



STAFF REPORT TO THE PLANNING & PROTECTIVE SERVICES COMMITTEE
MEETING OF WEDNESDAY, JULY 26, 2006

SUBJECT: Alternatives for Amendment of CRD Clean Air Bylaw No. 1, 1996

PURPOSE/PROBLEM:

Since enactment of the Clean Air Bylaw (the Bylaw), some bar and restaurant establishments have constructed outdoor areas for patrons to smoke while being served food and beverages. Some outdoor areas have been constructed such that the areas are essentially indoor spaces with unacceptable concentrations of smoke. The consumption of tobacco within enclosed areas contravenes the intent of the Bylaw.

HISTORY/BACKGROUND:

In 1999, the Capital Regional District enacted Clean Air Bylaw prohibiting smoking in all indoor public spaces. This Bylaw has no definition of an acceptable outdoor deck or patio area. Without a definition, owners have had no reference to what is acceptable. Also, without a definition, VIHA, where it observes unacceptable concentrations of second-hand smoke, is unable to obtain an order from the Courts in cases where owners dispute or ignore health risks to staff and patrons.

In June 2005, the Chief Medical Health Officer (CMHO) for the Vancouver Island Health Authority (VIHA) requested the Board amend the Bylaw to define acceptable outdoor areas (degree of permitted enclosure).

In September 2005, the Board tabled the CMHO's request and directed staff to develop a public consultation process to hear the views and evidence relevant to the issue. Difficulties in scheduling hearings amongst Directors' busy schedules have delayed moving forward. The April 2006 Committee report proposed alternate dates for three public hearings over two days (September 19/20 or September 26/27).

In a May 2006 meeting between District and VIHA staff to conclude plans for the community consultation process, the Chief Medical Health Officer (CMHO) raised concerns. He mentioned additional evidence of the health risks of inhaling second hand smoke, the limits of the proposed bylaw amendment (both legally and administratively) and experience in other jurisdictions. The CHMO suggested that this evidence might lead him to recommend smoke-free public outdoor areas. These comments raised second thoughts about proceeding with the proposed bylaw amendment only to see it replaced a year or two later with a different bylaw amendment and another round of public consultation. **Attachment One** contains a summary report from the CMHO on the recent evidence.

The balance of the report outlines the alternatives available to the Board for dealing with smoking in outdoor (patio) spaces.

ALTERNATIVES:

1. The Board maintain the current Clean Air Bylaw.
2. The Board continue with the proposed bylaw amendment process establishing a definition of enclosure of outdoor (patio) areas.

Attachment Two includes the proposed by-law amendment, an illustration of an acceptable patio under the amendment, and digital photos of current conforming and non-conforming patios.

3. The Board abandon the proposed amendment to the Clean Air Bylaw defining "outdoor area enclosure" and proceed with a new public consultation process on proposed amendments to the Clean Air Bylaw that would require all patio spaces of businesses where food and beverages are served to be smoke-free.

IMPLICATIONS:

There are a series of implications including health effects, financial, legal and administrative, industry/business and public consultation. This report cannot give a comprehensive review of these factors but they will be obtained from the public consultation process.

Health Implications

Alternative One does not address outdoor patio areas which have been enclosed to the degree that their air quality is deemed to pose a health risk to staff and patrons.

New evidence of the health risks of exposure to second hand smoke in public outdoor areas, outlined in Attachment One, is the primary reason for considering abandoning Alternative Two in favor of Alternative Three.

Financial

There is "massive and conclusive scientific evidence of the adverse effects of involuntary smoking on children and adults, including cancer and cardiovascular disease in adults and adverse respiratory effects in both children and adults¹". Treating these diseases entails significant public and private costs. There is reason to believe that the 1999 Clean Air By law reduced smoking in the Region and some evidence that this has contributed to a decline in cardiovascular disease.

Legal and Administrative

Courts have made it clear that the authority to legislate to protect public health is valid when scientific evidence demonstrates a significant risk to public health. In the 1998 Court of Appeal ruling in the case of the Restaurant and Food Services Association of B.C. v Vancouver (City), the Court upheld the City's right to prohibit smoking in restaurants and not bars and pubs because the scientific evidence of the day. The City's bylaw was justified and within its power to protect the public health.

Also, the Courts have given a clear signal that enforcement actions in relation to patios will not be successful due to the ambiguity in the word "structure" contained in the current Bylaw; this has the result that the current Bylaw may not be enforced and is ineffective in relation to patio areas.

¹ *The Health Consequences of Involuntary Exposure to Tobacco Smoke, A Report to the Surgeon General, US Department of Health and Human Services, 2006*

Alternative Three will make application of the rules easier to enforce as it will be a simple matter of whether smoking is occurring or not, much the same as it is now for inside business premises.

Alternative Three will also be easier to enforce than Alternative Two as there will be no need to determine whether a patio is "enclosed". Although the definition of enclosure in Alternative Two attempts to deal with as many circumstances as reasonable, there are still opportunities in which a proprietor may argue in defense whether or not a particular thing is a barrier or whether a particular configuration of physical barriers meets the criteria in the definition of "enclosed".

Industry/Business

The hospitality industry is likely to have concerns over loss of business and income from a ban on outdoor public smoking. The US Surgeon Generals 2006 Report concludes that "evidence from peer-reviewed studies shows that smoke free policies and regulations do not have an adverse impact on the hospitality industry²".

