



**SUBJECT: Amendments to Temporary Use By-law and By-law
Regulating Temporary Outdoor Patios In All Seasons**

TO: Community Planning, Regulation & Mobility Cttee.

FROM: Community Planning Department

Report Number: PL-60-20

Wards Affected: All

File Numbers: N/A

Date to Committee: November 2, 2020

Date to Council: November 2, 2020

Recommendation:

Approve Option 2, to:

Authorize Executive Director of Community Planning, Regulation and Mobility, working in consultation with Director of Transportation, to approve extension of temporary restaurant patios and/or temporary retail space permissions on public property in connection with COVID-19 recovery to October 31, 2021, subject to such criteria and conditions staff deem appropriate;

Authorize the Executive Director of Community Planning, Regulation and Mobility, working in consultation with the Director of Roads, Parks and Forestry and the Director of Transportation to undertake a case by case consideration of winter patios on public property and/or rights of way in downtown Burlington and to permit winter patios on public property and rights of way, where feasible, having regard to relevant operational considerations including winter control and winter maintenance of sidewalks and roads and general public safety;

Authorize the Executive Director of Community Planning, Regulation and Mobility, working in consultation with the Director of Transportation, to approve extension of temporary outdoor patios and/or temporary retail space on private property to October 31, 2021 subject to such criteria and conditions as staff deem appropriate; and

Authorize the Executive Director of Community Planning, Regulation and Mobility to grant or revoke such approvals, consents, agreements or other authorizations and take such other steps as may be required to give effect to the recommendations herein;

Authorize the Executive Director of Community Planning, Regulation and Mobility to execute any documents and agreements necessary to implement the recommendations herein

Amend By-law 2020.422, a By-law to amend Zoning By-law 2020 of the City of Burlington to permit temporary outdoor patios as a result of the COVID-19 pandemic recovery efforts until October 31, 2021, attached as Appendix “A” to Report PL-60-20; and

Amend By-law 39-2020, a By-law to delegate authority to temporarily restrict the common law right of passage in connection with on-street restaurant patios and other on-street retail uses in Downtown Burlington to allow for temporary outdoor patios in Burlington until October 31, 2021, attached as Appendix “B” to Report PL-60-20.

PURPOSE:

The purpose of this report is to provide City Council with options and recommendations needed to extend permissions for temporary patios on public and private property in connection with COVID-19 until October 31, 2021,

Provide council with options and recommendations related to patios on public property in downtown Burlington during winter months, including options to permit patios to remain on municipal rights of way where operational requirements for winter maintenance and public safety can be met, and options for removal of patios from rights of way where operational requirements for winter maintenance cannot be met.

Vision to Focus Alignment:

Temporary Outdoor Patios contribute to the achievement of supporting small business.

- Increase economic prosperity and community responsive city growth

Background and Discussion:

In March 2020, the Province of Ontario declared a state of emergency in response to the COVID-19 global pandemic. This resulted in many businesses, including all restaurants, being mandated to close or significantly restrict the number of patrons allowed within their premises. On July 2, 2020 Provincial regulations for Stage 2 were put in place to allow for restaurants to provide food and beverage service to patrons on outdoor patios.

With the COVID-19 restrictions on limited seating for indoor dining still in place, there is an increased need across municipalities in Ontario to provide unique and innovative

options for small businesses, such as restaurants to continue to serve patrons throughout the winter season. These restrictions have had significant negative economic impacts on restaurants across Burlington and Ontario and extending the outdoor patio season in Burlington throughout the winter season would provide an option for restaurants to continue operating while aligning with Provincial regulations and regional and municipal health and safety measures.

At the time of writing this report, 40 patios have been approved on private property and 13 patios on City property in the Downtown. Risks and opportunities for temporary patios on private property differ from those on City property.

