

CITY OF SAN JOSE

TEMPORARY SIDEWALK USE TERMS AND CONDITIONS

By registering for authorization to conduct its business operations and place, maintain, occupy and use tables, chairs, benches, umbrellas, other moveable furniture, barriers required by the California Department of Alcoholic Beverage Control and other items and equipment reasonably necessary to the Permittee's business (collectively, "Encroachment") on the public sidewalk abutting the Permittee's business and, if applicable, the public sidewalk abutting a neighboring property which has consented in writing to such use (collectively, "Subject Premises") in accordance with the Declaration of the Director of Emergency Services of the City of San José Suspending Enforcement of Certain Provisions in Land Use Permits and Approvals and Zoning and Encroachment Requirements in the San José Municipal Code issued June 4, 2020, as may be amended by the City Council from time to time ("Emergency Order"), which is incorporated herein by reference, the Permittee agrees and consents to the terms and conditions set forth in the Emergency Order and those contained herein (collectively, "Permit").

1. Revocable License. The Encroachment shall be allowed only as a revocable license, shall be personal to the Permittee and not transferable or assignable. The City shall not be estopped from ordering removal of the Encroachment or demanding compliance with any of Permittee's obligations under the Permit. The Permit shall not be construed to create any property right in the Subject Premises that the Permittee did not possess prior to receiving the Permit. The Permittee shall be solely responsible for all costs of complying with its obligations under the Permit.
2. Conformance with Permit. The Encroachment shall be in strict conformance with the Permit. The Permit has been granted upon each and every condition contained therein and shall be strictly construed against the Permittee. The City grants the Permittee no rights that are not explicitly written in the Permit.
3. Revocation. The City may revoke the Permit if: (i) the Permittee is in Default; (ii) the City determines to use the Subject Premises for a public purpose; (iii) the City determines that the Encroachment conflicts with the public's current or prospective use of the public property; (iv) the City determines that the Encroachment constitutes a public nuisance; or (v) the Encroachment is declared unlawful by a court of competent jurisdiction. The City's revocation shall be effective immediately upon providing Permittee with written notice.
4. Expiration. If not earlier revoked, the Permit shall automatically expire upon the termination or expiration of the Emergency Order.
5. Default. Permittee shall be in default under this Permit if it breaches, or fails to timely observe and perform any obligation under, this Permit and fails to timely cure such breach or failure in accordance with this Permit ("Default"). The Director of Public Works shall notify the Permittee in writing of any breach or failure to perform. If the Permittee does not cure the breach or failure to perform to the City's satisfaction within one (1) day, the Permittee shall be in Default, and the Permittee hereby grants to the City any consent or right necessary for the City to remedy the Default. The Permittee shall be responsible for all of the City's costs to remedy the Default. In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled

to specific performance of Permittee's obligations under this Permit and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.

6. Maintenance and Repair of Encroachment. The Permittee shall maintain and repair the Encroachment to the City's satisfaction so that it is in a safe condition and good working order for the intended purpose, except where a higher standard is required by applicable law.
7. City's Right to Enter and Cure. Notwithstanding anything to the contrary in this Permit, the City may remove the Encroachment at the Permittee's expense if the City determines that it represents a dangerous condition or threat of danger to life or property.
8. City Access and Inspection. The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over the Subject Premises at all times without notice to the Permittee, including portions covered by furnishings, materials or equipment, for any lawful purpose for which the Subject Premises may be used.
9. Permittee Responsibility for Encroachment. The Permittee shall be solely responsible for the design, maintenance, repair, occupancy, use and removal of the Encroachment, and the City shall not be liable for its review, approval, inspection or removal of any aspect or portion of the Encroachment. The Permittee's design, maintenance, repair, occupancy, use and removal of the Encroachment shall not interfere with, impede or make more costly the City's operation, maintenance or improvement of the public property.
10. Risk of Loss. The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, "City Indemnitees") shall not be liable for any injury to persons or property arising out of, pertaining to or relating to the Encroachment. The Permittee acknowledges that it bears the full risk of loss or damage to the Encroachment and hereby waives any right to make or prosecute any claims or demands against the City Indemnitees for any loss or damage arising from or relating to the Encroachment. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises or any portion of the public property and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.
11. Indemnity/Hold Harmless. To the fullest extent permitted by law, Permittee shall indemnify, hold harmless and defend the City Indemnitees from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively "Claims"), which arise out of, relate to or result from: (i) any act or omission of the Permittee, its independent contractors, agents, officers, employees or invitees pursuant to or in connection with the Permit or while in or about the Encroachment for any reason; (ii) the design, maintenance, repair, occupancy, use and removal of the Encroachment; and/or (iii) any breach of this Permit or violation of applicable law by the Permittee, its independent contractors, agents, officers,

