



THE CORPORATION OF THE TOWN OF AMHERSTBURG

OFFICE OF DEVELOPMENT SERVICES

Mission Statement: As stewards of the Town of Amherstburg, we strive to improve the quality of life of all residents through the delivery of effective, efficient, and affordable services.

Author's Name: Bill Tetler and Melissa Osborne	Report Date: June 11, 2024
Author's Phone: 519 736-0012 ext. 2251 and 2137	Date to Council: June 25, 2024
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To: Mayor and Members of Town Council

Subject: Information for Consideration on Temporary Encroachment Fees

1. RECOMMENDATION:

It is recommended that:

1. The information in this report **BE RECEIVED** for information.

2. BACKGROUND:

At the June 10th, 2024 Council meeting the following notice of motion was made:

That: Any commercial business seeking temporary patio extension onto a public right of way shall pay the same encroachment fees as a permanent encroachment or applicable to the payment fees as laid out in our fee bylaw.

This report is to provide Council with additional information related to this motion for consideration during the discussion on the matter.

3. DISCUSSION:

PERMANENT ENCROACHMENTS:

The current User Fee By-Law 2023-112 contains two fees for permanent encroachments - a \$474.60 initial fee and a \$50 annual fee thereafter. Execution of this fee is tied to the Town's 2023-061 By-law when a permanent encroachment agreement is executed.

The \$474.60 fee is made up of the following costs:

\$80	– registration of the encroachment on title
\$150	– Administration fee
\$244.60	– legal fees

After this the \$50 annual fee is to cover Administrative costs to keep the agreement active. Of note, the Town is not able to charge a fee which exceeds their costs, which is why the annual fee is only \$50 rather than \$150 as there is less work to sustain the agreement once it is in place.

Permanent encroachment agreements provide the property owner, be that a business or resident, rights to put their property in the encroachment area on a permanent basis, provided the requirements of the encroachment agreement are met.

The encroachment agreement is essential to ensure the Town is protected from several risks, which include but are not limited to:

- Risk of injury to someone in the encroachment area;
- Risk of asset damages in the encroachment area;
- Risk of Town or utilities companies not being able to access their assets for repair or replacement.

The formality of a legal permanent encroachment agreement ensures the property owner provides the Town with the necessary Certificate of Insurance (COI), protecting the Town from any risk of injury to a person or damage to property. It also ensures the property owner acknowledges and agrees that the Town or utility company with assets in that encroachment area can obtain access if necessary, and they accept that assets they placed in the encroachment area may be damaged and or removed to address the repair or replacement of critical municipal or utility assets in that area.

It is important to note that not all requests for encroachment agreements can be approved. In some instances, the Town or Utility company with assets in that area are not able to support an encroachment request due to risk and or concerns it would result in damage to their assets in that area.

The vast majority of the Town's encroachment agreements are with residential property owners. With these situations the property usually has assets of a more permanent nature in the encroachment area. Examples of these include but are not limited to:

- Fencing;
- Pools;
- Structures;
- Concrete pads;
- Landscaping;
- Play structures.

Permanent encroachment agreements with commercial businesses can vary as well. These encroachments range from permanent patio areas, such as Salty Dog, Pepper Cat and Caffeine and Co, or signs which encroach on the Town's air rights, such as the Richmond Centre sign on Richmond.

The process and requirements for commercial permanent patios varies based on:

1. Will the business be extending their liquor license to the patio area; and,
2. Will the patio be on public and/or private property.

Processes for Permanent Patios:

A. Permanent Patio with extended liquor license on private property:

The business will be required to obtain approval from the Alcohol & Gaming Commission of Ontario (AGCO) to extend their liquor license. The business will need to provide confirmation of this approval by the AGCO to the Town. There is no fee issued by the Town in this instance.

An example of this situation currently in Amherstburg is the Legion, which has a patio on their private property which serves alcohol.

B. Permanent Patio without extended liquor license on private property:

No action by the Town or business is required.

