



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: June 16, 2020

TO: Christine Daniel, City Manager

FROM: Charles S. Bryant, Community Development Director

SUBJECT: **Expediting Permitting For Temporary Outdoor Seating For Restaurants And Bars During COVID-19 Pandemic And Urging The County To Expedite Permits For Such Outdoor Seating**

An Ordinance Of The City Council Of The City Of Emeryville Temporarily Waiving Or Modifying Certain Provisions Of The Planning Regulations Related To Outdoor Seating For Restaurants And Bars During The COVID-19 Pandemic; CEQA Determination: Exempt Pursuant to California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines 15269(c) and 15061(b)(3)

An Urgency Ordinance Of The City Council Of The City Of Emeryville Temporarily Waiving Or Modifying Certain Provisions Of The Planning Regulations Related To Outdoor Seating For Restaurants And Bars During The COVID-19 Pandemic; CEQA Determination: Exempt Pursuant to California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines 15269(c) and 15061(b)(3)

RECOMMENDATION

Staff recommends that the City Council adopt the first reading of the above-referenced ordinance temporarily waiving certain provisions of the Planning Regulations related to outdoor seating for Restaurants and bars during the COVID-19 pandemic. Staff also recommends that the City Council adopt the companion urgency ordinance, which will take effect immediately if adopted by a 4/5 vote of the entire Council. Staff further recommends that the Council approve a motion authorizing the City Manager to send a letter to the Alameda County Board of Supervisors urging that the Alameda County Department of Environmental Health's permitting process for outdoor seating for restaurants and bars be expedited.

BACKGROUND

Due to the novel coronavirus (COVID-19) pandemic, restaurants are currently not able to accommodate dine-in customers. Under the current Alameda County Health Officer's Shelter in Place Order ("Order"), restaurants are limited to take-out and delivery service only. However, it is anticipated that, at some point in the not-too-distant future, restaurants may be allowed to serve on-site customers. When this occurs, it is expected that the number of customers that can be accommodated will be much fewer than before the pandemic, due to the required protocols for social distancing. Therefore,

many restaurants may wish to provide outdoor seating in order to increase their capacities and minimize interactions of customers in enclosed environments. At the May 19, 2020 City Council meeting, the Council directed staff to develop a streamlined approval process and reduce or eliminate fees for outdoor seating for consideration at a future Council meeting. This item responds to that request.

The State of California has developed a “Resilience Roadmap” for the gradual reopening of businesses and other activities (<https://covid19.ca.gov/roadmap/>), consisting of four stages:

1. Safety and preparedness
2. Lower-risk workplaces
3. Higher-risk workplaces
4. End of Stay Home Order

According to the State’s COVID-19 website, we are now in early Stage 2, where retail, related logistics and manufacturing, office workplaces, limited personal services, outdoor museums, childcare, and essential businesses can open with modifications. The state is issuing guidance to help these workplaces reopen safely. Note that dine-in restaurants are not included in early Stage 2. However, local health jurisdictions that meet the criteria set forth by the California Department of Public Health and follow the process in the county guidance may move further ahead in the Resilience Roadmap to “expanded Stage 2”, which does include dine-in restaurants. To be eligible for expanded Stage 2, a county must file an “Attestation” that they have met the readiness criteria specified in the California Department of Public Health COVID-19 County Variance Attestation Form. As of this writing, Alameda County has not filed a County Variance Attestation Form.

For those counties that are allowed to open dine-in restaurants, on May 12, 2020, the California Department of Public Health and Department of Industrial Relations issued “COVID-19 Industry Guidance: Dine-In Restaurants” (see Attachment 1). This document provides guidance for dine-in restaurants, brewpubs, craft distilleries, breweries, bars, pubs, and wineries to support a safe, clean environment for workers and customers. It encourages restaurants to continue to provide takeout, delivery, and drive through options. It also encourages restaurants to “Prioritize outdoor seating and curbside pickup to minimize cross flow of customers in enclosed environments. Restaurants can expand their outdoor seating, and alcohol offerings in those areas, if they comply with local laws and regulations.”

