



CITY OF HAMILTON
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT
Planning Division
and
Parking and By-law Services Division

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| TO: | Chair and Members Planning Committee |
| COMMITTEE DATE: | January 17, 2017 |
| SUBJECT/REPORT NO: | Entertainment on Outdoor Commercial Patios – Amendments to the Zoning By-laws and Noise By-law (PED16155(a)) (City Wide) |
| WARD(S) AFFECTED: | City Wide |
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| SUBMITTED BY: | Jason Thorne General Manager Planning and Economic Development Department |
| SIGNATURE: | |

RECOMMENDATION

- (a) That approval be given to **City Initiative 16-C** to establish Temporary Use By-laws for a period of 24 months, to allow for commercial entertainment/recreation, including live or recorded music and dance facilities on Outdoor Commercial Patios for seven pilot project areas: Downtown Hamilton, James Street North, Augusta Street, Hess Village, West Harbour area, Downtown Dundas, parts of Upper James Street (Stone Church to Rymal Road); and some properties within the Rural area identified in Appendices “A” to “A-2”, on the following basis:
 - (i) That draft Temporary Use By-laws, attached as Appendices “A”, “A-1” and “A-2” to Report PED16155(a) for the seven pilot areas and the rural area, be approved by City Council; and,
 - (ii) That the Temporary Use By-laws, attached as Appendices “A”, “A-1” and “A-2” to Report PED16155(a) be held in abeyance until such time as changes to the City’s Noise By-law for the pilot project areas, as per recommendation (b), have been approved by City Council, and are in effect.

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- (iii) That the draft Temporary Use By-laws are consistent with the Provincial Policy Statement (PPS) 2014, conform to Growth Plan for the Greater Golden Horseshoe, the City of Hamilton Rural (RHOP) and Urban Hamilton Official Plans (UHOP).
- (b) Subject to the approval of **City Initiative 16-C**, that the Noise Control By-law No.11-285 be amended to provide for the issuance, refusal and revocation of an outdoor commercial patio exemption permit where live entertainment or recorded music is provided, on the following basis;
 - (i) That the draft amending By-law to the Noise Control By-law No.11-285, attached as Appendix “B” to Report PED16155(a) which has been prepared in a form satisfactory to the City Solicitor, be enacted;
 - (ii) That a new application fee of \$300 for outdoor commercial patio exemption permits under the Noise Control By-law be approved and added to the User Fees and Charges By-law;
 - (iii) That Municipal Law Enforcement (MLE) staff be directed to undertake an enforcement pilot program for the duration of the Temporary-Use By-law approved in **City Initiative 16-C**, to administer and enforce the Outdoor Commercial Patio exemption permits under the Noise Control By-law and monitor related activity levels; and,
 - (iv) That staff, at the conclusion of the pilot project, analyze the data and evaluate the results to determine if the actions and initiatives met the goals and objectives of the project for a final report to the Planning Committee.

EXECUTIVE SUMMARY

City Council directed staff to investigate allowing entertainment on outdoor commercial patios.

The City’s seven Zoning By-Laws define an Outdoor Commercial Patio as any outdoor area used in conjunction with any establishment licensed under the *Liquor Licence Act* R.S.O. 1990, c. L.19; and contain a provision to prohibit outdoor commercial entertainment/recreation on the Outdoor Commercial Patio.

The proposed recommendations would remove temporarily the restriction on outdoor entertainment for seven pilot project areas located in different geographic urban areas and eighteen rural areas within the City for a 24-month period and utilize the Noise By-law to regulate noise to ensure there are no noise related nuisances.

To implement the recommendations, the following changes are required:

- Pass Temporary Use By-laws for seven pilot project areas: Downtown Hamilton, James Street North, Augusta Street, Hess Village, West Harbour area, Downtown Dundas, parts of Upper James Street (Stone Church and Rymal Roads); and, the Rural Area – lands zoned Open Space (P4) Zone, Settlement Commercial (S2) Zone, as shown in Schedules included in Appendices “A” to “A-2” to Report PED16155(a). City staff are recommending that these By-laws would be held in abeyance until such time as the amendments to the Noise By-law, as recommended in this Report, have been approved by Council. This process will ensure the Noise By-law provisions will appropriately regulate potential noise from Outdoor Commercial Patios prior to any changes to the Zoning By-laws, even on a temporary basis.
- Amend the Noise Control By-law to update the applicable provisions to introduce an exemption permit to regulate the noise emanating from live entertainment or recorded music on Outdoor Commercial Patios and establish conditions for granting an exemption.

