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TO: Detroit City Council

FROM: David Whitaker, Director
Legislative Policy Division 

DATE: June 4, 2020

RE: Report on Expedited Outdoor Café Permit Process

The Legislative Policy Division (LPD) has been requested by Council President Pro-Tem Mary Sheffield, to provide a report detailing the application and approval process for outdoor café permits. Included in the request is the understanding that “outdoor seating at restaurants is a key way to restart the economy while still practicing safe social distancing guidelines. As the City begins to open back up, many restaurants will be relying heavily on outdoor seating to for dine-in service.”

In addition to President Pro-Tem’s request for the report, the Administration is requesting City Council to approve a resolution that will give the Department of Public Works (DPW) the authority to issue a permit for an outdoor café based upon a general report provided by DPW and the Planning and Development Department (P&DD). The DPW and P&DD general report outlines the details applicants for permits will be required to adhere to before receiving a permit. LPD notes that the request for this general approval resolution is due to the impact the COVID-19 virus has had on the restaurant businesses in Detroit and elsewhere and the continuing need to provide and adhere to safe social distancing guidelines. The resolution will be effective from the time the Governor’s Executive Order to shelter in place is lifted through November 30, 2020.¹

LPD starts with the approval process for the issuance of permits to establish an outdoor café. This process is governed by the Detroit City Code, Article VIII, Encroachment and Obstructions, Division 2, Buildings and Other Structures, which provide under Sec. 43-8-23. - Temporary encroachments.

¹¹ On June 1, Governor Gretchen Whitmer issued Executive Order No. 2020-110 which allows retailers to reopen on June 4th and restaurant establishments to open on June 8, 2020, in accordance with the guidelines set forth therein.

The Director of the Department of Public Works may issue a permit for temporary encroachment in a street, alley, or Public easement after receiving the approval of the City Council through adoption of a resolution. The City Council shall only approve an encroachment after receiving a report from the Department of Public Works and the Planning and Development Department. The City Council may attach conditions to its approval that will protect the health, welfare, and safety of the community. Any permit issued under this section shall be revocable at the will, whim, and caprice of the City Council.

Understanding the state of the Detroit economy and the need for creative ways to expedite and assist Detroit businesses, City government is still required to comply with its own laws. The Courts have long determined how laws are to be interpreted. In *McCormick v Carrier*, 487 Mich. 180, 795 N.W.2d 517 (2010), the Michigan Supreme Court stated:

When reviewing a statute, all non-technical “words and phrases shall be construed and understood according to the common and approved usage of the language,” ... and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. *Id* at 192.

The language provided in Sec. 43-8-23 provides that City Council “shall only approve an² encroachment” after receiving a report from the Department of Public Works and the Planning and Development Department. Arguably the language unambiguously provides that the City Council shall approve by resolution each encroachment after receiving a report from DPW and P&DD regarding that specific encroachment.³ Additionally, based upon prior opinions by the Law Department and LPD, the City Council cannot modify or amend an ordinance by resolution.

Finally, the provision also provides as part of the intent of the ordinance to provide City Council the ability to attach conditions to its approval that protect the health, welfare, and safety of the community.⁴ If a general resolution is approved, City Council will not have the ability to exercise this authority.

With regard to the application process to obtain an outdoor café permit, DPW requires the following⁵:

Requirements for obtaining an outdoor café permit:

- Completed application.
- Signed and dated site plan:
 - o Must include name and address of business.

² Defined in Black’s Law Dictionary (5th Addition): “An” The English indefinite article, equivalent to “one” or “any”; Seldom used to denote plurality.

³ LPD notes that the receipt of reports and approval of singular encroachments have been that manner in which the ordinance has been consistently applied and is in line with the plain language of the ordinance.

⁴ The ability of City Council to receive pertinent information from the public is derived from its open meetings and its deliberative process. This combined with the reports provided by DPW and P&DD relative to the specific encroachment application gives City Council the ability to ascertain what conditions may be necessary to protect the health, welfare, and safety of the community.

⁵ The requirements are outlined on the DPW website.