C. Permanent Patio with extended liquor license on public property:

The business is required to obtain approval from the Alcohol & Gaming Commission of Ontario (AGCO) to extend their liquor license. Since the patio is on public property they will also need to enter into a permanent encroachment agreement with the Town. The Town will require confirmation of AGCO approval, Certificate of Insurance, fee of \$474.60 and the agreement will be registered on title. After the initial agreement the annual fee of \$50 as well as a yearly COI will be required to be provided to the Town for the life of the agreement.

There are currently two examples of this in Amherstburg, Salty Dog and Pepper Cat.

D. Permanent Patio without extended liquor license on public property:

If the business will not be serving alcohol on the permanent patio then they are only required to enter into a permanent encroachment agreement with the Town. The Town will require a Certificate of Insurance, fee of \$474.60 and the agreement will be registered on title. After the initial agreement the annual fee of \$50 as well as a yearly COI will be required to be provided to the Town for the life of the agreement.

There is currently one example of this in Amherstburg, Caffeine and Co. While the main business has a liquor license they currently do not provide for nor have legislative approval for the sale or consumption of alcohol on their patio.

TEMPORARY ENCROACHMENTS:

The current User Fee By-law 2023-112 and Encroachment By-law 2023-061 do not include a fee or process for temporary encroachments. Temporary encroachments are by in large issued to businesses which move onto public spaces during Town events in

which streets are closed to vehicles. The process followed to protect the Town is guided by the requirements in our encroachment By-law 2023-061, however not directed or enforceable under any By-Law. This process has been in place since the first street closure in 2020.

Temporary encroachments can include requests for the temporary installation of things such as:

- Tables, chairs;
- Shade structures;
- Clothing racks

In these instances, the business is required to provide an application for a temporary encroachment, noting the frequency, as well as what and where they will be locating items into the public space. Administration reviews the request and if approved the business will be required to provide the Town with a Certificate of Insurance. Temporary encroachments do not incur legal fees nor are they registered on title as they are temporary in nature and may be for one day or for several days or several months.

During times when the streets are closed there are several businesses which expand into the streets and as such enter into a temporary encroachment agreement with the Town.

As with the permanent encroachment agreements, patios serving food and/or beverages have a separate process which is required to be followed.

Processes for Temporary Patios:

The AGCO provided allowances during COVID for businesses to extend their liquor license to outdoor locations. Those locations could have been on private or public property. Effective January 1, 2023 the Alcohol and Gaming Commission of Ontario (AGCO) allow for individual municipalities to have the authority to approve temporary patios for up to eight (8) months total in a calendar year, which does not need to be consecutive, for liquor sales licensees and by-the-glass endorsement holders. Municipalities have the authority to approve for less than eight months and have the authority to specify conditions on the approval.

It should be noted that only businesses with a valid liquor license from the AGCO would be able to apply for this to extend their license. This downloaded authority does not allow the Town to approve a liquor license on a patio for which the main business does not have one.

Since the start of Open Air, the Town has required businesses with temporary patios / seating areas on public or private property serving alcohol to enter into a temporary encroachment agreement. Each application is reviewed and approved on a case by case basis with the best interest of the Town in mind and if approved the businesses is required to advise the ACGO of the Town's approval for use of public or private space for their use.

This process has remained in place and while it has ensured the appropriate execution of these temporary patios uses, in the absence of a By-law the Town had no authority for enforcement. It is for this reason the Temporary Patio By-law, 2024-026, was developed

to ensure the municipality has enforcement capabilities as well. It also sets out to define the period of time in which a temporary patio can be present, what situations the By-law applies to and what is required.

As with a permanent patio what is required varies so the details on what is required based on the situation is outlined below.

A. Temporary Patio with extended liquor license on private property:

Under the Town's Temporary Patio By-law 2024-026, the business will be required to apply to the Town for a temporary patio extension. The Town will require confirmation of a valid liquor license, COI and submission of an Annual Approval Application from the business. If approved the business will then need to provide the Town's approval to the ACGO. As there is no temporary encroachment fee or temporary patio extension fee in the Town's User Fee By-law, there is no cost to the business at this time.