By-Laws Governing Temporary Outdoor Patios and On-Street Uses

On June 18, 2020, Council approved By-law 2020.421, a By-law to amend Zoning By-law 2020 of the City of Burlington to permit temporary Outdoor Patios as a result of the COVID-19 recovery efforts. At this time, Council approved the removal of fees and regular process, including the Site Plan Approval and Zoning Clearance Certificate processes to make it easier for restaurants to install temporary outdoor patios. To further support this, on July 28, 2020, Council repealed By-law 2020.421 and approved By-law 2020.422, a By-law to amend Zoning By-law 2020 of the City of Burlington to permit temporary outdoor patios and limited tent structures to support the COVID-19 pandemic recovery efforts.

Provincial Regulations

Provincial regulations apply to patios on both private and City-owned property. On July 24, 2020, the Province allowed Halton Region to enter Stage 3 of the Provincial COVID-19 Recovery Plan, allowing for indoor dining with social distancing provisions, among other limitations.

Prior to implementation of Stage 3 permissions, the Province approved Ontario Regulation 344/20, regarding Stage 2 Businesses and Places (Food and Drink) to permit restaurants to serve patrons through take-out, drive-through, or delivery service or at an outdoor dining area, and introduced the following conditions:

1. Patrons must be served through take-out, drive-through or delivery service or at an outdoor dining area, that meets the following conditions:
 - i. The outdoor dining area must be in or adjacent to the place of business;
 - ii. The outdoor dining area must be configured to ensure physical distancing of at least two metres between patrons seated at different tables;
 - iii. If the outdoor dining area is covered by a roof, canopy, tent, awning or other element, at least two full sides of the outdoor dining area must be open to the outdoors and must not be substantially blocked by any walls or other impermeable physical barriers; and,

- iv. If the outdoor dining area is equipped with a retractable roof, the roof must be fully retracted and at least one full side of the outdoor dining area must be open to the outdoors and must not be substantially blocked by any walls or other impermeable physical barriers.

At this time, the Province is monitoring the COVID-19 infection rates in Halton Region, with the possibility that the Region will be rolled back to Stage 2 restrictions.

The Province has approved Ontario Regulation 345/20 to permit quick establishment or extension of restaurant and bar patios and provisions that enable municipalities to make the quick decisions necessary to support restaurants during this transition. The effect of O. Reg 345/20 is to eliminate certain typical planning processes and requirements to enact temporary use by-laws and to help expedite the creation of extended outdoor patio spaces to safely accommodate patrons where licensed establishments are permitted to reopen.

Current State of Temporary Patios in the City of Burlington

The City of Burlington has had success over the summer months of supporting the use of temporary patios and on-street patios. At the time of writing this report, 40 patios have been approved on private property and 13 patios on City property in the Downtown. Many restaurant owners have purchased or rented tents to provide covered dining experiences for their customers. Staff will provide a verbal update to Council on whether the 13 temporary patios on City owned lands intend to continue use of their patio and/or tent during the winter season.

Halton Region is currently in Stage 3 of the Provincial COVID-19 Recovery Plan. If the Province requires Halton Region to revert to Stage 2 business the result could be in restaurants being restricted to only serving patrons outdoors until further notice from the Province. In light of this risk, and with the winter months approaching, many restaurants have indicated intentions to operate their temporary outdoor patios throughout the winter months (November to April, inclusive). To do so, they have expressed plans to use temporary tents to protect their staff and patrons from winter weather, including snow, rain, and wind.

Strategy/process

Staff is recommending that the Temporary Use By-law to Regulate Temporary Outdoor Patios be amended to allow for the validity date of temporary patio agreements to be extended until October 31, 2021 to coincide with the typical end of patio season. By-law 2020.422 established the permission of temporary tents. This amendment would allow the regulations and provisions established in By-law 2020.422 to be expanded to permit the use of temporary tents up to 60m² in accordance with the requirements of the Ontario Building Code and Ontario Fire Code.

The zoning bylaw currently restricts temporary tents, greater than 60 m², to a maximum of three occasions in a 12 month period, subject to a maximum of 10 days duration per occasion. To accommodate temporary winter patios, staff propose amending the Zoning By-law to allow temporary tents greater than 60 m² to be permitted until October 31, 2021.