The guidance stipulates that “Brewpubs, breweries, bars, pubs, craft distilleries, and wineries should remain closed until those establishments are allowed to resume modified or full operation unless they are offering sit-down, dine-in meals. Alcohol can only be sold in the same transaction as a meal.” However, the guidance does allow such establishments to contract with another vendor to provide sit-down meals, in which case they may “serve dine-in meals provided both businesses follow the guidance ... and alcohol is only sold in the same transaction as a meal.”

Note that dine-in restaurants will be allowed throughout the state in Stage 3. The proposed ordinances provide an expedited process for outdoor seating for restaurants

and bars will take effect upon the effective date of an order of the Alameda County Health Officer allowing dine-in restaurants to operate in Emeryville.

DISCUSSION

Outdoor seating for restaurants can occur either on private property or in the public right-of-way and may be in parking spaces or on sidewalks or other outdoor areas. Outdoor seating on private property is approved through the Temporary Use Permit process. In the public right-of-way, sidewalk seating is approved via the Sidewalk Café Permit process. Seating in an on-street parking space is called a “Parklet” and is also approved through the Sidewalk Café Permit process, but with modified rules and procedures. The discussion below describes each of these processes, and the waivers and modifications to each that staff proposes to expedite approvals. Staff also proposes that the fees for these approvals be waived.

Temporary Use Permit. Temporary Use Permits (TUPs) are regulated by Article 6 of Chapter 7 of the Planning Regulations (see Attachment 2), and are defined in Section 9-8.220(d) as “a discretionary planning permit that may be granted by the Director of Planning and Building [i.e. Community Development Director] to allow a temporary use with any necessary conditions of approval.” According to the statement of purpose in Section 9-7.601, they “are intended to have a limited duration and will not permanently alter the character or physical facilities of the property where they occur.” Typical Temporary Use Permits that have been approved in the past have included holiday tree lots, pumpkin lots for Halloween, parking lot events such as the grand opening activities at Decathlon, and food truck events such as Off the Grid at the Public Market.

An application for a TUP is considered by the Community Development Director (“Director”) in consultation with the Public Works Director, Chief Building Official, Fire Marshal, Police Chief, and other City staff as deemed appropriate. The application must be submitted at least 14 days before the temporary use is intended to begin, and must include a site plan of the proposed use that shows any electrical or plumbing connections, the relation of the temporary use to existing buildings, parking spaces, landscaping, and other features of the site; a description of operating characteristics, including dates, hours, number of employees, expected visitors, and security if appropriate; and any other information deemed necessary by the Director. Certain findings must be made to approve a TUP, and standard conditions of approval apply, as well as any additional conditions that the Director deems appropriate. The Director’s decision on a TUP may be appealed to the Planning Commission. The Planning Commission’s decision on appeal is final and not subject to further appeal before the City Council.

The duration of a TUP may be either “one time” or “recurring”. A one-time event is limited to 60 days, except food trucks, which are limited to one year. A recurring event is one that is intended to recur at the same location at regular or irregular intervals, where each occurrence lasts for seven days or fewer, the interval between occurrences is at least twice the length of each occurrence, and the total number of occurrences may or may not be limited. Examples include farmers markets and similar recurring events. TUPs for recurring events are limited to one year.

Proposed Waivers and Modifications. Outdoor seating for restaurants and bars serving meals is likely to be continuous, not recurring, and would therefore be limited to 60 days under the TUP regulations. Staff recommends that this time limit be waived for outdoor seating for restaurants and bars serving meals, and that such TUPs instead be limited to the duration of this ordinance.

The current fee for a TUP application is \$553, and will increase to \$566 as of July 1, 2020, pursuant to the Master Fee Schedule for fiscal year 2020-2021 that was approved by the City Council on April 21, 2020. Staff proposes that this fee be waived for outdoor seating for restaurants and bars serving meals. The other regulations and procedures for TUPs are reasonable and not onerous; therefore, staff does not propose any other waivers or modifications. A typical TUP is approved within two weeks, and staff will make every effort to expedite those for outdoor seating for restaurants and bars serving meals during the COVID-19 pandemic.