Prior to expiration of the Temporary Use By-laws, staff would evaluate the effectiveness of the Noise By-law and tools to determine if they are appropriate and report back to City Council on whether the Pilot Project should be terminated, extended or implemented on a permanent basis. Based on this data and any other information, staff would evaluate longer term changes to the Zoning By-law regulations for outdoor entertainment.

Alternatives for Consideration – See Page 19

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial/Staffing: The cost of a pilot project as proposed in the analysis portion of Planning Committee Report PED16155(a) would not have an impact on current Municipal Law Enforcement (MLE) resources or changes to the annual operating budget.

While it is not known, applying the standard of review for current exemption permits, MLE Staff is recommending an application fee of \$300 for outdoor commercial patio exemption permits to reduce the administrative costs for receiving, processing and approving permit applications.

Legal: As required by the *Planning Act*, Council shall hold a Public Meeting to consider a Temporary Use By-law.

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HISTORICAL BACKGROUND

1.1 General Issues Committee -April 2015

In approving General Issues Committee Report 15-008, City Council, on April 8, 2015 approved the following:

“That staff be directed to investigate and report to the Planning Committee on how other major cities address outdoor entertainment on restaurant/bar patios in waterfront areas with adjacent residential neighbourhoods and on possible alternatives for permitting such outdoor entertainment.”

1.2 Planning Committee/City Council - June 2016

Staff prepared Report PED16155. The purpose of this Report was to outline the results of the municipal survey, options for changes to the Zoning By-laws and the use of Municipal tools such as the Noise By-law, to allow outdoor entertainment and to minimize noise impacts. Additional staff time was required to evaluate all the various options. Planning Committee recommended that:

“That Planning Division staff be directed to hold a statutory Public Meeting in October 2016 for the purposes of determining public submissions on potential changes to the Zoning By-law, identified in Appendix “A” to Report PED16155, respecting live and recorded music and dance facilities.”

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

1.0 Provincial Policy

The Growth Plan for the Greater Golden Horseshoe is silent on outdoor commercial patios since these uses are accessory to commercial uses.

Similarly, the Greenbelt Plan is silent on this matter; but resource based commercial, legally existing uses, and commercial areas within rural settlement areas are permitted within the Greenbelt Plan.

2.0 Urban Hamilton Official Plan (UHOP)

Outdoor Commercial Patios are not identified as a use in the UHOP. Under Volume 1 of the UHOP, the policy for development and redevelopment of local commercial uses (E.3.8.9 Design), in part, provides that local commercial uses be compatible with the surrounding area in terms of noise impact.

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Section F.1.11 contains policies with respect to Temporary Use By-laws. More specifically, the following policies, amongst others, apply:

F.1.11 Temporary Use By-laws

At times it is in the public interest to permit lands to be used for a particular use on a temporary basis even though it may not conform to the Zoning By-law. The *Planning Act* authorizes a municipality to pass a temporary use by-law, which defines the area and duration of the use.

1.11.1 Council may adopt temporary use by-laws provided the use complies with the permitted uses in Section E – Urban Systems and Designations, to permit the temporary use of land, buildings or *structures* for a purpose that is prohibited by the Zoning By-law.

1.11.2 A temporary use by-law may allow a use that is temporary in nature. Any new buildings or *structures* associated with the proposed temporary use shall be constructed so that it can be easily removed after the expiry date of the temporary use by-law.

1.11.3 The proposed temporary use shall:

- a) be *compatible* with uses on adjacent and nearby properties;
- b) have no adverse impact on the traffic, transportation or parking facilities in the area;

1.11.4 A temporary use by-law may be permitted for a period of time which shall not exceed three years, except for garden suites which shall not exceed ten years. However, Council may, by By-law, extend such period of time for further periods of time not exceeding three years each, during which the temporary use is authorized.

As noted in the Analysis and Recommendation Section of this Report, amendments to the Noise By-law will address the issuance, refusal and revocation of an Outdoor Commercial Patio exemption permit where live entertainment or recorded music is provided. The proposed changes to the Noise By-law will establish a maximum sound level of 60 dBa (which is equivalent to normal conversation, as identified in Appendix “B-1” to Report PED155(a)).

