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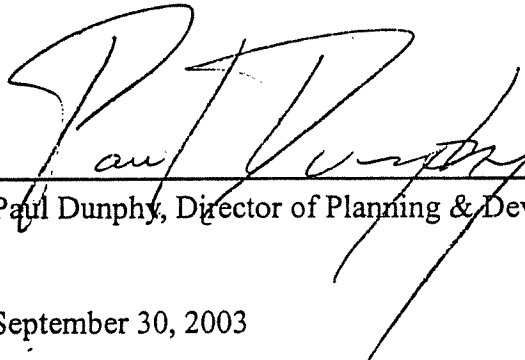


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Halifax Regional Council
October 21, 2003
October 28, 2003

TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY:



Paul Dunphy, Director of Planning & Development Services

DATE: September 30, 2003

SUBJECT: Smoke Free Places Bylaw - Tobacco Bars

INFORMATION REPORT

ORIGIN

- April 15, 2003 - Regional Council approved the Smoke Free Places By-law
- October 7, 2003 - Regional Council requested a report addressing the establishment of tobacco bars and whether or not the number of tobacco bars operating in HRM is in keeping with the By-law

BACKGROUND

This report focuses solely upon issues related to smoking regulations within "drinking establishments", specifically "tobacco bars." The information in this report does not have relevance to smoking regulations in restaurants, offices, clubs, bingos or other public places.

Provincial smoking regulations: prohibit smoking in drinking establishments except within a designated smoking room. After 9:00 pm the Province allows smoking throughout a drinking establishment. The Province also granted municipality's the authority to adopt smoking regulations which are more restrictive than the Province's.

HRM's bylaw: extends the Province's smoking restrictions past 9:00 pm. As a result, after 9:00 pm smoking is still restricted to a designated smoking room. If a designated smoking room is not provided, smoking is prohibited.

HRM's bylaw exemption: The Municipal bylaw exempts one specific type of drinking establishment from the bylaw. "A drinking establishment that generates ten percent or more of its total annual gross income in a calendar year from the on-site sale of tobacco products and the rental of on-site humidors" is defined as a "tobacco bar." Such drinking establishments are not required to restrict smoking to a designated smoking room after 9:00 pm. Smoking is permitted throughout the drinking establishment after 9:00 pm.

Sunset date: After January 1, 2008 drinking establishments will no longer be allowed to have smoking within designated smoking rooms. There will be a full ban on smoking within drinking establishments after this date, with one exception. Tobacco bars will be exempt from this ban. As a result, smoking will continue to be allowed throughout tobacco bars after 9:00 pm.

DISCUSSION

Since tobacco bars are exempt from HRM's Smoke Free Places Bylaw, a number of drinking establishments are attempting to prove that they:

- currently meet the requirements of being a tobacco bar; or
- have a business plan to generate sufficient revenue from tobacco products/services to become a tobacco bar over the next year.

Approximately thirty drinking establishments are seeking a tobacco bar exemption. There are two views of this situation. This can be viewed as a case of drinking establishments exploiting a loophole in the bylaw or alternatively that drinking establishments are seeking to comply with a legal business opportunity created by the Municipality. It's difficult to choose between these competing views without understanding Council's policy intent with respect to tobacco bars, which admittedly was not clearly articulated when the bylaw was adopted. The following thoughts however were expressed in support of tobacco bars during Council's debate. There was:

- an acknowledgement that a core business focus of some establishments is to provide a public place to smoke (approximately two were believed to exist);
- a desire to avoid automatically putting these establishments out of business with the adoption of the Smoke Free Places Bylaw;
- a desire to ensure that the Municipality did not inadvertently give these existing smoking facilities (i.e. tobacco bars) a monopoly by "grandfathering" them while prohibiting new tobacco bars from being established; and
- an understanding that any drinking establishment which attempts to become a tobacco bar will require a reasonable period of time before 10% of its gross annual income is derived from on-site sale of tobacco products and humidor rentals.

Bylaw Interpretation and Administration

There are two reasonable approaches to interpreting and administering the bylaw with respect to tobacco bars.

Smoking Outside a Designated Smoking Room During Business Start-up

- Based upon Council's comments during adoption of the bylaw, which were noted above, staff has taken a liberal interpretation of the bylaw.
- In this interpretation tobacco bars which can prove they existed when the bylaw was adopted will be granted the smoking exemption. In addition new tobacco bars will be permitted to be established. These businesses will be required to submit a business plan which indicates how and when they will achieve 10% of their gross revenue within the calendar year.
- If an existing drinking establishment is claiming to be converting to a tobacco bar, they will in particular be required to indicate what specific new initiatives will be undertaken to increase tobacco revenues beyond their historic levels.
- A reasonable period of time will be provided to establish the new business initiative since projected revenues cannot likely be achieved within the first months. During this period, smoking will be allowed outside the designated smoking room. This could be considered a one time opportunity. This would prevent frivolous repeat applications for trial period extensions for an establishment that has failed to achieve the 10% gross revenue threshold.
- Financial statements will then have to be reviewed to determine whether 10% gross sales are being met. If the 10% revenue threshold is not met then smoking will again be restricted to the designated smoking room.