Some hospitality establishments which have incurred costs to construct outdoor enclosures may have concerns about the costs to remove or modify them. Under Alternative Three, such owners will not have to incur any additional costs to comply. Those constructed or renovated areas can be continued to be used even if they are not allowed to be used for smoking. Further, the providers who did incur costs to comply with the current bylaw have had the advantage of allowing those areas to be used by patrons who smoke. However, there is no guarantee that the law will not change and that a proprietor will not be subject to new rules in the future.

Also prohibiting smoking on all patios where food and beverages are served, whether partially enclosed or not, will set a level playing field for all businesses, something often complained about by businesses that cannot offer outside patios.

Public Consultation

Alternative Two would see the public hearing process conducted in the fall leading to the Board's final consideration in late 2006. VIHA advise there are 1109 bars and restaurants in the region. Seventy (70) of these have outdoor structures and approximately forty (40) of them (or 3% of all bars and restaurants) would not meet the proposed amendment.

With the evidence suggesting that this amendment may not go far enough in protecting public health, the small number of establishments causing this amendment to be brought forward and the significant time and effort involved in public consultation processes, continuing with Alternative Two is questionable.

Also relevant to Alternative Three is the number of other jurisdictions enacting bans on public outdoor area smoking (see **Attachment Three**), a high degree of local public support for the current by-law and 55% local support for the ban on smoking on patios (see **Attachment Four**).

At present, there is no detailed process or schedule attached to this alternative. A likely schedule is commencement of public hearings early in 2007 with the Board's final consideration in May 2007. This would allow time to conduct a public education process if deemed necessary.

² *The Health Consequences of Involuntary Exposure to Tobacco Smoke, A Report to the Surgeon General, US Department of Health and Human Services, 2006*

SUMMARY/CONCLUSION:

The CMHO originally requested the District amend the Clean Air Bylaw to incorporate a definition regarding enclosure of outdoor areas (e.g. patios and decks at bars and restaurants). The Board tabled the amendment and directed staff to develop a public hearing process regarding this issue. That process is set to begin in September 2006.

In May 2006, the CMHO reported new information regarding the dangers of tobacco smoke and is now recommending the District amend the Clean Air Bylaw to make all patio spaces where food and beverages are served to be smoke free. This report outlines three alternatives for the Board to consider in addressing this issue.

RECOMMENDATION:

That the proposed amendment to the Clean Air Bylaw that would define "outdoor area enclosure" be abandoned and that staff be directed to proceed with a new public consultation process on proposed amendments to the Clean Air Bylaw that would require all patio space of businesses where food and beverages are served to be smoke-free.



Jeremy Tate, Senior Manager
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Report Writer



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COMMENTS:

Attachment One

Recent Evidence on Public Health Risks of Second Hand Smoking In Outdoor Areas

1. **Outdoor Air Pollution from Secondhand Smoke; Repace, James L, Tufts University**

Method: Experiments were conducted to measure respirable particles (carcinogens) to investigate the levels of second hand smoke on two cruise ships in the Caribbean and five outdoor cafes in Helsinki, Finland.

Results: Smoking in outdoor areas of cruise ships tripled the level of particulate carcinogens relative to indoor and outdoor areas in which smoking did not occur, despite strong breezes and unlimited dispersion. Outdoor smoking areas were contaminated to nearly the same extent as the ship's casino. Particulate levels in five outdoor cafes were 5 to 20 times higher than on sidewalks along busy streets. Secondhand smoke outdoors increases the exposure of outdoor hospitality workers such as waitstaff, bartenders and musicians as well as members of the public to harmful fine particle air particles and carcinogens

2. **Tobacco Smoke Pollution in Outdoor Hospitality Settings; - The Results of Monitoring on Patios and Inside Bars: Kennedy D.K. et al, University of Waterloo**

Method: Indoor and outdoor air quality was assessed at 6 bars with patios in Southwestern Ontario on the evening of July 15, 2005 to determine whether tobacco smoke pollution (TSP) reaches hazardous levels and whether TSP in outdoor settings compromises indoor environments

Results: The findings demonstrate that TSP on outdoor patios represents a potentially significant health threat that, in some circumstances, may approach the level of TSP in indoor settings. Readings inside a bar were related to readings on its patio. Average indoor readings over 90 micrograms /m³ inside one bar location (3 times that of background readings) demonstrate that smoke from outside can and does drift inside.

Implications : The results demonstrate that smoking on outdoor patios (1) represents a potential health hazard on those patios and (2) leads to smoke exposure indoors that may compromise the protection against TSP intended by indoor smoke-free laws .

Notes:

1. and 2. Summaries of research presented at the 13th World Conference on Tobacco OR Health, July 12 - 15, Washington, D.C. USA.

The Health Consequences of Involuntary Exposure to Tobacco Smoke, A Report of the Surgeon General US Department Of Health and Human Services, 2006

1. Secondhand smoke causes premature death and disease in children and adults who do not smoke.
2. Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer.

3. Even brief exposures could pose significant acute risks to older adults or to others at high risk for cardiovascular disease.
4. Non- smokers exposed to secondhand smoke see their risk of developing heart disease increase 25 to 30 % and their risk of lung cancer increase by 20 – 30%.
5. The scientific evidence indicates there is no risk- free level of exposure to secondhand smoke.