Outdoor Commercial Patios are permitted as an accessory use to a restaurant in the Neighbourhoods (Local Commercial Uses), Commercial and Mixed Use and some Rural and Settlement Commercial Designations. The Pilot Project areas were selected

based on the compatibility with the surrounding area. The Temporary Use By-law will allow staff the opportunity to determine if nuisances caused by Outdoor Commercial Patios are better regulated and dealt with by the Noise By-law rather than through Zoning By-law regulations.

The Temporary Use By-laws conform to the Urban and the Rural Hamilton Official Plan.

2.1 City of Hamilton Official Plan - Setting Sail Secondary Plan

The proposed outdoor commercial patio pilot project areas encompass the West Harbour area which is subject to the Setting Sail Secondary Plan. On some sites, the current zoning permits restaurants and uses that are legal non-complying to the Secondary Plan. As such, the accessory use of the outdoor commercial patio does not conflict with the Secondary Plan, subject to the proposed Noise By-law changes being adopted by Council.

3.0 Rural Hamilton Official Plan

Similar to the Urban Hamilton Official Plan discussion above, outdoor commercial patios are not identified uses; however, they are located in conjunction with existing restaurants. For those areas that have been identified as pilot project sites, restaurants are permitted uses (i.e. stand-alone in a rural settlement area, golf courses or private clubs).

The Temporary Use By-law conforms to the Rural Hamilton Official Plan.

4.0 Zoning By-laws

The City's seven Zoning By-Laws define an Outdoor Commercial Patio as any outdoor area used in conjunction with any establishment licensed under the *Liquor Licence Act* R.S.O. 1990, c. L.19 and the By-laws contain a provision to prohibit outdoor commercial entertainment. These zoning provisions were established in the former City of Hamilton in 1986, and harmonized in 2009 with the other former municipal Zoning By-laws, to ensure that accessory Outdoor Commercial Patios are compatible with surrounding land uses. Although noise is not specifically regulated, the provisions for Outdoor Commercial Patios are intended to ensure the location of outdoor patios are regulated to minimize noise from outdoor entertainment because noise may be disruptive to living environments. The current process to approve outdoor entertainment on Outdoor Commercial Patios is by a Zoning By-law amendment, minor variance, or Temporary Use By-law approval of a rezoning amendment or a variance as a permanent change.

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Patios associated with businesses without liquor licences do not have restrictions on entertainment in the Zoning By-laws; any noise impact is dealt with through the Noise By-law.

RELEVANT CONSULTATION

MLE staff conducted preliminary discussions with Legal Services and a qualified certified acoustic consultant in preparation of this Report.

ANALYSIS AND RATIONALE FOR RECOMMENDATION

There are different municipal tools that can be used to control noise (e.g. Noise By-law) and regulate land uses (e.g. Zoning By-law).

- Noise Control By-law controls/regulates noise
- Zoning By-law permits/prohibits a use.

At the present time, the Zoning By-law does not permit live and/or recorded music on Outdoor Commercial Patios. To allow music outdoors, the Zoning By-laws have to be changed to permit the use. However, outdoor music on non-licensed patios are regulated by the Noise By-law only.

1.0 Planning Review

1.1 City of Hamilton Zoning By-law Regulations

The City's seven Zoning By-Laws define an Outdoor Commercial Patio as an establishment licensed under the *Liquor Licence Act*, and contain a provision to prohibit outdoor commercial entertainment from the licensed Outdoor Commercial Patio. These zoning provisions have been in existence since 1986, and harmonized in 2009 with the other by-laws, to ensure that Outdoor Commercial Patios accessory to commercial establishments are compatible with surrounding land uses. Although noise is not identified in relation to these provisions, it indirectly implies that noise from outdoor entertainment is disruptive to living environments. It is noted that an outdoor patio associated with a non-licensed establishment is not subject to the Zoning By-law general provisions applicable to "Outdoor Commercial Patios".

The current process for approving outdoor entertainment in the City of Hamilton is through a site specific zoning, or minor variance. Two minor variances were recently granted to permit pre-recorded music and televisions on commercial patios.

1.2 Review of Other Municipal Regulations outside Hamilton

As noted in Report PED16155, several municipalities were surveyed to determine what regulations and tools they use for outdoor entertainment on commercial patios.