Restrict Smoking to Designated Smoking Rooms During Business Start-up

- It should be noted that the Municipality is not obliged to allow smoking outside a designated smoking room while an establishment attempts to achieve 10% gross revenue. The Municipality is also not obliged to provide a period of time for drinking establishments to achieve 10% gross revenue from tobacco products.
- The Municipality may reasonably restrict smoking to the designated smoking room until such time that 10% gross revenue is achieved. Only after an establishment has proven they are a tobacco bar would smoking be permitted outside the designated smoking room. It should be noted that it may not be possible in most cases to achieve the 10% revenue threshold revenue if smoking is restricted to the limited space of the designated smoking room.
- If it is Council's wish that this interpretation prevails, then staff will only consider documentation from drinking establishments which show 10% gross revenue prior to the bylaw's adoption. All remaining drinking establishments will be told to immediately cease smoking outside designated smoking rooms until such time that their tobacco revenues reach 10%. Charges will be laid in those cases where this direction is ignored.

Policy Options

Staff have developed a process to review the information being provided for the tobacco bar exemption. A draft application form is attached to this report. Approximately thirty drinking establishments are seeking a tobacco bar exemption. It is unclear at this time how many more applications will be received or how many will meet the bylaw's criteria. If Council is concerned by the number of tobacco bar applications generated by the bylaw, the risk of numerous tobacco bars being authorized, or allowing smoking to continue outside a designated smoking room for a trial period, there are several options. It should be noted however that not all applications will necessarily be approved. Staff will continue to process the applications and let Council know the results. At that point if Council is dissatisfied with the number of approvals, Council could direct staff in take any of the following steps:

- As mentioned above, staff could be directed to take a more limited administration of the bylaw. This would immediately restrict smoking to designated smoking rooms until such time that tobacco revenues meet the minimum 10% threshold.
- Only allow tobacco bars which existed on the date the bylaw was adopted. This would in effect "grandfather" tobacco bars which existed when the bylaw was adopted and prohibit the establishment of new tobacco bars.
- Increase the bylaw's standards for tobacco bars (e.g. increase the minimum gross revenue from tobacco to 20%, or require that an on-site humidifier is mandatory not optional); or
- Eliminate the exemption for tobacco bars entirely.

The first option does not require an amendment to the bylaw and therefore no public hearing is required. The remaining options require public hearings before adopting the amendments.

Action Being Taken

Staff have begun to implement administrative procedures to review tobacco bar documentation. During the application process, any complaints generated in regard to the Smoke Free Places Bylaw will be placed on hold for those applying for registration until the process has determined the tobacco bar status of the facility. Inspectors are provided with the list of those who have made formal request.

Should HRM not provide an administrative process to allow establishments an opportunity to demonstrate that they can meet the definition, the only alternative will be to lay a charge. The proprietor would then have to prove to the court that they met the definition.

This administrative process can allow the matter to be settled outside of the court system, avoiding legal costs that occur when a charge is laid and adjudicated in court.

Registration Requirements

Financial reporting must be required so that we can be assured that:

- Tobacco products are purchased and sold on-site, and expenditures and sales are consistent with each other. The Tobacco Retail Vendor License requires such information to be provided or recorded.

- 10% of gross revenue in the licensed drinking establishment is generated through the sale of tobacco products and on-site rental of humidor space to customers. Revenue from vending machines cannot be included.
- Gross sales will include net VLT income, food sales, alcohol sales and sales taxes; and
- Revenue data is verifiable through sworn affidavit of a professional accountant verifying review and accuracy of statements.

BUDGET IMPLICATIONS

None

FINANCIAL MANAGEMENT POLICIES / BUSINESS PLAN

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Capital and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Capital and Operating reserves, as well as any relevant legislation.

ALTERNATIVES

1. Four options were outlined in the main body of this report.

ATTACHMENTS

Attachment 1: Draft application

Additional copies of this report, and information on its status, can be obtained by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

Report Prepared by: Barbara Nehiley, Special Projects Advisor

(902)490-4612

**ATTACHMENT 1: Halifax Regional Municipality
Smoke Free Places By-law (SFPB) S-203**

DRAFT APPLICATION For Registration

The following application and documentation is required to register with the HRM Planning & Development Services as a Tobacco Bar

BY-law S-203 on Smoke Free Places (SFPB) defines a tobacco bar in section 2(i).

