Minute No. 272
Report – Standing Policy Committee on Protection, Community Services and Parks – April 22, 2020

Item No. 3 Review of the Patio Smoking Prohibition under the Outdoor Smoking By-law

COUNCIL DECISION:

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

1. That this report be received as information.

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DECISION MAKING HISTORY:

Moved by Councillor Rollins,

That the recommendation of the Standing Policy Committee on Protection, Community Services and Parks be adopted by consent.

Carried

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On April 28, 2020, the Executive Policy Committee concurred in the recommendation of the Standing Policy Committee on Protection, Community Services and Parks and submitted the matter to Council.

STANDING COMMITTEE RECOMMENDATION:

On April 22, 2020, the Standing Policy Committee on Protection, Community Services and Parks concurred in the recommendation of the Winnipeg Public Service and submitted the matter to the Executive Policy Committee and Council.

ADMINISTRATIVE REPORT

Title: Review of the Patio Smoking Prohibition under the Outdoor Smoking By-law

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

AUTHORIZATION

Author	Department Head	CFO	CAO
W. Yee	C. Fernandes	N/A	M. Ruta, Interim CAO

EXECUTIVE SUMMARY

On March 22, 2018, Council adopted changes to the Outdoor Smoking By-law 30/2018, which banned smoking on the outdoor patios of bars, restaurants and craft breweries; extended the definition of "smoking" to include the use of devices such as e-cigarettes, and smoking non-tobacco substances such as cannabis; and replaced the fines set out in the By-law with standard set fines that are currently enforced through The Municipal By-law Enforcement Act.

Through that report to Council, the Public Service was directed to report back to the Standing Policy Committee on Protection, Community Services and Parks in two years with a review of the Outdoor Smoking By-law, including:

a) Considerations for establishing buffer zones around outdoor commercial patios where personal smoking devices generating second-hand smoke is prohibited, and
b) Advice concerning if prohibitions should be extended to areas where food and drinking are ancillary or incidental to the principal use under occupancy permit.

In undertaking the review, the Public Service conducted a jurisdictional scan, considered the impact that further amendments to the By-law would have on the public and business owners, reviewed citizen complaints over the past two years, and assessed the results of the Community By-law Enforcement Services Division's enforcement and education initiatives. Based on this assessment, no changes to the By-law to establish buffer zones are recommended.

Additionally, extending the areas for a smoking prohibition is not recommended, as current Provincial legislation covers the majority of circumstances where smoking is prohibited; extension would result in the inclusion of a significant number of locations, many of which are unenforceable by the City; and complaints about smoking in areas not covered by the By-law are minimal.

RECOMMENDATIONS

1. That this report be received as information.

REASON FOR THE REPORT

On March 22, 2018, Council adopted the following:

1. That Council adopt the attached By-law to amend the Outdoor Smoking By-law No. 62/2011 which will:
    a. Ban smoking on outdoor patios of bars, restaurants and craft breweries;
    b. Extend the definition of "smoking" to include the use of devices such as e-cigarettes, and smoking non-tobacco substances such as cannabis;
    c. Replace the fines currently set out in the By-law with standard set fines that can be enforced through The Municipal By-law Enforcement Act.

2. That the Public Service be directed to report back to the Standing Policy Committee on Protection, Community Services and Parks in two years with a review of the Outdoor Smoking By-law including:
    a. Considerations for establishing buffer zones around outdoor commercial patios where personal smoking devices generating second-hand smoke is prohibited; and
    b. Advice concerning if prohibitions should be extended to areas where food and drinking are ancillary or incidental to the principal use under occupancy permit.

IMPLICATIONS OF THE RECOMMENDATIONS

There are no financial or other implications, as this report is to be received as information.

HISTORY/DISCUSSION

The Outdoor Smoking By-law No. 62/2011 was passed by Council on May 25, 2011, to prohibit smoking in areas around playgrounds and athletic fields, school grounds, around health care facilities and City of Winnipeg workplaces.

On June 12, 2017, the Standing Policy Committee on Protection, Community Services and Parks directed the Winnipeg Public Service to:

1. Conduct a cross-jurisdictional review of Canadian municipalities and other Canadian regulatory agencies and/or legislations on prohibitions related to cigarettes, cigars, pipes, e-cigarettes, water pipes, hookahs, and other similar products/devices that generate second-hand smoke on outdoor patios at restaurants and bars.
2. Through the Office of Public Engagement, conduct consultation with the public and stakeholders to determine the level of interest in changing the Outdoor Smoking By-law No. 62/2011 as applicable to smoking on outdoor patios at bars and restaurants.

3. Provide appropriate recommendations based on the information obtained in its review and feedback provided through public consultation and report back to the appropriate committee of Council within 180 days.