While there are currently no businesses in this situation there is a request currently being processed and reviewed.

B. Temporary Patio without extended liquor license on private property:

No action by the Town or business is required.

C. Temporary Patio with extended liquor license on public property:

Under the Town's Temporary Patio By-law 2024-026, the business will be required to apply to the Town for a temporary patio extension. The Town will require confirmation of a valid liquor license, COI and submission of an Annual Approval Application from the business. If approved the business will then need to provide the Town's approval to the ACGO. As there is no temporary encroachment fee or temporary patio extension fee in the Town's User Fee By-law there is no cost to the business at this time.

For the 2024 festival season all patio / seating extensions serving alcohol in the public area have executed their requirements. There are several businesses with temporary patios/seating areas, serving alcohol on public property including but not limited to; Salty Dog; Burger 67; Artisan Grill and Lot 10. Approval of By-law 2024-026 allows Administration to enforce the requirements set out in By-law 2024-026 for Temporary Patio Extensions.

D. Temporary Patio without extended liquor license on public property:

If the business will not be serving alcohol on the temporary patio then they are only required to enter into to submit and Annual Approval Application and provide the Town with a COI. As there is no temporary encroachment fee or temporary patio extension fee in the Town's User Fee By-law there is no cost to the business at this time.

For the 2024 festival season all patio / seating extensions not serving alcohol in the public area have executed their requirements. There are only one or two businesses with this type of temporary patios/seating areas on public property, example Espresso Cafe.

Approval of By-law 2024-026 allows Administration to enforce the requirements set out in By-law 2024-026 for Temporary Patio Extensions.

OTHER SITUATIONS

As Council is aware the Tourism team have several instances in which other businesses operate in the street closure areas. There are generally three (3) types of situations in which this will occur:

- The Town has contracted a business to provide services at the event;
- Night Markets;
- Business Markets (including Non-Profits)

Contracted by Town for Services

There are a variety of vendors which are contracted by the Town for entertainment during our various festivals and events. They include but are not limited to:

- Entertainers – e.g. busking, music, artist;
- Children activities – e.g. crafts, face painting;
- Recreational Activities – e.g. pickleball, yoga

In these situations, all of the vendors are contracted by the Town to provide services on Town property and those agreements for services apply. There is no requirement for any encroachment agreements.

Night Markets

During the 2023 season the Town hosted 3 Night Markets. Administration considered the various Open Air surveys and feedback from Night Market vendors it was determined that continuance of the Night Markets in 2024 would be ideal. The programming was expanded to every Friday. Attached as Appendix A is a template of the annual application and terms and conditions for a Night Market vendor. A fee is charged to the vendors to encourage attendance at their requested dates and cover the cost of hosting and managing the event.

Vendors such as the ones which attend Night Markets have, at times, found a market and demand such that they transition into Brick and Mortar businesses. This is why the Town's Economic Development Co-ordinator has been tasked with overseeing the Night Markets as a means of networking and building relationships with these business owners who may eventually seek a more permanent location in Amherstburg.

Given this programming is specific to Open Air and organized by the Town and is temporary in nature, so no encroachment agreement is required. Night Market vendors are not permitted to set up seating areas for the consumption of food and or beverages, nor are they permitted to sell alcohol, as such the Temporary Patio Extension By-Law would not apply.

Business Markets

This was designed specially to address the growing concern and desire for businesses not in the footprint of street closures to have the opportunity to be in the footprint. This is

the first year for this and as such information is still being gathered and will be reviewed in the fall to assess if it should continue in 2025 and if so what changes might need to be made.

Given this is offered only to other local Brick and Mortar businesses outside the street closure footprint, there no cost associated with this program. While there has been interest from businesses not local to Amherstburg to participate, they have not been approved as the focus this year is to invite local brick and mortar businesses. Attached as Appendix B is the application form and terms and conditions they are required to sign.

Administration has worked to encourage various businesses to explore this opportunity and have reached out directly to those businesses which have previously voiced their concerns at not having the advantage of being in the footprint.