- A “tobacco bar” means a drinking establishment that generates ten percent or more of its total annual gross income in a calendar year from the on-site sale of tobacco products and the rental of on-site humidors.
- Under SFPB Section 3B tobacco bars are exempt from the prohibition of smoking .
- A drinking establishment licensed by the Province of Nova Scotia that has a designated smoking room which meets the requirements of the provisions of the Nova Scotia Smoke Free Places Act and can provide a current certificate of compliance in this regard signed by a duly licensed engineer can be a tobacco bar if it meets the by-law definition by registering and meeting the requirements as set out in this application.
- An establishment can register as an existing tobacco bar if the proprietor can demonstrate that it fully meets the definition and the requirements for registration.
- An establishment may also register as a new “probationary tobacco bar” providing it submits a business plan, current sales revenue breakdown and projected revenues for the current and next calendar years and meets the other requirements set out in the application. Up to six months after probationary status is granted will be allowed for the 10% gross revenue standards to be met. At the end of that period a probationary tobacco bar must meet the definition in the by-law in order to retain its registration. Otherwise the Smoke Free By-law S-203 comes into full effect.
- An establishment operating as a tobacco bar, each year if, upon the renewal of its registration, continues to generate ten or more per cent of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors.
- No applicant in arrears of HRM taxes or outstanding fees will be eligible for registration.
- **NOTE: A tobacco bar will be required to meet the regulations of the NS Smoke Free Places Act and restrict smoking to a designated smoking room between the hours of 6 AM to 9 PM during hours of operation. Only an establishment with a variance from the Province of Nova Scotia may open the full establishment to smoking at an earlier time.**

Section A: Instructions to the Applicant for registration

The following submission guidelines and documentation is required for all applicants:

- All applicants must have a current , valid permit to operate a business, food service, and licensed drinking establishment issued by the Province of NS
- NS Retail Tobacco Vender license.
- All information provided as part of the application package must be either typed or printed clearly in ink.
- The name of the applicant or entity must be the same on all supporting documentation submitted.
- The application must be completed and signed where indicated.
- If the applicant is not applying in person, the person applying on the applicants behalf must present power of attorney in either standard legal form or an affidavit form provided by a notary public.
- The person holding power of attorney must present one acceptable form of his/her photo identification as a detailed below(instead of the applicants photo identification).
- Where noted original documentation should be provided; otherwise copies will be accepted.
- Each drinking establishment seeking registration must prepare and submit all required documents for a an individual application. No group registration is permitted.
- Only revenue and tobacco purchase receipts from the licensed drinking establishment can be used for the application. Revenue and tobacco expenses from adjoining restaurants, or retail facilities **cannot be included.**

The following additional documentation is also required for submission:

Individual registrations;

1. business certificate of ownership
2. Photo identification of the individual applicant or any representative with power of attorney. A copy of one of the following is required:
 - drivers license with photo ID
 - Canadian or foreign passport
3. A copy of Halifax Regional Municipality property tax assessment number.
4. NS Alcohol and Gaming Authority current Liquor license.
5. NS Marketing and Agriculture Department Food service license.
6. In all cases the license address must match the address of the establishment.
7. Verified accounting of revenues and tobacco expenses for each of the twelve month tax or financial reporting periods ending December 31 that declare the breakdown of sales receipts of the business by the required categories found in the application. If the business tax or financial reporting period does not coincide with the calendar years, provide the most recently available tax returns and indicate the financial years to be covered.
8. A signed and dated copy of NS Tobacco Retail Vender license.
9. A copy of HST Tax submissions to the Province of Nova Scotia and proof of purchase of tobacco product invoiced to the registered establishment.

Submitting the Registration Application:

Submit the completed application for registration and supporting documents by Mail:

Halifax Regional Municipality
Planning & Development Services
Smoke Free Places By-law- Tobacco Bars
PO Box 1749
Halifax NS B3J 3A5

or **in person** to :
Any of the following Customer Services Centres:
Scotia Square, lower Mall, Halifax
West End Mall, Mumford Rd. Halifax,
2nd Floor Alderney Gate, Alderney Dr. Dartmouth,

Section B: Determining if your establishment is a tobacco bar

All applicants must complete Section B. You must provide revenue records which separately state sales receipts from the sales of food, alcoholic beverages and tobacco products, certified by a professional accountant, for 2 most recent twelve month periods ending December 31 ending each calendar year for your application to be evaluated by the Municipality.

Period covered: from _____ (Month) _____(Year) to _____(Month) _____(Year).