employees or invitees, in each case whether or not caused by the negligence of the City Indemnitees, except for Claims resulting from the City's sole negligence. The foregoing obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligations arise at the time such claim is tendered to Permittee by the City and continues at all times thereafter until satisfied.

12. Insurance. Permittee shall, at Permittee's sole cost and expense and for the full term of this Permit, obtain and maintain at least the following minimum insurance. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit. Said insurance shall name the City as additional insured and shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) calendar days' prior written notice has been given to City.
13. Compliance with Law. Permittee agrees to comply with all applicable laws, ordinances and regulations in its maintenance, repair, occupancy, use and removal of the Encroachment.
14. Severability. If any provision of this Permit is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Permit.
15. Survival. The provisions under Sections 9-11 and 19-20 shall survive the expiration of this Permit.
16. Headings. The headings used in this Permit are for convenience only and shall not be used in the interpretation of this Permit.
17. Days. All references to days in this Permit shall mean calendar days, unless specified otherwise.
18. Time is of the Essence. Time is of the essence in performing each and all obligations under this Permit.
19. Choice of Law. This Permit shall be construed according to the laws of the State of California.
20. Venue. Any dispute arising under this Permit shall be adjudicated in California State Court in and for the County of Santa Clara, or in the Federal Court in and for the Northern District of California, as appropriate.

EXHIBIT B
CONDITIONS AND LIMITATIONS FOR
USE OF ABUTTING PUBLIC SIDEWALKS

General Retail, Food Services and certain General Services and Education and Training businesses may provide seating and conduct business operations on public sidewalks abutting their property, and any other type of business may provide seating only on public sidewalks abutting their property, all subject to the following conditions and limitations.

1. LOCATION OF SIDEWALK USE

For purposes of this regulation, an "Abutting Sidewalk Area" is defined as a public sidewalk abutting a business' property, subject to the following:

- a. The Abutting Sidewalk Area may extend to public sidewalks in front of a neighboring property only with the written consent of the neighboring property, which written consent shall be provided to the City prior to the business' use of such additional area(s).
- b. The Abutting Sidewalk Area shall include a minimum clear pedestrian through zone (*i.e.*, contains no objects) along its entire length that is at least four feet (4') wide with seven feet (7') of vertical clearance above the sidewalk surface.

2. ELIGIBLE BUSINESSES

Only businesses allowed to operate under the Health Orders of the State of California and Santa Clara County, as amended, are eligible to use an Abutting Sidewalk Area under this regulation.

3. LIMITATIONS ON PERMITTED OPERATIONS

- a. Food Services businesses, as identified in Table 20-90 of the City's Zoning Code, may use an Abutting Sidewalk Area for food and beverage service, subject to the limitations in this Exhibit B.
- b. The following businesses, as identified in Table 20-90 of the City's Zoning Code, may use an Abutting Sidewalk Area for seating and permitted business operations subject to the limitations in this Exhibit B:
 - i. All uses within the category General Retail;
 - ii. Dry Cleaner and Personal Care uses within the category General Services; and
 - iii. Instructional Art Studios and Private Instruction, Personal Enrichment uses within the category Education and Training.
- c. All businesses other than those identified in Sections 3.a.-b. above may use an Abutting Sidewalk Area only to provide seating for the public and customers waiting to enter the business establishment. No other business operations shall be conducted on public property under this regulation.