Sidewalk Cafés. Sidewalk cafes are regulated by Article 15 of Chapter 5 of the Planning Regulations (see Attachment 3), and are defined in Section 9-5.1515(g) as “an area of the sidewalk used exclusively for eating, drinking, and related pedestrian circulation and located adjacent to, and operated in conjunction with, a street-level Restaurant.” In addition to the public walkway along a street, a “sidewalk” also includes any other publicly accessible pedestrian area owned or controlled by the City of Emeryville such as greenways and parks. Thus, the outdoor seating area of the Broken Rack Sports Bar and Billiards Hall along the Peladeau Park portion of the Greenway is considered a sidewalk café, even though it is not on a street, because it occupies a publicly-accessible pedestrian area owned by the City. Because a sidewalk cafe occurs within the public right-of-way or other City-owned property, it is not a land use entitlement, but rather is a temporary license for the use of public property.

An application for a sidewalk cafe is considered by the Community Development Director in consultation with the Public Works Director, Chief Building Official, Fire Marshal and Police Chief. The application must include a detailed site plan showing the proposed arrangement of tables and chairs; any other proposed features such as umbrellas, railings, and planters; all other features in the public right-of-way; details of the design of all such furnishings and features; and pedestrian circulation including the accessible path of travel. It must also include photographs of the sidewalk area prior to establishment of the sidewalk café so that it can be restored to its original condition when the sidewalk café is removed. In addition, the application must include proof of insurance and a statement that the permittee will indemnify the City from any claim, action, or proceeding against the City. Certain findings must be made to approve a sidewalk cafe, and the Director may impose any conditions of approval deemed appropriate to ensure conformity to the Sidewalk Café Regulations. The Director’s decision on a sidewalk café permit may be appealed to the Planning Commission and whose decision on appeal is final. Alternatively, an application for a sidewalk café permit may be referred by the Director to the Planning Commission for a decision, in which case it is appealable to the City Council. In staff’s experience, no sidewalk café permit has ever been referred to the Planning Commission, nor has one ever been appealed.

A sidewalk café permit is intended to eliminate the need for a separate encroachment permit, because it includes all of the standard requirements and safeguards of an

encroachment permit. In the past, the Public Works Director has sometimes required an encroachment permit in addition to a Sidewalk Café Permit, out of an abundance of caution. Staff feels that this should not be necessary, especially during the term of this ordinance.

A sidewalk café is subject to specific standards, including that it must adjoin and be operated in conjunction with a bona fide Restaurant; that the permittee must comply with all applicable laws; that the hours of operation of the sidewalk café may not exceed those of the Restaurant with which it is associated; that no food may be prepared or stored in the sidewalk café area; that all furnishing must be removed at the end of each business day except for semi-permanent barriers; that at least four feet of clear public sidewalk must be maintained adjacent to the sidewalk café for pedestrian circulation; that the sidewalk café must be maintained in a clean, sanitary, and attractive condition at all times, and that a final cleanup must be conducted at the end of each business day; that amplified sound is not permitted in the sidewalk café area; and that smoking is prohibited in the sidewalk café area and within 25 feet of the associated Restaurant.

Alcoholic beverages are permitted to be served within the sidewalk café area provided that the permittee has a valid State liquor license; that the permittee must comply with all applicable laws related to alcohol sales; that the sidewalk café area is separated from the adjacent sidewalk by a physical barrier; that alcohol may only be consumed within the sidewalk café area and associated Restaurant; and that the sidewalk café must maintain full food service and operate as a bona fide eating place at all times that it is in operation. The regulations explicitly state that “no sidewalk cafe may function as a bar, tavern, or cocktail lounge, and no sidewalk café shall be associated with a Bar/Nightclub/Lounge.”