Generally, ten of the municipalities surveyed define and regulate the location of patios in their Zoning By-laws. Of these municipalities, a total of five municipalities (including Burlington, and London) also have a regulation for outdoor entertainment.

1.2.1 Location

Most municipalities have a locational restriction and minimum distance from a sensitive land use for an Outdoor Commercial Patio; a minimum distance is required between a patio and a Residential and Institutional zone, or other sensitive land use such as Open Space Zones. Typically the minimum distance ranges from 30 m in Kitchener, Ottawa, and Toronto, to 45 m in Burlington from these zones. In addition, each municipality have additional regulations permitting Outdoor Commercial Patios in the front yard. For example in Niagara Falls, an Outdoor Commercial Patio is only permitted in the front yard if the rear lot line adjoins a Residential Zone, and in Oakville, an Outdoor Commercial Patio is not permitted in any yard abutting a Residential Zone. Others such as London and Oakville, an Outdoor Commercial Patio is not permitted where any lot adjoins a Residential Zone.

The implications of locational restrictions on Outdoor Commercial Patios vary depending on the municipality and if there are additional restrictions in the Commercial Zones on locating Outdoor Commercial Patios if accessory to a restaurant. In a municipality such as Burlington and Oakville where it is more suburban in nature and where the lot fabric is larger, the impact of a locational restriction is less restrictive due to more flexible site planning and larger lot sizes allowing for more options for placement of the Outdoor Commercial Patio. In addition, many of these lots may not abut a sensitive zone such as a Residential Zone, but perhaps abutting Industrial Zones. Where the lot fabric is a lot smaller and lot coverage for commercial buildings may be fairly high, a locational restriction would essentially sterilize any opportunity for new Outdoor Commercial Patios in established urban areas other than larger parcels of land, which may be difficult to find in older, more established municipalities.

1.2.2 Entertainment

With respect to outdoor entertainment, Burlington is the only municipality in the review that address the issue of commercial entertainment in the definition:

“Means an outdoor area associated with a permitted restaurant use, located on the same lot as the restaurant, is used on a seasonal basis only and which shall

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provide tables and seating for patrons to be served meals and/or refreshments for consumption on the premises. Patio seating shall not exceed 50% of the capacity of the restaurant. An Outdoor Commercial Patio shall be used exclusively for dining and shall not include any recreational or entertainment use or activity.”

Four of the municipalities contacted prohibit commercial entertainment in the zoning regulations.

- In London, no amplified or electronic music (whether performed live or recorded), dancing or other forms of entertainment shall be permitted, with the exception of non-amplified acoustical music. Some recent changes have occurred.
- Zoning regulations in Niagara Falls states that no music (whether performed live or recorded), dancing or other forms of entertainment shall be permitted on an Outdoor Commercial Patio, except in compliance with the City’s Noise By-law.
- Vaughan’s regulation is more descriptive where the use of musical instruments, or other mechanical or electrical music equipment, and dancing, theatrical performances or audio-visual presentations, music concerts and shows, shall not be permitted in areas designated for Outdoor Commercial Patio use.
- In Toronto, their restriction is less descriptive where Outdoor Commercial Patio may not be used to provide entertainment such as performances, music and dancing.

In the past year, both the Cities of London and Burlington have brought forward initiatives to reverse the Zoning By-law restrictions with regard to Outdoor Commercial Patios.

1.2.3 Other Municipal Amendments for Outdoor Commercial Patios

Burlington

On July 18, 2016, Burlington City Council passed a Temporary Use By-law which permitted entertainment/recreational uses on Outdoor Commercial Patios in the downtown area as a pilot project. The City’s Zoning By-law No. 2020 includes a definition of “outdoor patio” that establishes that an outdoor patio shall be used exclusively for dining purposes and prohibits recreational and entertainment uses. This definition restricts restaurants from having live entertainers perform on outdoor patios. The legal interpretation of this definition would allow portable speakers playing pre-recorded music or the music of a live performer located inside the restaurant to be played on the patio.

The Temporary Use By-law will allow entertainment and recreational uses on Outdoor Commercial Patios located within the downtown area for a period of two years. The Temporary Use By-law prohibits amplified sound and establishes restrictions for the hours of operation beyond what is established in the City's Nuisance and Noise By-law to limit the impact of the outdoor entertainmentrecreational uses on downtown residents.