ATTACHMENT TWO

CAPITAL REGIONAL DISTRICT

BYLAW NO. _____

CAPITAL REGIONAL DISTRICT CLEAN AIR BYLAW NO. 1, 1996,
AMENDMENT BYLAW NO. 3, 2005

The Board of the Capital Regional District in open meeting assembled enacts as follows:

1. Bylaw No. 2401 cited as the "Capital Regional District Clean Air Bylaw No. 1, 1996" is amended as follows:

(1) by adding to section 1 INTERPRETATION:

(a) after the definition of "*business*" the following definitions:

"*enclosed*" means a space obstructed by a physical barrier where more than 25% of its total floor area is covered from above by a roof, canopy or other physical barrier that is capable of excluding rain and the height of more than 50% of its perimeter is more than 50% obstructed by a physical barrier; and

"*height*" means the greater of:

(a) the vertical distance between the floor area and the roof, canopy or other overhead cover described in the definition of "*enclosed*"; or

(b) 8 feet or 2.46 metres."

(b) after the definition of "*no-smoking sign*", the following definition:

"*physical barrier*" includes

- (a) a wall;
- (b) a window or door, whether or not it is open;
- (c) panelling;
- (d) fabric or an awning;
- (e) dense vegetation;
- (f) fencing or lattice; or
- (g) any other physical barrier that impedes airflow."

(2) by deleting section 2(2) in its entirety and replacing it with the following:

"(2) No proprietor of a business shall permit a person to carry or have in his possession a burning cigarette or pipe containing burning tobacco, or to burn tobacco in any manner, inside any part of the enclosed business premises or inside any part of the business vehicle."

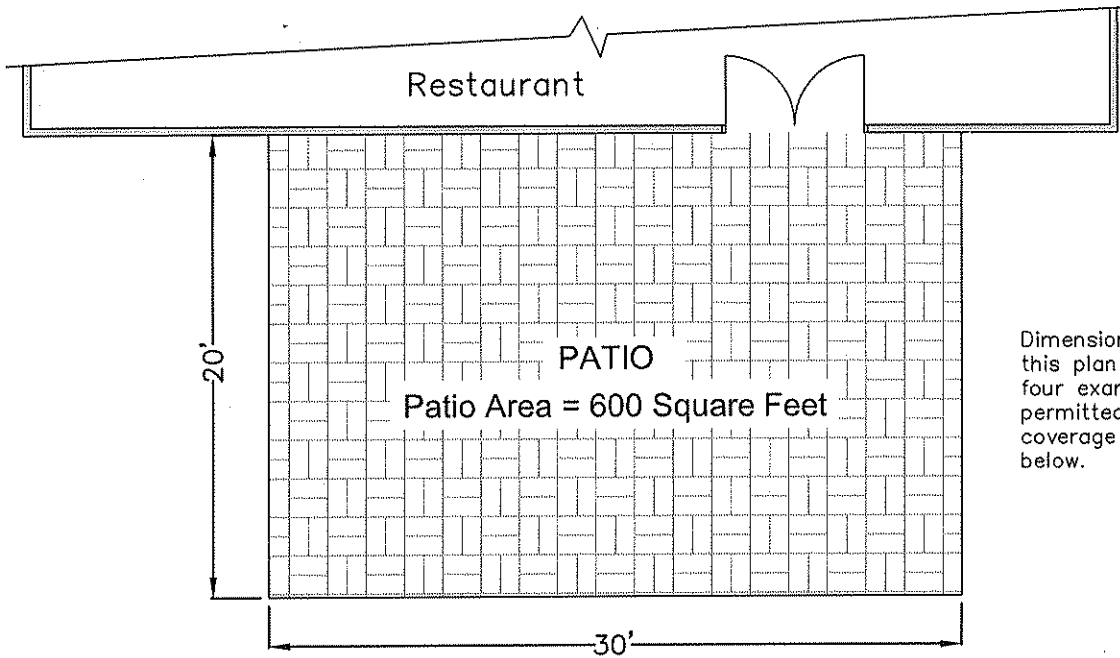
2. This Bylaw may be cited for all purposes as "Capital Regional District Clear Air Bylaw No. 1, 1996, Amendment Bylaw No. 3, 2005".
3. The effect of this Bylaw is suspended until January 1, 2006, and this Bylaw shall come into force effective January 1, 2006.

READ A FIRST TIME THIS	day of	2005.
READ A SECOND TIME THIS	day of	2005.
READ A THIRD TIME THIS	day of	2005.
DEPOSITED WITH THE MINISTER OF HEALTH SERVICES THIS	day of	2005.
ADOPTED THIS	day of	2005.