On January 25, 2018, Council directed the Public Service to prepare amendments to the Outdoor Smoking By-law No. 62/2011, to achieve the following:

1. Prohibit the use of personal smoking devices (including cigarettes, cigars, pipes, e-cigarettes, water pipes, hookahs, and other similar products/devices) on outdoor patios where food and/or beverage service is permitted.
2. Penalties for both smokers and patio owners/operators if smoking on outdoor patios takes place.
3. A fine schedule for offences related to smoking on patios, enforceable through the Municipal By-law Enforcement Act (MBEA).
4. That Indigenous-led ceremonies be exempt.
5. Effective date of April 1, 2018.

On March 22, 2018, Council adopted the amending Outdoor Smoking By-law 30/2018 as outlined above, and directed the Public Service to report back to the Standing Policy Committee on Protection, Community Services and Parks in two years with a review.

Discussion:

1. Considerations for establishing buffer zones around outdoor commercial patios where personal smoking devices generating second-hand smoke is prohibited.

No changes are recommended to the buffer zone for the following reasons:

i. A jurisdictional scan indicated that there is no definitive best practice for establishing a buffer zone.
ii. Establishing a buffer zone would result in added complexity for citizens and business owners, and may create situations that are not enforceable by the City.
iii. Citizen complaints on this issue are minimal.
iv. Enforcement and education initiatives have not identified this as a serious issue.

A jurisdictional scan encompassing 10 Canadian municipalities in 2017 and again in 2019 indicated there are no definitive best practices for a buffer zone around prohibited smoking areas for commercial patios. This was one of the primary reasons why a buffer zone was not recommended to be implemented in 2018.

Other highlights of the jurisdictional scan include:

- Municipal by-laws have become more specific and detailed regarding the patio smoking issue. As a result, Provincial Acts are deferred to in fewer municipalities.
- Edmonton is the only municipality to extend the distance at which one can smoke from any door, window or air intake (to 10 metres as opposed to 5 metres in 2017). *However, there was no change to a buffer zone around a patio.*

  - Ottawa has developed a form entitled “Report Smoking in the Public or Workplace”, which allows citizens to voice complaint(s) / concern(s) if a business or member of the public refuses to comply with the smoking by-law.
- All municipalities (or provinces where applicable) continue to provide an outdoor smoking exemption for Indigenous ceremonial use.
- Much of the responsibility to enforce the patio smoking by-law continues to fall upon the business owner.

The jurisdictional scan shows that many of the municipalities have amended their by-laws to reflect elements that were incorporated into the City of Winnipeg’s by-law in 2018, the most prominent being amendments to their definition of “smoking”. Half of the municipalities have also amended their by-laws to include cannabis.

In 2018, the City of Winnipeg amended the definition of smoking to capture all types of devices and products: “smoking” means the use of a personal smoking device to inhale tobacco, cannabis, or any other substance”. In addition, a new definition of “personal smoking devices” was incorporated into the By-law to support the amended definition of “smoking”: “…include cigarettes, cigars, pipes, e-cigarettes, water pipes, hookahs and similar devices that allow the user to inhale tobacco, cannabis or any other substances and that generates second-hand smoke when being used”.

Introducing a requirement for buffer zones would add a layer of complexity that may confuse citizens as to where smoking is allowed, because a significant number of patio buffer areas would be on public land. Such requirements would also create situations that are not enforceable, and may place operators in a difficult situation to comply with by-laws. The majority of commercial outdoor patios are adjacent to public space or private property with public access; in these situations, enforcement by operators is difficult.

Since amendments to the Outdoor Smoking By-law were completed in April 2018, the Public Service has received only one complaint related to the notion of buffer zones around commercial patios.

Two education and enforcement initiatives were conducted in the summers of 2018 and 2019, which resulted in 316 operator education opportunities, distribution of over 300 information pamphlets to operators, and inspection of 316 patios. No violations were noted during these inspections.

2. Advice concerning if prohibitions should be extended to areas where food and drinking are ancillary or incidental to the principal use under occupancy permit.

No changes are recommended to extending the areas for a smoking prohibition for the following reasons:

i. Extending prohibition of smoking to areas where food and beverage are incidental or ancillary to the zoning use would result in the inclusion of a significant number of locations as well as added complexity with regards to enforceability. Current Provincial legislation covers the majority of circumstances where smoking is prohibited.
ii. The Public Service has not received complaints about smoking in areas not covered by the current by-law.

Council adopted amendments to the Outdoor Smoking By-law 62/2011, which prohibited smoking in outdoor areas set up for the consumption of food and which are required to obtain an occupancy permit under the Winnipeg Building By-law. To operationalize Council's direction, it was critical to define the location of this prohibition. As such, the following criteria for applicable locations were set out in the By-law:

- On properties whose principal use falls within the "Food and Beverage Service" Use Category (within the area governed by the Winnipeg Zoning By-law) or the "Restaurant" or "Drinking Establishment" use in areas within the Downtown Zoning By-law, or
- Within an encroachment onto the street right of way approved (or able to be approved) pursuant to sub-clause 4(1)(c)(i) of the Encroachment By-law (outdoor patios adjacent to restaurants).