- o Labeled street names and location of the business along the street.
- o Must show the distance from the building face to the street curb.
- o Must show the distance from the building face to the edge of the proposed seating area.
- o Must show the distance from the edge of the seating area to the street curb.
- o If there are obstructions in the sidewalk, must show the distance from the obstruction to the edge of the seating area (must be 6ft clearance minimum; if the obstruction is a tree grate, must be 6ft clearance from the center of the tree grate to the edge of the seating area).
- o Must show any obstructions within a 20ft radius of the café (i.e. parking meters/kiosks, tree trunks, bike racks, benches, etc.)
- o Must show the height of the barrier/enclosure, tables, and chairs.
- o Must show the layout of the tables and chair and service corridor location.
- o If the seating area is near the curb, must show distance from the edge of the seating area to the building face. Must be a 6ft clearance minimum.
- Photos of existing proposed outdoor seating area, and proposed furniture for area.
- Seating area may only be used for dining and drinking; no storage or food prep.
- If serving alcohol, you must be licensed by the Michigan Liquor Control Commission (MLCC); Applicant must have an outdoor service authorization.
- Signed and notarized indemnity agreement

The application requirements can be expedited as set forth in the memorandum from DPW dated June 1, 2020.⁶ Once an applicant has obtained the expedited approvals from DPW, the Department along with P&DD can submit the report to City Council for approval. The City Council approval can be expedited according to City Council Rules that allow placement on the New Business agenda for approval at the next regular session or Special session if necessary.

LPD notes that the Administration has also requested City Council’s approval of a general resolution that will allow for the closure of streets, alleys and public spaces as determined by DPW. The purpose of the request is “to streamline the process for permits to be issued to restaurants, bars and other businesses for the purpose of utilizing the public right of way to increase safe onsite

⁶ LPD notes that Section 43-8-23; *Temporary encroachment*, does not require approvals from the Detroit Police Department (DPD), Detroit Health Department (DHD), Building, Safety, Engineering and Environmental Department (BSEED), Historic District Commission (HDC) or LPD. The Department of Public Works obtains these approvals as a matter of general policy to ensure compliance with other City Code and regulations are in compliance. The issuance of a permit prior to the departmental approvals could expedite the process. Should a department subsequently identify a problem with the applicant City Council has the authority under the ordinance to revoke the permit at any time for any reasons.

dining capacity”⁷. The resolution also provides that its purpose is to “support the active operation of businesses in a safe manner that protects the patrons and employees of food service establishments and other businesses within the City”. The underlying rationale, again, is due to the impact of the COVID-19 pandemic and the need to continue practicing safe social distancing during the operation of business. The resolution granting DPW the authority to close streets, alleys and public spaces will be effective from the time the Governor’s Executive Order to shelter in place is lifted through November 30, 2020.

The governing authority to close streets, alleys and public spaces is provided in Section 43-3-2 which provides:

Before any resolution is adopted by the City Council opening or closing any street, alley or public place, or any portion of the same, or vacating any street, alley or public place, or any portion of the same, or extending or widening any existing street, alley or public place, or any portion of the same, or changing the name of any existing street, or vacating alleys and creating easements therein for any public utility, the Director of the Department of Public Works shall ascertain what rights or property the City, or any public utility, hold in such street, alley, or public place that will be affected by reason of such resolution, and shall require compliance with any reasonable conditions to protect and save such rights that may be necessary to be performed by the petitioners or owners of property abutting on such street, alley or public place, including obtaining any deeds, easements, agreements and releases, and the collection in advance of monetary payment to the City for the expense and cost to be incurred by the City, or any of its departments, in moving, relating or relinquishing its property.

Clearly the authority to open or close any street alley or public place is in the purview of the City Council by resolution. Prior to any approval of a resolution to open or close a street alley or public place by City Council, the Director of DPW is required to undertake certain actions. The resolution provides that DPW will provide “every thirty (30) days thereafter, identifying any temporary closure of a street, alley, or public place for the preceding thirty (30) days”. The supporting memorandum provides that “Businesses will be required to apply for partial street closures permits individually.” The resolution and supporting memorandum clearly indicate that it is being adopted before the DPW Director has complied with the provisions of Section 43-3-2, if the streets, alleys or public places to be closed have yet to be identified.

Finally, if the proposed resolution is approved City Council will have surrendered its authority to receive information from the surrounding establishments and community prior to approving the closure.⁸ LPD notes that even if the resolution approving the closure of any street, alley or public space for the purpose of allowing onsite dining capacity, the business establishment would still be

⁷ Stated in DPW’s June 1, 2020 memorandum.

⁸ LPD notes the potential impact of the closure of streets or alleys are often brought forth after those in the surrounding area are notified through City Council’s open meetings. An example would be the closure at Woodward and Larned. During City Council deliberations many impacted by the closure were able to express their opinion (Including but not limited to the Chief Judge of the Third Circuit Court). The intended purpose of the Code provision is to provide City Council and the community the opportunity to understand the implications of a closure and provide an opportunity for thoughtful deliberation and mitigation of any negative impact. The desire to provide a temporary response to expedite the business community recovery during the COVID-19 pandemic is understandable and can be achieved without circumventing protections set forth in the Code.

required to obtain a temporary encroachment permit under Section 43-8-23 as stated above. As stated earlier, the City Council cannot modify or amend an ordinance by resolution.

If we can be of further assistance, please call upon us.