Staff also recommend that By-law 39-2020, a By-law to delegate authority to temporarily restrict the common law right of passage in connection with on-street restaurant patios and other on-street retail uses in Downtown Burlington to allow for temporary outdoor patios in Burlington to be extended until October 31, 2021. Allowing such on street uses presents risks to the City related to safe passage and the ability to safely clear snow from sidewalks and roadways. As such, a case by case assessment of those patios that can be permitted to remain in winter permit safe and effective winter maintenance is required.

A Winter Patio Task Force will assess the appropriateness of each patio that expresses interest in operating on public land throughout the winter months. Assessments will be made to ensure health and safety measures are upheld, including whether the patio adheres to provincial regulations such as the Ontario Building Code, Ontario Fire Code, and public health regulations, as well as any local by-laws that may be deemed appropriate (e.g. the Zoning by-law). The ability for the City to comply with its maintenance obligations under the *Municipal Act, 2001*, and uphold its minimum maintenance standards on public right of ways and the general safety of the public on the City's rights of way will also be considered. Patio and temporary structure applications will be evaluated on a case by case basis by the Winter Patio Task Force to consider whether they obstruct road and/or pedestrian traffic.

Provincial Requirements for Temporary Structures

In accordance with the Building Code Act and Ontario Building Code, a tent or group of tents is exempt from the requirement to obtain a permit under section 8 of the Act and is exempt from compliance with the Code provided that the tent or group of tents are:

- (a) not more than 60 m² in aggregate ground area,
- (b) not attached to a building, and
- (c) constructed more than 3 m from other structures.

A building permit is required for a tent or group of tents when the aggregate area is more than 60 m², it is attached to a building, and/or it is less than 3 metres from another structure. If a tent requires a building permit, the structural design for tents require a Professional Engineer registered in Ontario to seal the documents/drawings and ensure compliance the Ontario Building Code. Specifications apply to the design of the complete building system including all structural members, connections, anchorage and

fabric cover. As part of the structural design, mechanical, thermal, manual or other means of snow removal are not permitted by the Ontario Building Code.

As part of the building permit review process, the Building Section will consult with Fire Prevention to ensure compliance to the provisions of TSSA for the placement of any heating appliances.

Recommendations Align with Ontario Fire Code Requirements

The Ontario Fire Code contains specific requirements for the use of tents that exceed 30 m² in size or that are used for commercial or assembly purposes regardless of size. Section 2.9 of the Ontario Fire Code (OFC) is relevant to outdoor heating regulations, which states:

- Tents should be composed of non-combustible materials or flame proofed to ensure that the materials will pass the match flame test outlined in NFPA 705, “Recommended Practice for Field Flame Test for Textiles and Films,”
- The tent should have at least two exits located remotely from each other,
- The tent shall have at least one listed minimum 2A rated portable fire extinguisher located at or near one of the exits,
- Combustible materials (including decorations) shall not be permitted within the tent,
- Smoking and open flame devices shall not be permitted in the tent, unless provisions have been made for such activities under the approved Fire Safety Plan in consultation with Burlington Fire Department,
- A Fire Safety Plan is required for all tents used for assembly purposes and should be submitted for review and approval to firedepartment@burlington.ca, and
- If the tent is not equipped with a fire alarm system, a person shall be appointed for fire watch duty and shall patrol the area continuously to ensure that the exits are kept clear. If a fire is detected, this person shall notify occupants and staff to exit the tent immediately and call 9-1-1.

The Ontario Fire Code also contains specific requirements for the use of heaters located within tents in accordance with Technical Standards and Safety Authority (TSSA) requirements. The regulations do not permit heaters to be located:

- In or below a tent or canopy,
- Under fire escapes,
- Within a means of egress or adjacent to an exit,
- Adjacent to or otherwise obstructing firefighting equipment like fire hydrants or fire department connections, and
- Near or attached to trees, utilities or other street elements.

