A person must not:
(a) operate or permit the operation of any engine or motor in or on any motor vehicle or attached auxiliary equipment for a continuous period exceeding 10 minutes, while such vehicle is stationary within 150 meters of a residential property before 7:00 a.m. and after 10:00 p.m. on any day;
(b) operate or permit the operation of a powered model vehicle before 9:00 a.m. and after 9:00 p.m. on any day.

Air conditioners, fans, etc.
70(1) Subject to subsection (2), the owner and occupant of property must ensure that air conditioning equipment, air moving devices or fans located on his or her property do not collectively exceed a sound level at the point of reception of
(a) 55 dBA between 7:00 a.m. and 9:00 p.m.; and
(b) 50 dBA between 9:00 p.m. and 7:00 a.m.
70(2) Notwithstanding subsection (1), where the ambient sound level at the point of reception exceeds the sound level limits set out in subsection (1), the air conditioning equipment, air moving device or fan is not contravening this section unless the sound level it produces measures 5 dBA in excess of the ambient sound level.

The Liquor and Gaming Control ACT:

Terms and conditions on licence

107(1) The executive director may issue a licence to an applicant with or without terms and conditions. The executive director may also impose, rescind or vary a term or condition on a licence at any time after a licence has been issued.

Duty of licensee re conduct in licensed premises

27(2) A licensee must not

(a) allow or permit any activity that contravenes a federal or provincial enactment or a municipal by-law to take place in the licensed premises;

(b) allow or permit disorderly persons to be in the licensed premises or in the immediate vicinity outside of the licensed premises;

Responsibilities of the executive director

10(2) The executive director is the chief executive officer of the authority and is responsible for

(a) the administration of the authority;

(b) ensuring the policies of the authority are implemented; and

No disorderly conduct in licensed premises

28 A person must not engage in disorderly conduct in licensed premises or in the immediate vicinity of licensed premises.

Investigating and mediating complaints

67(1) If the executive director becomes aware of a complaint respecting the operation of retail premises, licensed premises or premises that are the subject of a permit, he or she may

(a) investigate the complaint; and

(b) if the person making the complaint and the holder of the licence or the operator of the premises agree, attempt to mediate the complaint.

Additional requirements — liquor service and retail beer vendor licences

106(2) A liquor service licence or a retail beer vendor licence may not be issued unless the executive director is satisfied that

(c) the licence is in the public interest having regard to the needs and wishes of residents of the area where the premises are located.

There is further authority within the LGA licensing and enforcement process to restrict music on a licensee by licensee basis. Page 14 of the LGA's Liquor Licensee Policy Manual (dated June 16, 2017) states:

3.3.5. If the LGA receives noise complaints once the patio is approved, approval may be withdrawn or additional conditions such as restricted service or vacating hours may be imposed to prevent noise nuisance to nearby residents and the public. (Authority of The Act Ss. 10(2) and 107(1).