- d. Only tables, chairs, benches, umbrellas, other moveable furniture, canopies, tents, barriers required by ABC and other moveable equipment and items reasonably necessary to the business' permitted operations may be placed in an Abutting Sidewalk Area pursuant to this regulation and shall be subject to the following:
 - i. Items placed in the Abutting Sidewalk Area shall be set back a minimum of five feet (5') from building corners;
 - ii. Walls or vertical coverings on canopies or tents shall be set back a minimum of twenty feet (20') from building corners.
 - iii. Items placed in the Abutting Sidewalk Area shall be set back a minimum of two feet (2') from the curb;
 - iv. Items placed in the Abutting Sidewalk Area shall not obstruct doorways, fire equipment/connections or interfere with a building's ingress/egress;
 - v. Items placed in the Abutting Sidewalk Area shall comply with the City's current Building Code and applicable ADA accessibility standards;
 - vi. Canopies shall not exceed seven hundred (700) square feet in floor area; and
 - vii. Tents shall not exceed four hundred (400) square feet in floor area.
- e. No part of the Abutting Sidewalk Area or any other public property shall be physically altered pursuant to this regulation, including by attaching any objects to the sidewalk.
- f. All of the following are prohibited in the Abutting Sidewalk Area under this regulation:
 - i. Canopies exceeding seven hundred (700) square feet in floor area, tents exceeding four hundred (400) square feet in floor area and structures of any type or size; provided, however, businesses may submit a separate application to the City for a permit to erect canopies over seven hundred (700) square feet in floor area, tents over four hundred (400) square feet in floor area or structures of any size. Permit applications for structures shall be accompanied by engineered plans. The City may issue subject to conditions or deny a permit in its discretion based on the proposed location and business operations and other factors affecting the public health, safety or welfare.
 - ii. Flames of any type, including, without limitation, stoves, burners and candles, with the sole exception of heat lamps operated and stored in compliance with San José Fire Department regulations and guidelines.

- iii. Gas or diesel generators.
 - iv. Amplified sound or entertainment.
 - v. Advertising.
 - vi. Consumption of alcohol except in compliance with ABC rules and regulations.
 - vii. Smoking.
 - viii. Storage of materials or equipment, including, without limitation, movable furniture, with the sole exception of canopies, tents or structures.
- g. An Abutting Sidewalk Area located in the Downtown Primary Commercial zone as reflected on the City's Zoning Map may be used in accordance with this regulation daily between the hours of 7 a.m. and 12 a.m. An Abutting Sidewalk Area located outside the Downtown Primary Commercial zone may be used in accordance with this regulation daily between the hours of 7 a.m. and 10 p.m.
- h. All items placed in an Abutting Sidewalk Area, with the exception of canopies, tents and structures, shall be removed each day at the conclusion of a business' operations in the Abutting Sidewalk Area. At all times, canopies and tents shall be stored and secured (e.g., properly weighted) in such a manner that they do not interfere with public use of the sidewalk or present a threat to public health, safety or welfare.
- i. The Abutting Sidewalk Area and all items placed therein shall be maintained in good condition and kept free of litter and graffiti.

4. OTHER REQUIREMENTS

Any conflicting provisions contained in an existing permit or authorization from the City allowing sidewalk seating or dining are superseded while this regulation is in effect.

5. REGISTRATION PROCESS

Before an eligible business may begin using an Abutting Sidewalk Area, the business shall register online in accordance with the following:

- a. The business shall register its use of an Abutting Sidewalk Area through the City's web site. There shall be no fee for registering.
- b. As part of the online registration process, businesses must (a) consent to standard terms and conditions on the registration website and (b) upload a certificate of insurance meeting the requirements set forth on the registration website.
- c. Following registration, a business shall have the City's conditional approval – allowing the business to immediately begin using the Abutting Sidewalk Area – pending the City's review of the registration submission to determine whether it meets the requirements of this regulation.

- d. If a submittal does not comply with the registration requirements, the City will contact the business, which shall immediately cease use of the Abutting Sidewalk Area and correct any deficiencies prior to continuing to use of the Abutting Sidewalk Area.

6. ADMINISTRATION

The provisions of this Exhibit B shall be under the administration of the Director of Public Works.