Staff will monitor complaints and assess the impacts of the Temporary Use By-law and determine whether any permanent amendments to the Zoning By-law are required.

London

In 2014, London amended their Zoning By-law to allow non-amplified acoustical music and television on commercial patios for the 2014 patio season.

Further to the amendments in 2014, Council of the City of London directed staff to embark on a Music, Entertainment and Culture District background study in 2015. One of the purposes of the review was to look at the existing policies and regulations and how they affect music and entertainment. There is no specific reference to Outdoor Commercial Patios. This study is expected to be completed by December 2016.

1.3 How Other Municipal Approaches Could be Used in Hamilton

As noted in Report PED16155, as well as this Report, there is not a consistent approach for location of patios or entertainment on Outdoor Commercial Patios and the neighbourhood impacts.

Staff examined the approaches of ten municipalities and has the following comments on other municipal approaches:

- If a 30 to 45 m setback from residential zones was applied in Hamilton, only 32 of the 237 existing patios would meet this requirement. The majority of our commercial areas directly abut residential zones; and
- A Temporary Use By-law should not address days and hours that entertainment could be provided outdoors. Such restrictions are more appropriate in the Noise By-law.

1.4 Options for Changes to Hamilton Zoning By-laws

A review of other municipalities and in particular, London and Burlington’s by-law amendments, reveals there are a number of approaches to regulating entertainment/noise on Outdoor Commercial Patios through the Zoning By-law.

There are three options that may be considered with respect to the regulation of live entertainment on Outdoor Commercial Patios. Options 2 to 4 include changes to the Zoning By-laws which are subject to potential appeals to the Ontario Municipal Board.

Option 1 – Status Quo

This option would be to maintain the regulation respecting live entertainment in the seven Zoning By-laws. If a restaurant owner wishes to have entertainment on an Outdoor Commercial Patio, an application for a Zoning By-law Amendment or Minor Variance can be made to either vary or seek an exemption from this requirement. In the last five years, three minor variance applications for this use have been approved.

| Advantages | | Disadvantages | |
|-------------------|---|----------------------|--|
| 1. | Each application can be evaluated on its own merits with respect to matters such location of the patio relative to sensitive land uses, type of entertainment; etc. | 1. | There is a fee for the applications. |
| 2. | The current patio regulations were planned on the basis of this regulation and have no specific setback from residential zones, other than adjacency. | 2. | Applications take time to process and they are subject to appeal to the Ontario Municipal Board. |

Option 2a – Create a Temporary Use By-law for specific urban and rural areas within the City

This option would select certain areas of the City to temporarily suspend the zoning regulation for live entertainment for a specified period of time not to exceed two years. In these areas, a newly amended noise by-law and other potential tools would be used to deal with potential noise complaints/issues from the entertainment; the noise by-law can also deal with days and hours of operation. Unless the regulation is suspended, there is no mechanism to test the noise by-law and other tools as viable options to control noise since entertainment is not permitted outdoors.

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To identify potential pilot project areas, staff identified urban areas where there were concentrations of five or more licenced establishments with Outdoor Commercial Patios generally within 50 m of the property line from each other.

In the rural area the majority of licenced establishments are located within golf courses; other licenced establishments such as private clubs, restaurants, African Lion Safari. These uses would have limited impacts on the surrounding areas since there are fewer residential uses.

On this basis, the following areas have been identified for inclusion in the Temporary Use by-law.

Zoning By-laws No. 05-200

1. Portions of James Street North and Portions of Downtown (see Schedule “A” to Appendix “A” to Report PED16155(a))
2. Hess Village (see Schedule “A” to Appendix “A” to Report PED16155(a))
3. Rural Area – lands zoned Open Space “P4” Zone, Settlement Commercial (S2) Zone (see Schedules “A1-A18” to Appendix “A” to Report PED16155(a))

Zoning By-law No. 6593

1. Portions of James Street North (see Schedule “A1 to Appendix “A-1” to Report PED16155(a))
2. Augusta Street Area (see Schedule “A2” to Appendix “A-1” to Report PED16155(a))
3. West Harbour area (see Schedule “A3” to Appendix “A-1” to Report PED16155(a))
4. Upper James Street (Stone Church to Rymal Roads (see Schedule “A4” to Appendix “A-1” to Report PED16155(a))