The By-law therefore applies to all patios that occupy defined space and therefore require an occupancy permit. It therefore applies to areas surrounded by fences or hedges that limit access to the area. However, in order for the By-law to apply, the defined space applies on private property where the principal zoning use is a restaurant, drinking establishment or craft brewery, distillery or winery, or it would have to be on an encroachment onto the sidewalk, street, or any public right-of-way for an outdoor patio.

This means that the By-law would not apply to outdoor areas on properties where food or beverage services are ancillary or incidental to the zoning use. Sports or entertainment areas/stadium facilities and other recreation and entertainment outdoor venues will be exempt where the principal uses, under the occupancy permit, are not a restaurant or drinking establishment. The prohibition would also not apply to outdoor eating areas set up by employers for employees to enjoy lunch or coffee breaks.

If amendments were made to the By-law to extend to locations where food and beverage were incidental or ancillary to the zoning use, it would result in the inclusion of a significant number of locations, many of which are unenforceable by the City and could be covered by either company policy or Provincial legislation (if applicable). Public feedback on any extension of the prohibition is unknown; the public survey conducted in 2017/2018 focused specifically on smoking prohibitions at restaurant and bar patios, per Council's initial direction.

Notwithstanding the above, Provincial legislation on this subject matter must be considered in order to avoid redundancy. Provincial legislation covers a significantly broader range of issues related to smoking, including locations where smoking is prohibited.

The initial report considered applicability of Provincial legislation and how the outdoor smoking by-law would complement or address Council policy regarding where smoking is not allowed. Consequently, a summary of relevant Provincial legislation and recent Provincial amendments to smoking legislation are provided below.

Provincial legislation (C.C.S.M. c. S150; *The Smoking and Vapour Products Control Act*) addresses all "incidental" or "ancillary" uses where those areas are indoors or "covered":

No smoking in enclosed places

2(1) Except as permitted in section 3, 3.1, 4 or 5.1, no person shall smoke in

(a) an enclosed public place;

(b) an indoor workplace;

(c) a group living facility;

(d) a public vehicle; or

(e) a vehicle used in the course of employment, while carrying two or more employees.

No e-cigarette use in enclosed places

2(1.1) Except as permitted in section 3, 3.1 or 4.1, no person shall use an e-cigarette in

(a) an enclosed public place;

(b) an indoor workplace;

(c) a group living facility;

(d) a public vehicle; or

(e) a vehicle used in the course of employment, while carrying two or more employees.

The City of Winnipeg's commercial patio smoking prohibitions, which hold proprietors responsible, is consistent with Provincial legislation:

Proprietor to ensure no smoking or e-cigarette use

2(2) The proprietor of a place, area or vehicle set out in subsection (1) or (1.1) where smoking or using an e-cigarette is prohibited under this Act must ensure that no person smokes or uses an e-cigarette in that place, area or vehicle.

In the updated Provincial legislation, *The Smoking and Vapour Products Control Act*, new provisions related to vapour products and their use came into force on October 1, 2017. As of this date, the same rules that apply to tobacco use also apply to vaping in enclosed public places. Public Health Inspectors investigate complaints about violations of the smoking and vaping ban in venues such as restaurants bars, arenas, shopping malls and any other enclosed public place. In addition, the amended *Act* prohibits smoking cannabis in any public place.

Provincial legislation allows smoking on all commercial outdoor patios, unless the owner of an establishment has designated a patio as non-smoking or the patio is considered enclosed, as follows:

Patios are considered an "enclosed public place" and therefore smoking is not allowed if:

- more than 25% of the total floor area is covered by a roof, canopy or other barrier; AND
- more than 50% of the perimeter is more than 50% covered by a physical barrier such as a wall, window or panelling that impedes air flow.

The City of Winnipeg's by-law amendment in 2018, however, prohibited smoking on commercial outdoor patios at restaurants and bars in the City of Winnipeg.

Since the adoption of the amending by-law in April 2018, Community By-law Enforcement Services has not received any complaints related to prohibition of smoking in areas where food and drinking are ancillary or incidental to the principal use under the occupancy permit.

The Public Service has notified stakeholders who were consulted on the initial report in 2018 of the March 22, 2018 Council disposition and the direction to report back.

FINANCIAL IMPACT

Financial Impact Statement Date: February 14, 2020

Project Name:

Review of the Patio Smoking Prohibition under the Outdoor Smoking By-law

COMMENTS:

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

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

CONSULTATION

This Report has been prepared in consultation with:

N/A

OURWINNIPEG POLICY ALIGNMENT

N/A

WINNIPEG CLIMATE ACTION PLAN ALIGNMENT

N/A

SUBMITTED BY

Department: Community Services
Division: Community By-law Enforcement Services
Prepared by: Winston Yee, Manager, Community Licensing & Bylaw Enforcement Services
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