Chair

Secretary

Attachment 1 to the report on CRD Clean Air Bylaw

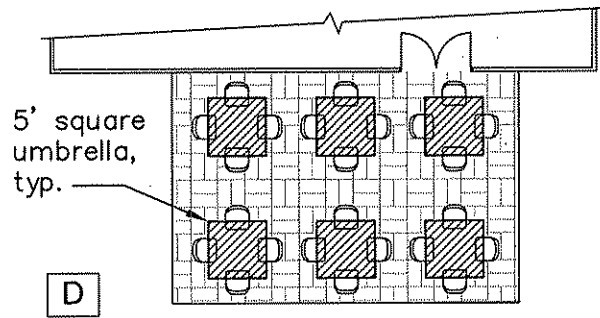
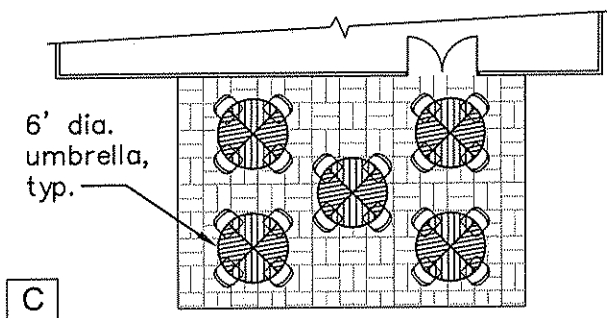
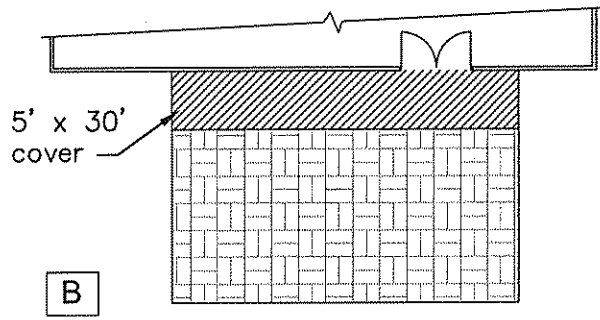
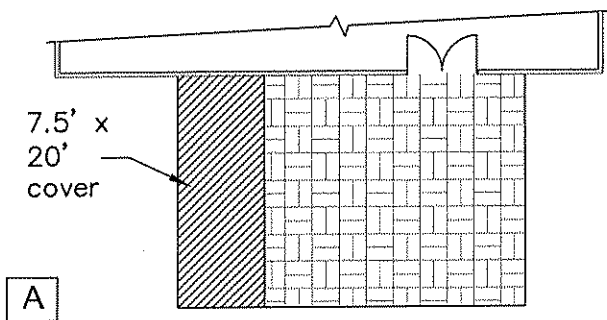


Plan - Typical Patio
1/8" = 1'-0"

Examples of permitted typical patio overhead coverage:

Scale: 1/16" = 1'-0"

NOTE: Maximum overhead barrier coverage = 25% of patio floor area, (150 sq. ft.)

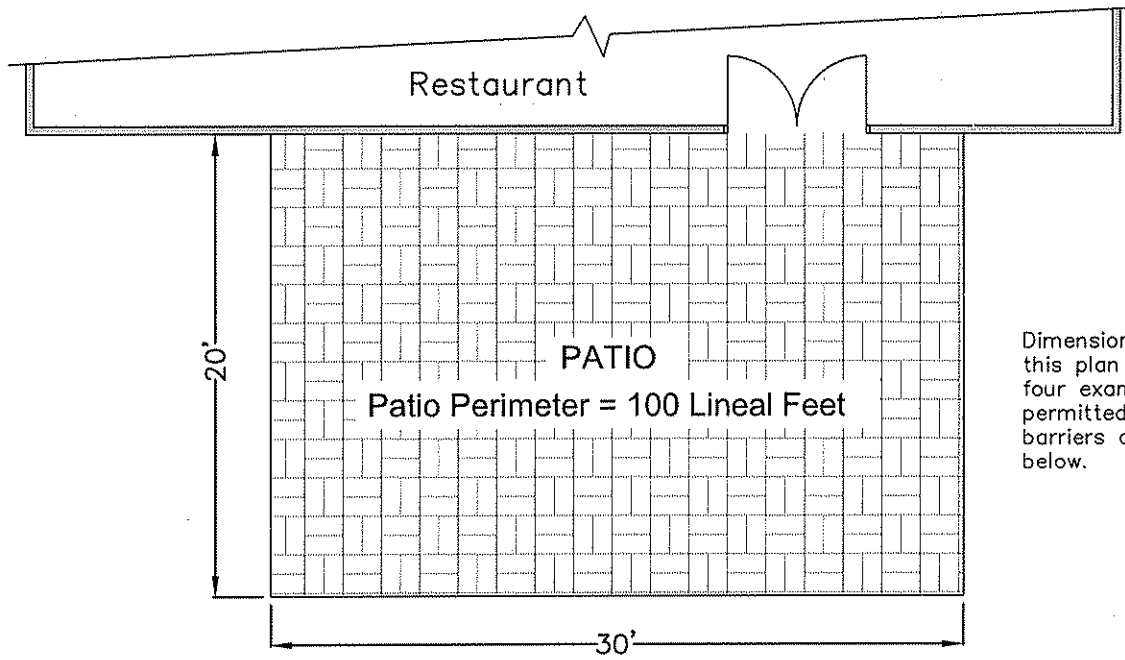


Five - 6' dia. umbrellas. Number of tables permitted as per license but no more umbrellas.

Six - 5' square umbrellas. Number of tables permitted as per license but no more umbrellas.