Electric heaters must be used in accordance with manufacturer's instructions and power cables / cords must be kept clear from pedestrian walkways and protected from mechanical damage.

Provincial Requirements for Minimum Maintenance Standards

Temporary patios on public property must consider the road and sidewalk maintenance requirements imposed on municipalities by section 44 of the *Municipal Act, 2002*, and the Ontario Regulation 239/02 Minimum Maintenance Standards for Municipal Highways, which requires all Ontario municipalities to monitor weather for the accumulation of snow and ice between October 1 and April 30. City staff are required to clear municipal roads and right of ways of ice and snow accumulation to ensure health of safety of road and sidewalk users. Patios that extend into the street may prevent staff from being able to conduct proper maintenance of right of ways during the winter season. Tents on patios may drop unexpected snow loads onto road right of ways, creating potential hazards for pedestrians.

Applicable considerations with respect to Winter Control Measures are addressed in Appendix D.

The same regulations as outlined in the Ontario Building Code, Ontario Fire Code, and AGCO apply to temporary patios on public lands.

Provincial Requirements for Alcohol Service

Staff will follow provincial guidance as it is updated in accordance with public health and safety. Restaurant compliance with AGCO regulations is necessary, and is the responsibility of the restaurant owner to abide by these regulations.

Options Considered

While it is critical for the City to support small business recovery, the impacts of doing so may result in a reduced amount of available public space. Staff recognizes the need to balance the interests of the public broadly. As such the following options have also been considered by staff:

Option One: Early Wrap-up of Existing Temporary Patio Program:

By-law 2020.422, a By-law to amend Zoning By-law 2020 of the City of Burlington to permit temporary outdoor patios as a result of the COVID-19 pandemic recovery efforts does not permit temporary patios to continue operating beyond Jan 1, 2021.

In order maintain health and safety standards, staff considered the option of removing all temporary patios and tents from municipal property before the first snow, which typically occurs between November and December months. There is a risk that in-street

patios may prevent the appropriate clearance of snow. The existing agreements for temporary patios on municipal land allow the agreement to be terminated without prior notice to the restaurant operator, if City staff need to conduct maintenance such as snow or ice removal on municipal right of ways.

While terminating the current agreements early or letting them come to a natural end on Jan 1, 2021 is a potential option, the unprecedented length of the COVID-19 pandemic has and will continue to have negative economic impacts on City residents and small businesses. Due to this uncertainty, a number of restaurants have expressed a strong desire to continue their patio operations throughout the winter season.

Option Two: Extending the Existing Patio Program

Due to the negative economic impacts COVID-19 has caused on the restaurant industry, restaurant operators are facing lower revenues and restricted seating options due to public health measures (e.g. physical distancing). A main revenue stream for restaurants at this time is outdoor food and beverage service. To support Burlington restaurants during the pandemic, staff recommend extending the temporary pop-up patio by-laws to October 31, 2021.

At the time of writing this report, 40 patios have been approved on private property and 13 patios on City property in the Downtown. City staff will communicate with restaurants with existing temporary patio agreements to learn how many intend to extend their agreement to October 31, 2021. Restaurants that have existing outdoor patio agreements with the City of Burlington and intend to operate a patio throughout the winter must inform the City of Burlington of their intentions no later than November 8, 2020.

Through a Winter Patio Task Force, a restaurant that expresses interest in operating their patio throughout the winter season on public land will be evaluated to ensure health and safety measures are upheld, including provincial regulations such as the Ontario Building Code, Ontario Fire Code, maintenance obligations under the *Municipal Act, 2001* and minimum maintenance standards on public right of ways, public health regulations, relevant local by-laws and the general safety of the public on the City's rights of way will also be considered.

The City's Zoning By-law would be amended to remove the current time limitations of temporary structures and tents up to 60 m² to instead permit temporary structures until October 31, 2021. While temporary structures of this size will be subject to the guidelines contained within the temporary use by-law, this amendment will provide increased flexibility to restaurants.