Zoning By-law No. 3581-86

Downtown Dundas (see Schedule “A” to Appendix “A-2” to Report PED16155(a))

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Prior to expiration of the Temporary Use By-laws, staff would evaluate the effectiveness of the Noise By-law and tools to determine if they are appropriate. Based on this data and any other information, staff would evaluate and report back to Council on whether the Pilot Project should be terminated, extended or implemented on a permanent basis.

| Advantages | | Disadvantages | |
|------------|--|---------------|--|
| 1. | It would allow staff to use the amended noise by-law and other tools to deal with noise complaints, establish days/times of the week when entertainment could occur on patios, etc. | 1. | If there are significant complaints during this time period from patio operators, the City may have to take additional steps (e.g. report business to the AGCO) to deal with operator. |
| 2. | It would allow patio operators the flexibility to use their patios for entertainment during warmer weather, or special events (e.g. sports such as the World Cup). | 2. | Other Areas or specific patio owners that have not been included in this pilot project may want to be included. Ad hoc addition of single operators would only be evaluated on the basis of the added operator and not the impact of these regulations on an area. |
| 3. | A variety of entertainment such as pre-recorded music, tv's , singers would be permitted which would create a more vibrant area. | 3. | The Zoning By-law does not deal with noise from patrons on patios. It would be dealt with by the Noise By-law. |
| 4. | The areas that were selected do not have a history of complaints. In this way, it is easier to determine if these patios are generating complaints and if these complaints can be mitigated through the proposed tools and Noise by-law changes. | | |

Option 2b – Create a Temporary Use By-law for the Entire City

This option is variation on Option 2a. Instead of a Temporary Use By-law for certain areas, the Temporary Use By-law would be applied across the entire City.

| Advantages | | Disadvantages | |
|------------|---|---------------|--|
| 1. | It would allow staff to use the amended noise by-law and other tools to deal with noise complaints, establish days/times of the week when entertainment could occur on patios, etc. | 1. | If there are significant complaints during this time period from patio operators, the City may have to take additional steps (e.g. report business to the AGCO) to deal with operator. |

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| Advantages | | Disadvantages | |
|------------|--|---------------|---|
| 2. | It would allow patio operators the flexibility to use their patios for entertainment during warmer weather, or special events (e.g. sports such as the World Cup). | 2. | It would include other areas, that have been the subject of issues in the past. |
| 3. | A variety of entertainment such as pre-recorded music, TV's, singers would be permitted which would create a more vibrant area. | 3. | Staff will have to monitor and report back on more locations. |
| 4. | The areas that were selected do not have a history of complaints. In this way, it is easier to determine if these patios are generating complaints and if these complaints can be mitigated through the proposed tools and Noise by-law changes. | | |

Option 3 – Delete the Prohibition for Outdoor Entertainment from all Zoning By-laws

Eliminate the regulation restricting entertainment on Outdoor Commercial Patios from the Zoning By-laws and leaving enforcement of the Noise By-law to manage any nuisances caused by the Outdoor Commercial Patio.

| Advantages | | Disadvantages | |
|------------|---|---------------|---|
| 1. | It would allow staff to use the amended noise by-law and other tools to deal with noise complaints, establish days/times of the week when entertainment could occur on patios, etc. | 1. | Staff would rely on the Noise by-law and other tools for all areas without the ability to test and modify as necessary at the end of the pilot project. |
| 2. | It would allow patio operators the flexibility to use their patios for entertainment during warmer weather, or special events (e.g. sports such as the World Cup). | 2. | The current regulations do not appear to be an issue or an interest in many areas of the City. |
| 3. | A variety of entertainment such as pre-recorded music, tv's , singers would be permitted which would create a more vibrant area. | | |

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| Advantages | | Disadvantages |
|------------|--|---------------|
| 4. | It would allow all outdoor commercial patios to have the potential for entertainment, whether or not the operators plan to have entertainment. | |

2.0 Noise Control By-law and Enforcement Plan

2.1 Noise Control By-law

The City of Hamilton Noise Control By-law currently creates an offence that prohibits noise that is likely to disturb the inhabitants of the City. The By-law lists specific noise from various sources (common community noises) which deems in part that a radio, amplifier, speaker or other similar device that is clearly audible at a point of reception is considered to be unreasonable noise.