OR ANY COMBINATION OF OVERHEAD BARRIERS THAT DOES NOT EXCEED 25% OF FLOOR AREA

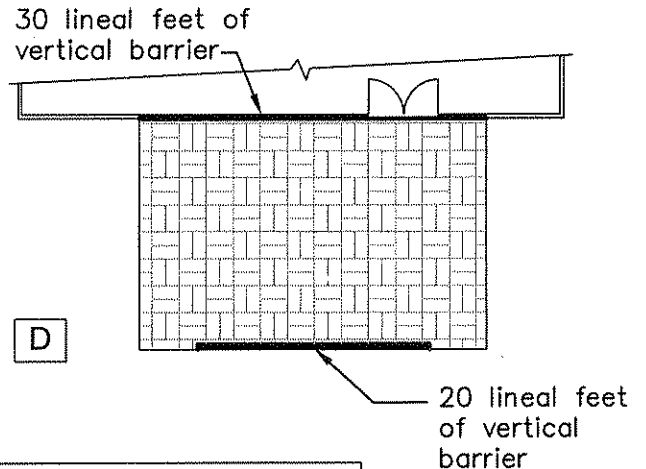
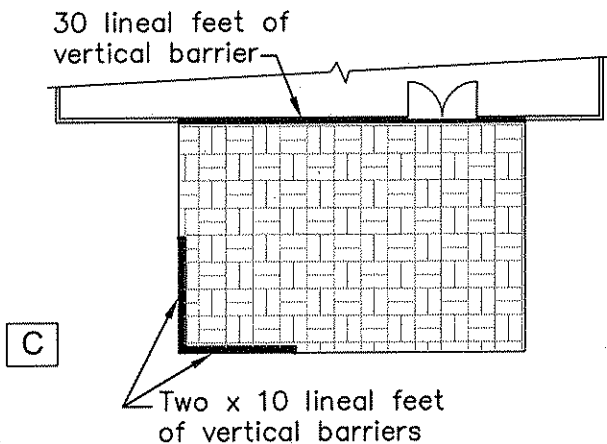
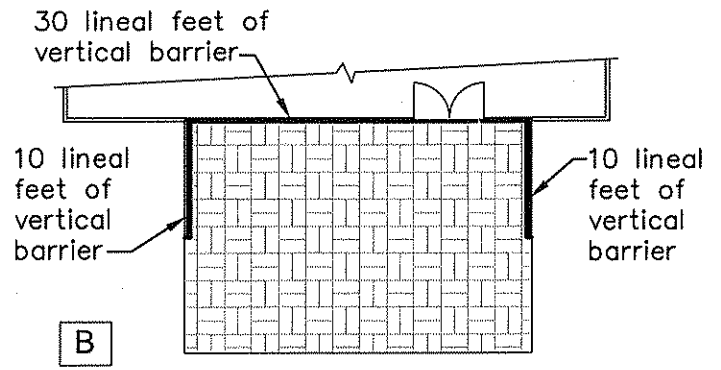
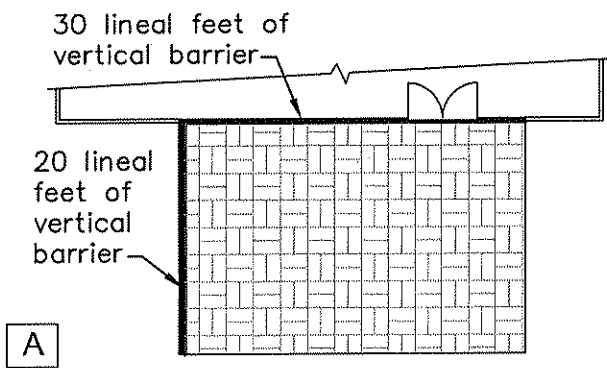
Attachment 2 to the report on CRD Clean Air Bylaw



Plan - Typical Patio
1/8" = 1'-0"

Examples of permitted typical patio vertical coverage:
Scale: 1/16" = 1'-0"