A comprehensive set of winter regulations will be incorporated into the guidelines that will accompany any agreements to extend a patio's validity to October 31, 2021. The agreement will include guidance for appropriate winter patio operations, including the

obligations of restaurant owners with respect to: snow clearance, tents, heaters, and how these differ on public and private lands.

Staff are recommending that temporary patios for those restaurants not wishing to operate their patios into the winter season and/or those public property locations where patios cannot be accommodated during winter months for reasons of winter maintenance or other considerations of public safety be notified by the City of their removal no later than November 15, with removal taking place between November 16-19. Staff are also recommending no further approvals shall be issued until May 1, 2021 to mitigate potential health and safety impacts during the winter months.

Staff across the corporation are committed to reviewing applications and implementing approvals and agreements as fast as possible in order to permit businesses to provide restaurants with clarity regarding whether and how they can safely operate an outdoor patio during the winter season.

Financial Matters:

Staff have maintained the streamlined review and approval process that is currently in place, and which waives fees for all normal clearance processes. In accordance with Section 106 of the Municipal Act, 2001, staff do not recommend waiving fees related to building permits for temporary structures.

Appendix C – Financial Matters includes the cost of building permits for temporary structures over 60 m².

Climate Implications

Patio heaters that rely on fossil fuels such as propane emit greenhouse gas emissions, contributing to climate change. In comparison, given the lower carbon footprint of the provincial electricity grid, electric infrared heaters should be encouraged for use on outdoor patios. The lifecycle costs of electric infrared heaters have also been shown to be lower in comparison over time. Installation and use of patio heaters must meet public safety regulations, including but not limited to the Ontario Fire Code, Ontario Building Code, and relevant public health information regarding the COVID-19 pandemic.

Engagement Matters:

Staff have notified the Burlington Restaurant Association and both of Burlington's BIAs of the recommendations contained within this report. Staff will also advise all

restaurants with existing and pending temporary patio approvals of the change in permissions and assist with any restaurants seeking to extend their temporary outdoor patio.

Conclusion:

Staff is recommending that By-law 2020.422, a temporary use by-law and by-law to regulate temporary outdoor patios to support restaurant recovery due to COVID-19 and By-law 39-2020, a By-law to delegate authority to temporarily restrict the common law right of passage in connection with on-street restaurant patios and other on-street retail uses in Downtown Burlington to allow for temporary outdoor patios in Burlington be extended until October 31, 2021. As a result of the passing of this by-law, outdoor patios that have met specifications for minimum maintenance standards of City land, Ontario Building Code, Ontario Fire Code, public health regulations, public safety measures, and other regulatory considerations that may arise will be permitted to operate until October 31, 2021.

Considering the two options presented in this report, staff are recommending patios seeking to operate on municipal land throughout the winter season be reviewed on a case by case by the Winter Patio Task Force to assess their suitability and adherence to the aforementioned regulations.

Respectfully submitted,

Robert Catherall

Special Business Area Coordinator

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Appendices:

- A. Proposed extension of and addition to By-law 2020.422, a By-law to amend Zoning By-law 2020 of the City of Burlington to permit temporary outdoor patios as a result of the COVID-19 pandemic recovery efforts.
- B. Proposed extension of and addition to By-law 39-2020, a By-law to delegate authority to temporarily restrict the common law right of passage in connection with on-street restaurant patios and other on-street retail uses in Downtown Burlington to allow for temporary outdoor patios in Burlington.

C. Financial Matters

D. Winter Control Measures

Notifications:

Burlington Restaurant Association c/o Andrea Dodd

Aldershot Village BIA c/o Judy Worsley

Burlington Downtown Business Association c/o Brian Dean

Report Approval:

All reports are reviewed and/or approved by Department Director, the Chief Financial Officer and the Executive Director of Legal Services & Corporation Counsel.