To date there are 4 businesses which have signed up for this opportunity and 3 which have indicated an interest, which we are working to finalize. In these cases, there is a potential that the business may want to set up a seating area and provide food and or beverages. Should this occur then the Temporary Patio Extension By-Law will apply to those businesses. As such, should Council provide direction to include a User Fee for Temporary Patio Extensions, these businesses would be required to pay that fee as well.

USER FEE CONSIDERATIONS

At this time the Town's User Fee By-law 2023-112 only includes the two fees related to permanent encroachments, that being \$474.60 as the initial fee to cover legal costs and registration of the agreement on title, as well as \$150 for the Administrative fee for the first year, after which an annual \$50 fee is applied. This fee is applied to any permanent encroachments for residential or businesses, including permanent patio encroachments as previously noted above.

By-law 2024-026 as written and approved does not include a fee for temporary patio extension encroachments. In addition, the Town's User Fee By-law 2023-112 does not include a temporary encroachment fee. It should also be noted that businesses which have a permanent encroachment have access and rights to use the Town's property 365 days a year for \$50 and can leave fencing, patio furniture, landscaping and such in place. Should the same fee be applied to those which use it temporarily at most these businesses will have access for 7 months and 7 days and more likely for many just 45 days. These businesses are also required to set up and tear down anything on public property on a weekly basis.

As can be appreciated in reading this report the matter of encroachments is a complex one. To that end based on the collective review of the discussion which lead to the Notice of Motion as well as the review of the Notice of Motion as stated, Administration has recognized that the suggested wording discussed with Administration may not be reflective of the intent. In addition, previous discussions did not provide the Councillor with information regarding the permanent fee structure as outlined in this report, which necessitates clarity on which fee Council would intend to apply. As such we include in this report additional considerations for Council should they wish to amend the current Notice of Motion.

More specifically, the current motion recommends a User Fee specifically to Temporary Patio Extensions, not for all other types of temporary encroachments the Town issues for businesses in the public right of way. In addition, the current motion states “shall pay the same encroachment fees as permanent encroachment...” Given these are temporary agreements there are no legal costs or costs to register the encroachment on title which can be charged therefore the User Fee of \$474.60 is not able to be charged. The only fee currently charged for permanent encroachments which could be charged for temporary encroachments would be either the \$150 initial Administrative Fee or the annual \$50 Administrative fee. For Council’s reference, a search of municipalities that have a similar By-law in place have fees ranging from \$0 to \$250.

If Council’s intention is to charge a temporary encroachment fee to all businesses seeking a temporary encroachment onto the public right of way, including those which have patio extensions, and to align that fee with the annual \$50 permanent encroachment fee, Administration provides below a suggested rewording of the recommendation for Council’s consideration:

That: Administration BE DIRECTED to bring back to Council an amendment to the User Fee By-Law 2023-112 to include a fee for any commercial business seeking a temporary encroachment onto a public right of way, including but not limited to temporary patio extensions which fall under By-Law 2024-026, with said fee to be an annual cost of \$50.

4. RISK ANALYSIS:

Several risks were discussed throughout the discussion section of this report.

5. FINANCIAL MATTERS:

While there is no financial cost related to this report as it is for information only, there are financial considerations regarding the application of a User Fee for temporary use of public space.

Those considerations would be as follows:

1. Legislatively the fee applied must be at or less than costs incurred, as such only an Administrative Fee can be charged;
2. The Administrative Fee for permanent encroachments is \$150 for the first year, given it is more work, and \$50 each year thereafter for the life of the agreement;
3. Temporary encroachments can be from 1 day to 191 days.
4. Council may want to consider that if a User Fee for temporary encroachments is approved, consideration is given to the number of days of the encroachment and apply the fee as a daily rate. Should the annual rate be set at \$150 the daily fee would be \$0.41 and if the annual rate is set at \$50 the daily rate would be 0.14.