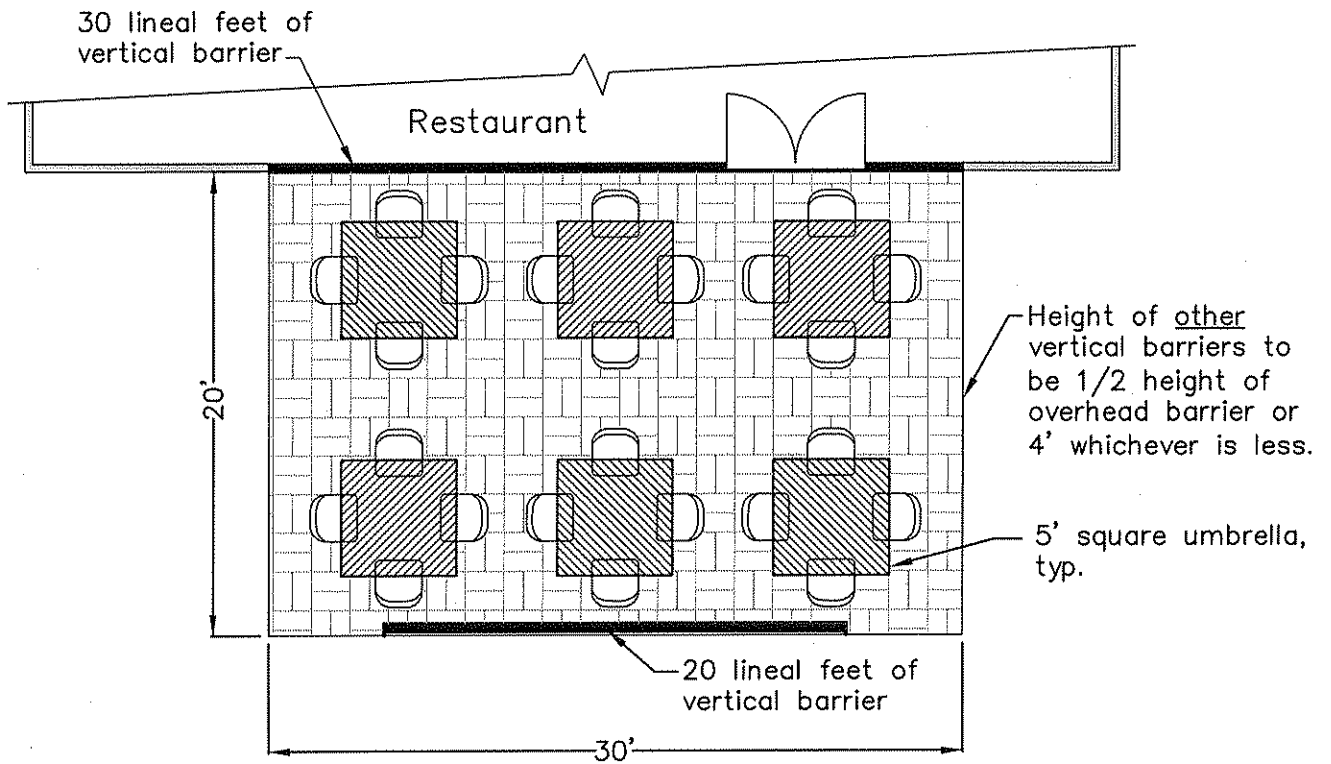
NOTE: Maximum length of vertical barriers impeding airflow = 50% of patio perimeter (50 sq. ft.)



OR ANY COMBINATION OF VERTICAL BARRIERS THAT DOES NOT EXCEED 50% OF PATIO PERIMETER.

Attachment 3 to the report on CRD Clean Air Bylaw

PUTTING IT TOGETHER



Plan - Typical Patio
1/8" = 1'-0"

Patio area = 600 sq. ft.

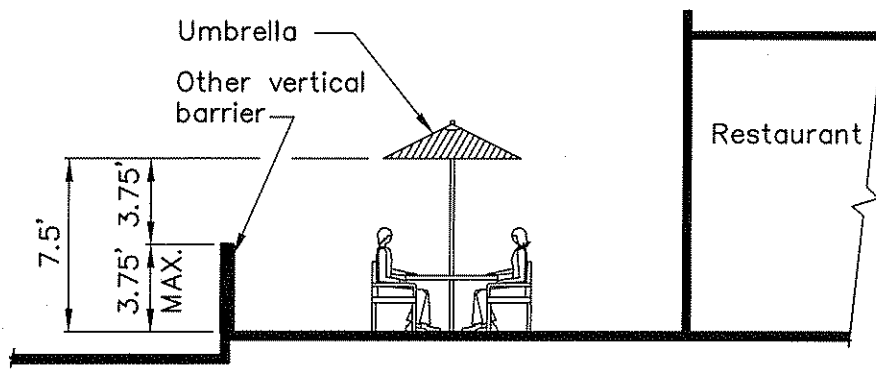
Maximum overhead barrier = 25% of 150 sq. ft.
(Six - 5 ft. sq. umbrellas)

Patio perimeter = 100 Lineal feet

Maximum perimeter impeding airflow = 50% of patio perimeter
= 50 lineal feet

Attachment 4 to the report on CRD Clean Air Bylaw

HEIGHT OF OTHER VERTICAL BARRIER



Note:

Height of overhead barriers are examples only and are not requirements.

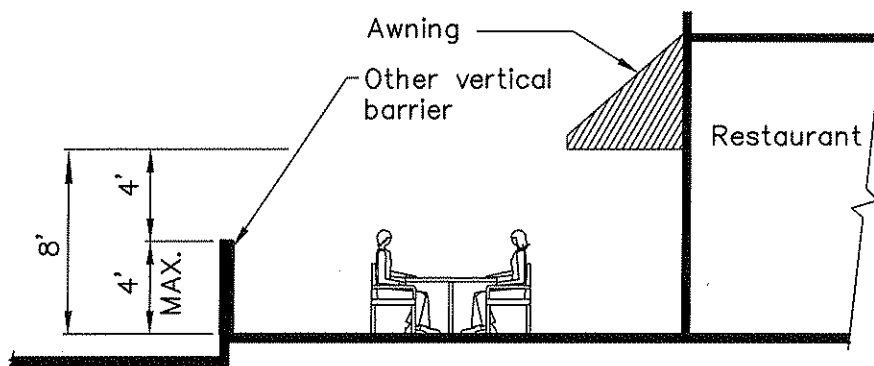
Full height barriers permitted to a maximum of 50% of patio perimeter.

Elevation – Example Patio with umbrella

1/8" = 1'-0"

Umbrella height = 7.5' (7' 6")

Other vertical barrier height – $(7.5' \div 2) = 3.75'$ (3' 9") maximum.