Year 1 Revenue Reporting Year ending December 31

	Existing Tobacco Bar (Actuals)	New Tobacco bar (Years Current and Projected)	
1. Total annual gross sales of food =	\$	\$	\$
2. Total annual gross sales of alcoholic beverages =	\$	\$	\$
3. Total annual gross sales of tobacco products and the rental of on-site humidors =	\$	\$	\$

Year 2 Revenue Reporting Year Ending December 31

	Existing Tobacco Bar (Actuals)	New Tobacco Bar (Years-Current and Projected)	
4. Total annual gross sales of food =	\$	\$	\$
5. Total annual gross sale of alcoholic beverages =	\$	\$	\$
6. Total annual gross sales of tobacco products and the rental of on-site humidors =	\$	\$	\$

- Applicants must submit the supporting documentation to indicate the percentage of sales of tobacco products, alcoholic beverages and food for each revenue-reporting year. All documents submitted must be signed and dated.
- Applicants just starting up as a tobacco bar apply for a probationary registration and have up to 6 months to reach the 10 per cent sales target and must maintain the level of tobacco sales for 12 months to retain registration. Monthly verified sales figures must be submitted during this probationary period.
- Applicants who currently operating as a tobacco bar can apply for registration and provided verified sales figures that indicate they have reached the 10 per cent target for sales and meet other requirements. Annual renewal of the registration is required.
- Sworn affidavit signed by a Commissioner of Oaths or Notary from a professional accountant is required attesting that he or she has reviewed your financial records for the two most recent calendar years and can verify the source and correctness of the figures. If the business, tax or financial reporting period does not coincide with the calendar years, provide the most recently available monthly reporting that coincides with the calendar year.

This application will be used to determine if you are an existing Tobacco bar and meet the definition as stated in the Smoke Free Places By-law. This application will also determine if you will be provided a certificate renewable annually, or probationary certificate of up to 6 months in order to demonstrate that you can meet the 10 per cent revenue target for Tobacco Bars.

Applicant Name		
PLEASE PRINT OR TYPE		
Civic address of building Address <i>no PO Box</i>		
include postal code		Name of establishment (other known names)

HRM Application for Registration as A Tobacco Bar

Provincial liquor license #(s)			
Provincial tobacco retail Vendor License		Telephone number	
BN# (HST number)		Fax number	
Municipal Tax Assessment # commercial and business occupancy tax		E-mail	
How many years have you operated as a Tobacco Bar? Less than 1 year [] 2 or more Years []			
Do you have humidor? Yes [] No []			
Please describe the size and capacity of the humidor.			
What is the volume of space available for rental of humidor space?			

Hours of Operation

Day	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Open							
Close							

Certification by Professional Accountant

Please complete the form and attest to the validity of the sales figures

Name _____

Title/Designation _____

Signature _____

Date (D/M/Y) _____

I hereby swear that I have reviewed the financial information provided in this application and can attest to the validity of its source and content.

Professional Accountant Civic Address		
Postal code	Phone ()	Fax ()
E-Mail:		

The above statements are hereby certified to be correct to the best knowledge and belief of the undersigned (owner or principal officer). The applicant hereby authorises and consents to receipt of financial information by the municipality from time to time for the purpose of annual review including the HST reports,, Tobacco Vender License reports, and annual sales breakdowns, sales tax submissions , all license renewals. I hereby agree that upon issuance of a certificate, the information contained therein shall be shared with other government departments and other orders of governments.

Name _____

Title _____

Signature _____

Date (D/M/Y) _____

HRM Application for Registration as A Tobacco Bar

List of names, home address,, phone number, and Social Insurance number, title of owners, partners, corporate officers, principals. Use additional sheets if necessary.

1.Last name	First name	Title	SIN
Civic address	Street		
City	Province	Postal Code	Telephone

2.Last name	First name	Title	SIN
Civic address	Street		
City	Province	Postal Code	Telephone

3.Last name	First name	Title	SIN
Civic address	Street		
City	Province	Postal Code	Telephone

4.Last name	First name	Title	SIN
Civic address	Street		
City	Province	Postal Code	Telephone

5.Last name	First name	Title	SIN
Civic address	Street		
City	Province	Postal Code	Telephone

HRM Application for Registration as A Tobacco Bar

Office Use Only	Date received	# of attachments	
Contact notes			
Permanent [] Probationary []			
Office Use Only	Yes	No	Comments
All requested documents submitted?			
Application completed and correct?			
sales of tobacco products on site			
10% of total sales			
business plan provided			
humidor on site			
rental of humidors			
Variance to open outside DSR earlier than 9 PM			
Reviewer	Recommendation Yes [] No []		
Name	Annual renewable registration []		
	Probationary Registration		
signature			
Approved by:	Date (D/M/Y)		