The City of Hamilton Zoning By-Laws contain a provision to prohibit live entertainment or recorded music from an outdoor commercial patio licensed by the the Alcohol and Gaming Commission of Ontario (AGCO). The mere presence of live entertainment or recorded music in these establishments constitutes a zoning contravention, regardless of the noise produced. The recommendation to remove the Zoning prohibition allows licensed outdoor commercial patios to introduce outdoor entertainment/music that normally would not be a permitted use. In doing so, the Noise Control By-law still remains in effect, and the commercial establishment is subject to the by-law general provisions for common community noises.

The Noise Control By-law has been effective to control the same type of unwanted noise arising from the interior or exterior of any establishment (i.e. private residence, nightclub, tavern, pub, or restaurant). It is reasonable to conclude that most outdoor entertainment/music from an Outdoor Commercial Patio in a mixed commercial/urban environment is likely to disturb the nearby inhabitants. Unless an exception to the By-law is provided, the outdoor commercial patio is liable to contravene the Noise Control By-law. Research of best practices in other jurisdictions has not found any specific exemption permit in a noise by-law for outdoor commercial patios.

The City of Hamilton Noise Control By-law does allow for the issuance of a noise exemption permit, with conditions, provided that no other by-laws are contravened. This provision has primarily been used for specific Events (single occasions) and construction projects on City owned property and may not be suitable for live entertainment or recorded music on outdoor commercial patios. It is the consensus of MLE staff that additional conditions specific to outdoor commercial patios is required to balance the needs of the commercial enterprise and the nearby inhabitants.

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The current Noise Control By-law authorizes the MLE Director to grant, refuse and revoke an exemption permit, and impose conditions specific to the application. Appeals to the application are made before the Planning Committee. The application process for an exemption permit under the Noise Control By-law is considered less formal than a Minor Variance under the City's current Zoning By-laws, and appeals are not subject to review by the Ontario Municipal Board. However, the exemption permit scheme under the Noise Control By-law does not provide the opportunity for formal public comments normally available under a Planning Act application.

In reviewing a permit under the current Noise Control By-law, the MLE Director may have regard to:

- any negative effects or benefits to the neighbouring property;
- any previous contraventions to the Noise Control By-law; and
- anything the MLE Director considers relevant.

The MLE Director may also impose other requirements or other conditions to an exemption permit, including but not limited to:

- prescribing the format and content of any forms or documents required by the By-law;
- the monitoring of the sound levels with all associated costs at the expense of applicant; and
- failure to comply with the terms and conditions renders the permit null/void, and may result in the permit being revoked.

Proposed Amendments to the Noise By-law

The draft amending by-law to the Noise Control By-law attached as Appendix "B" to Report PED16155(a) provides, in addition to the information routinely collected, that applicants for an outdoor commercial patio exemption permit must provide:

- a Certificate of Compliance by a certified acoustic consultant/engineer;
- a detailed FloorPlan showing:
 - (a) surrounding residential areas, properties and dwelling units;

- (b) a detailed floor plan;
- (c) position/direction of the noise source;
- (d) position/direction of hospitals, schools, senior care facilities/residences;
- contact information and undertaking of person(s) supervising the activity; and
- a \$300 application fee.

The draft amendments to the Noise Control By-law impose the following conditions to a outdoor commercial patio exemption permit:

- the dates/times be limited from Thursday to Saturday, 11am – 11pm;
- any resulting noise be restricted to a maximum equivalent sound level (Leq) 60 dBA measured at the permit holder's property line (i.e. conversation in a restaurant, office, background music, air conditioning unit at 30 m);
- the activity/use be in compliance with all City by-laws and other applicable law;
- no sound equipment other than equipment approved under the permit shall be used; and
- all sound equipment shall be placed and used in accordance with the approved Site Plan and Certificate of Compliance.

It is MLE staff opinion the draft amendments to the Noise Control By-law are appropriate benchmarks to balance the needs of the commercial enterprise and the nearby inhabitants.

Appendix "B-1" to Report PED16155(a) provides a comparison of various activities at different noise levels as well as the effects on how a person would feel at the varying noise levels.