Elevation – Example Patio with awning

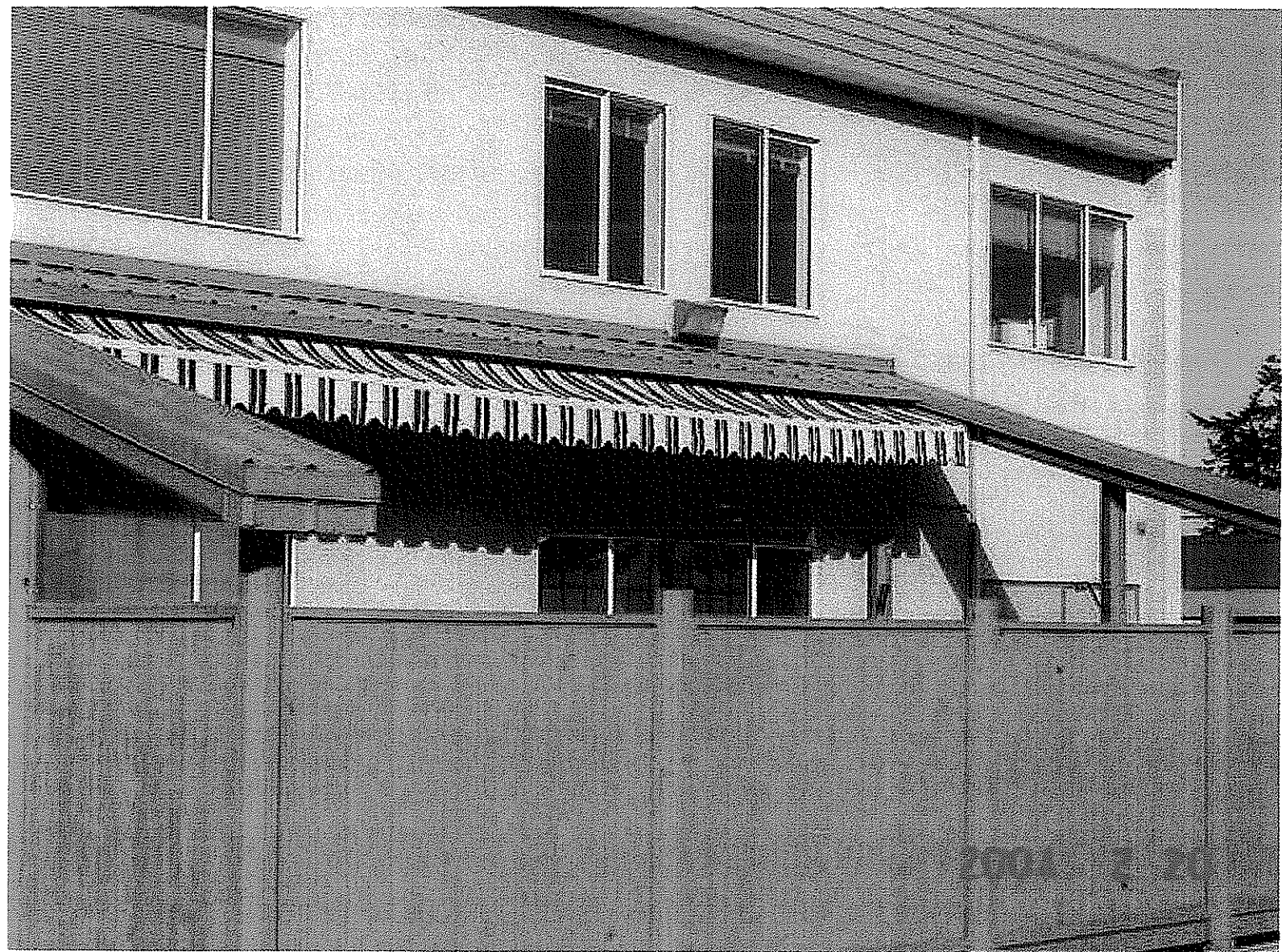
1/8" = 1'-0"