A sidewalk café permit is valid for one calendar year and expires on December 31 of each year. The regulations spell out a process for renewing the permit each year. However, the regulations do not require the City to send reminder notices, and include the provision that “in the absence of any action by the City or the permittee to renew a sidewalk cafe permit ... the permit shall be deemed to be renewed for one year.” The initial application fee for a sidewalk café is \$100, and there is no renewal fee. What this means in practice is that sidewalk café permits are automatically renewed each year. If there are problems with a sidewalk café, the regulations spell out a revocation process; alternatively, the City could just decide not to renew the permit for the following year. It should be noted that, in staff’s experience, neither has ever occurred.

Proposed Waivers and Modifications. Given the need for social distancing, staff proposes to modify the minimum clear sidewalk width around a sidewalk cafe from four feet to no less than six feet. In addition, staff proposes to waive the regulation requiring that all furnishings be removed at the end of each business day, as long as such furnishings are adequately secured.

Staff further recommends waiving the restriction that prohibits bars from having sidewalk cafes, provided that the bar provides full meal service as required by the State guidance, either from its own kitchen or by contract with another vendor. Notwithstanding the current Shelter in Place Order, staff has previously had inquiries from several popular bars about sidewalk seating. The current restriction was included

in the Sidewalk Café Regulations out of an abundance of caution, and, in the future, staff would propose to eliminate that provision from the regulations. For purposes of this ordinance, staff feels that bars should be allowed to have sidewalk seating as long as they comply with the State guidance to serve full meals until they are allowed to reopen as bars.

As noted above, the fee to establish a sidewalk café is \$100, and there is no annual renewal fee; these fees were not modified in the Master Fee Schedule for fiscal year 2020-2021 that was approved by the City Council on April 21, 2020. Staff proposes that this fee be waived for sidewalk cafes for restaurants and bars serving meals for the duration of this ordinance. Staff also proposes to make it explicit that a separate encroachment permit is not required for a sidewalk café. The other regulations and procedures for sidewalk cafes are reasonable and not onerous; therefore, staff does not propose any other waivers or modifications. Staff will make every effort to expedite sidewalk café permits for restaurants and bars during the COVID-19 pandemic.

Parklets. Section 9-5.1515(a) of the Planning Regulations defines “parklet” as “the temporary use of space in the roadway, adjacent to the curb and typically located in a parking space, unused bus stop, or other vehicular zone, with or without a platform to extend the grade of the sidewalk into the roadway. A parklet may feature tables and chairs for public use, benches, planters and landscaping features, bicycle parking, and other public amenities, and may be built and operated in conjunction with an adjacent street-level Restaurant or other use. A parklet may also function as a ‘bicycle corral’ with bicycle racks in the roadway for the on-street parking of bicycles.” A parklet is considered a type of sidewalk café, and is therefore processed under the Sidewalk Café Regulations in Article 15 of Chapter 5 of the Planning Regulations (see Attachment 3). Specific provisions for parklets are contained in Section 9-5.1514 of that Article.

Like a sidewalk café, an application for a parklet is considered by the Community Development Director in consultation with the Public Works Director, Chief Building Official, Fire Marshal and Police Chief. However, because it is in the street, Section 9-5.1514(a) provides that “A parklet shall require the approval of the City Council, upon the recommendation of the Transportation Committee, prior to the approval of a sidewalk cafe permit. Any conditions and requirements designated by the City Council in its approval shall become conditions of approval of the sidewalk cafe permit.”

Section 9-5.1514(b) further stipulates that “A parklet shall be available for use by the general public and shall not be reserved for the exclusive use an adjacent Restaurant or other use, even if built and operated in conjunction with that Restaurant or other use, nor for the exclusive use of any other private enterprise.” Sections 9-5.1514(c) and (e), respectively, specify that “table service shall not be permitted in a parklet”, and “service and consumption of alcoholic beverages shall not be permitted in a parklet.” Section 9-1514(g) stipulates that “A building permit shall not be required for a parklet, but its design and construction shall comply with all applicable building regulations, including but not limited to disabled access, and any design criteria issued by the Director.”