It should also be noted that for the 2024 season there are 15 businesses with temporary encroachments for the 15 weekends and 2 businesses seeking temporary patio extensions which would be for the 8 months. This does not include the Night Markets or Business Markets which are part of Town programming, unless a business also falls under the Temporary Patio Extension By-Law.

Based on current 2024 temporary encroachments the following revenue would be generated based on the following scenarios:

1. User Fee of \$150 flat fee regardless of duration of the temporary encroachment
 - a. 17 businesses x \$150 = \$2,550
2. User Fee of \$50 flat fee regardless of duration of temporary encroachment
 - a. 17 businesses x \$50 = \$850
3. User Fee annual \$150 (\$.41/day) charged based on number of days of temporary encroachment
 - a. 2 businesses x 191 days x .41 = \$156.62
 - b. 15 businesses x 45 days x .41 = \$276.75

Additional administrative costs associated with processing a User Fee for temporary encroachments would fall to financial services as invoicing and fee collection would be new activities added onto the current processes and workloads.

6. CONSULTATIONS:

Jennifer Ibrahim – Manager of Economic Development and Tourism
Kevin Fox – Town Clerk / Risk Manager

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7. CORPORATE STRATEGIC ALIGNMENT:

Vision: Preserving our past while forging our future.

<i>Amherstburg Community Strategic Plan 2022 - 2026</i>	
<p style="text-align: center;">PILLAR 1 Deliver Trusted & Accountable Local Government</p> <ul style="list-style-type: none"> <input type="checkbox"/> Improve trust between council and staff, and residents, by strengthening governance and internal accountability structures. <input type="checkbox"/> Deliver transparent and efficient financial management. <input type="checkbox"/> Increase effective communication and engagement with residents. <input type="checkbox"/> Develop our staff team, resources, and workplace culture. <input type="checkbox"/> Continue to deliver strong core municipal services. <input type="checkbox"/> Ensure Amherstburg is an inclusive accessible and welcoming community committed to reconciliation. 	<p style="text-align: center;">PILLAR 3 Encourage Local Economic Prosperity</p> <ul style="list-style-type: none"> <input type="checkbox"/> Encourage development of commercial and industrial lands. <input type="checkbox"/> Continue to promote local tourism industry, especially overnight accommodation. <input type="checkbox"/> Continue to facilitate downtown development for residents and visitors. <input type="checkbox"/> Continue to leverage partnership opportunities with other provincial, federal, and local governments, agencies, and organizations.
<p style="text-align: center;">PILLAR 2 Invest in Community Amenities and Infrastructure</p> <ul style="list-style-type: none"> <input type="checkbox"/> Maintain safe, reliable and accessible municipal infrastructure and facilities. <input type="checkbox"/> Increase access to recreation opportunities for all ages. <input type="checkbox"/> Finalize and execute plans for town-owned lands (e.g. Duffy’s site, Belle Vue) <input type="checkbox"/> Create public access to water and waterfront <input type="checkbox"/> Prioritize opportunities to reduce environmental impacts of Town operations and increase Town resilience to climate change. 	<p style="text-align: center;">PILLAR 4 Shape Growth Aligned with Local Identity</p> <ul style="list-style-type: none"> <input type="checkbox"/> Define and communicate a vision for the Town’s future and identity. <input type="checkbox"/> Promote and plan for green and “climate change ready” development. <input type="checkbox"/> Review and implement policies that promote greater access to diverse housing. <input type="checkbox"/> Protect the Town’s historic sites and heritage. <input type="checkbox"/> Preserve the Town’s greenspaces, agricultural lands, and natural environment.

8. CONCLUSION:

This report is provided to Council for consideration.



Melissa Osborne
Deputy CAO/Director of Development Services

Report Approval Details

Document Title:	Information for Consideration on Temporary Encroachment Fees .docx
Attachments:	- Appendix B - 2024 Open Air Business Market.pdf - Appendix A - 2024 Open Air Night Market.pdf
Final Approval Date:	Jun 13, 2024

This report and all of its attachments were approved and signed as outlined below:



Tracy Prince



Valerie Critchley



Kevin Fox