It is important to note that a noise exemption permit is an exemption to the Noise Control By-law, and does not operate as a release to other sanctions or legal obligations. The AGCO, in granting/approving licenses, has placed controls to restrict or prohibit noise from Outdoor Commercial Patios where significant sounds are audible to

the nearby community. Ontario Regulation 719/90 of the *Liquor Licence Act* regulates noise where license holders may not permit noise from entertainment or from the sale and service of liquor to disturb nearby residents. It is MLE's staff opinion that the staff recommended changes to the Noise Control By-law meets the general intent of the AGCO licensing regime that nearby residents are not to be disturbed by the activities from an Outdoor Commercial Patio.

2.2 Enforcement Plan

MLE staff recommends implementing an enforcement pilot program for the duration of the Temporary-Use By-law as proposed in the analysis portion of Planning Committee Report PED16155(a). Pro-active and re-active enforcement initiatives are important components to achieve compatibility amongst adjacent commercial/residential land uses. In a pilot program, there must be an emphasis toward educating and negotiating compliance to provide a balanced approach before commencing any legal action.

The overall enforcement strategy considered by MLE staff primarily relies on the process for municipal orders under the Noise Control By-law to educate the offender in order to gain compliance. The current Noise Control By-law provides "...where an officer is satisfied that a contravention of this By-law has occurred..." a municipal order may be issued. The use of a common noise meter may be found reasonable as an enforcement tool to reach that conclusion (not an evidentiary burden to establish in court) for issuing a municipal administrative order. Legal action may be commenced when an offender disobeys or fails to comply with the order, as an alternative to a noise charge in the first instance. In addition, the City of Hamilton Business Licensing By-law requires that all commercial food services (outdoor commercial patios included) be licensed, and any license holder who contravenes any of the City's by-laws may be subject to license suspension.

3.0 Recommendations

To test whether or not the Noise by-law is an appropriate tool to address potential noise impacts from entertainment on Outdoor Commercial Patios, the Zoning By-laws would have to be amended to permit the use.

The preferred approach, from a land use planning perspective is to pass temporary use By-laws for certain areas of the City for a specific time period. The Noise by-law would be the mechanism to address noise complaints. Changes to the Zoning By-laws and the Noise By-law work together; therefore, changes to the Zoning By-laws should not proceed without the Noise By-law changes being adopted by Council.

MLE staff have identified the changes to the Noise Control By-law to address this matter.

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Staff are recommending that:

- (a) Amendments to Zoning By-law No. 05-200, 6593 (Hamilton) and (Dundas) for a 24-month period to allow for commercial entertainment/recreation, including live or recorded music and dance facilities on Outdoor Commercial Patios for seven pilot project areas: Downtown Hamilton, James Street North, Augusta Street, Hess Village, West Harbour area, Downtown Dundas, parts of Upper James Street (Stone Church to Rymal Road); and the Rural area identified in Appendices “A” to “A-2” to Report PED16155(a);
- (b) The Temporary Use By-laws attached as Appendices “A”, “A-1” and “A-2” to Report PED16155(a) not be presented to City Council for adoption until such time as changes to the City’s Noise By-law for the pilot project areas has been approved by City Council;
- (c) Amendments are made to the Noise Control By-law No.11-285 for an exemption permit for a outdoor commercial patio providing live entertainment or recorded music;
- (d) An application fee of \$300 is imposed for outdoor commercial patio exemption permits; and
- (e) MLE staff undertake a 24-month pilot program to monitor, administer, and enforce outdoor commercial patio exemption permits under the Noise Control By-law.

ALTERNATIVES FOR CONSIDERATION

City Council adopts another Option which has been addressed in this Report.

City Council identifies different area of the City to permit entertainment on Outdoor Commercial Patios.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Economic Prosperity and Growth

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APPENDICES AND SCHEDULES ATTACHED

Appendix “A”: Temporary Use By-law for Zoning By-law 05-200 (Includes lands in Downtown, Hess Village, certain properties in the Rural area)

Appendix “A-1”: Temporary Use By-law for Zoning By-law No. 6593 (Includes lands in the area of Augusta Street, West Harbour, James Street North, Upper James – Stone Church to Rymal Road)

Appendix “A-2”: Temporary Use By-law for Zoning By-law No. 3581-86 (Includes lands within Downtown Dundas)

Appendix “B”: Amendment to By-law 11-285 (A By-law to Control Noise)

Appendix “B-1”: Levels of Noise in Decibels

JHE/SR/RU/MH/mo/st