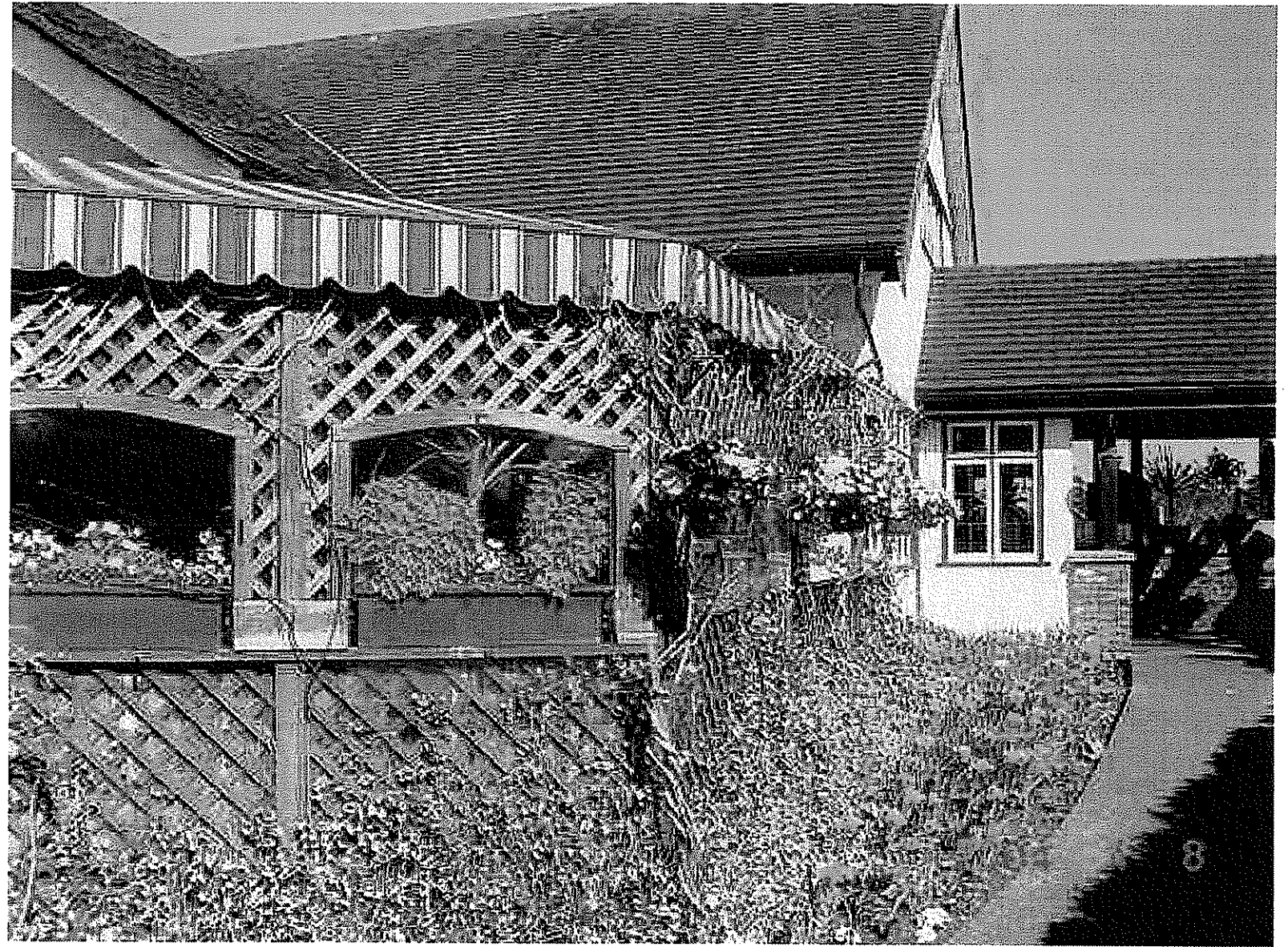
Awning height = 8'

Other vertical barrier height – $(8' \div 2) = 4'$ maximum.

NOTE:

If height of overhead barrier exceeds 8' the maximum height of the other vertical barrier remains at 4'.





Attachment Three

Other Canadian Jurisdictions with Legislation on Outdoor Patios and Decks

Provincial Legislation

Newfoundland and Labrador and Nova Scotia have provincial legislation that bans smoking on outdoor decks and patios.

Saskatchewan has provincial legislation giving municipalities the authority to enact more restrictive by-laws which includes banning smoking at outdoor public places such as patios.

Municipalities

Eighteen municipalities have full bans on smoking on outdoor patios and decks:

Alberta (9): Airdrie, Banff, Calgary, Devon, Edmonton, Jasper, Red Deer, St. Albert, and Stettler

Saskatchewan (1): Saskatoon

Ontario (6): Brighton, Burpee & Mills, Haldimand County, Kingston, Tehkummah, and Thunder Bay

Nova Scotia (2) : County of Antigonish and New Glasgow

British Columbia: Vancouver Coastal Health Authority is preparing a report for the City of Vancouver in response to increasing public complaints about not being able to use outdoor areas due to exposure to second hand smoke and such smoke drifting into smoke free indoor areas.

Attachment Four

Various Smoking Bylaw Public Opinion Survey Results

Part 1; Vancouver Island Smoking Bylaw Study (CRD results); Ipsos Reid, April, 2005

1. Awareness of Smoking Bylaw:

99 %

2. Support for Smoking Bylaw in Indoor Public Places:

1996 = 61%
1998 = 65%
2000 = 77%
2001 = 81%
2005 = 90%

3. Impact of Smoking Bylaw on Frequency of Patronage:

Any type of restaurant or café = + 34%
Neighbourhood pub that also serves meals = + 33%
Bar or lounge that primarily serves drinks = + 19%
Food fair in shopping mall = + 20%
A club or night spot that serves drinks
and has live entertainment/dancing = + 18%
Bowling alley, bingo hall, casino = + 10%

4. Attitudes Toward Smoking:

Aside from lung cancer, smoking can cause or irritate
many different types of health problems = 98 % agreement

Second hand smoke can cause or irritate many different
types of health problems = 96 % agreement

5. Impact of Bylaw on Smoking Behaviour = 89% no influence

Small base size (n <100) , interpret with caution

Part 2: Vancouver Island Health Authority Clean Air , Tanning and Vending Machine Study (CRD results) , Ipsos Reid , November 2005

Support for eliminating smoking on all patios = 55 %