Proposed Waivers and Modifications. Given that the purpose of this ordinance is to allow for the expansion of outdoor seating for Restaurants, staff proposes waiving the provisions that “a parklet shall be available for use by the general public and shall not

be reserved for the exclusive use an adjacent Restaurant”, that “table service shall not be permitted in a parklet”, and that “service and consumption of alcoholic beverages shall not be permitted in a parklet”, as long as a physical barrier is provided similar to sidewalk cafes that serve alcohol. Any necessary accommodations for disabled access will be handled by staff on a case-by-case basis, and no modifications or waivers to the existing regulations are required to account for this.

To expedite the approval process, staff proposes eliminating the requirement for Transportation Committee review and City Council approval. Similar to sidewalk cafes, staff feels that bars should be allowed to have parklets as long as they comply with the State guidance to serve full meals until they are allowed to reopen as bars. Staff also proposes to waive the \$100 fee to establish a parklet and will make every effort to expedite sidewalk café permits for parklets during the COVID-19 pandemic.

General Provisions. Under the proposed ordinance, all outdoor seating for restaurants and bars would be required to comply with any and all COVID-19 protocols established by Alameda County and the State of California, as well as all other applicable local, state, and federal laws and regulations. In addition, except as noted above, all outdoor seating would be required to comply with the accessibility provisions of the California Building Code and/or the Americans with Disabilities Act.

Duration of Ordinance. The proposed urgency ordinance will take effect immediately upon passage but will not be operative until the effective date of an order of the Alameda County Health Officer allowing dine-in restaurants to operate in Emeryville; it will cease to be effective when the regular ordinance takes effect. The regular ordinance will take effect upon the effective date of an order of the Alameda County Health Officer allowing dine-in restaurants to operate in Emeryville, but no sooner than 30 days following its final passage; it will expire one year after its effective date, unless otherwise extended by the City Council by resolution.

County Permits. All retail food facilities require a permit from the Alameda County Department of Environmental Health (not to be confused with the Alameda County Public Health Department). This involves submitting plans for review and approval, receiving a permit, constructing the project, having an inspection, and then having the permit finalized. As a separate motion from the proposed ordinances, staff recommends that the City Council authorize the City Manager to send a letter to the Alameda County Board of Supervisors urging that the Department of Environmental Health’s permitting process for outdoor seating for restaurants and bars be expedited.

ENVIRONMENTAL REVIEW

Adoption of the two proposed ordinances is exempt from the California Environmental Quality Act (CEQA) under California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines Section 15269(c), which pertain to actions taken to mitigate an emergency, and the “common sense exemption” at State CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the Ordinance may have a significant effect on the environment.

FISCAL IMPACT

Aside from the recommended fee waivers, which are negligible, these ordinances will have no fiscal impact on the City.

STAFF COMMUNICATION WITH THE PUBLIC

Staff has fielded several inquiries from the public concerning the ability of restaurants and bars to have outdoor seating during the COVID-19 pandemic.

CONCLUSION

Staff recommends that the City Council take the following actions on the urgency ordinance:

1. Introduce the proposed urgency ordinance after a motion to read by title only.
2. Take public testimony regarding the proposed urgency ordinance.
3. Adopt the proposed urgency ordinance by at least a 4/5 vote of the entire Council.

Staff further recommends that the City Council take the following actions on the ordinance:

1. Introduce the proposed ordinance after a motion to read by title only.
2. Take public testimony regarding the proposed ordinance.
3. Adopt the first reading of the proposed ordinance.

Staff also recommends that the City Council approve a motion authorizing the City Manager to send a letter to the Alameda County Board of Supervisors urging that the Alameda County Department of Environmental Health's permitting process for outdoor seating for restaurants and bars be expedited.

APPROVED AND FORWARDED TO THE CITY COUNCIL OF THE CITY OF EMERYVILLE:



Christine Daniel, City Manager

ATTACHMENTS

- Attachment 1 – State of California COVID-19 Industry Guidance for Dine-In Restaurants
- Attachment 2 – Planning Regulations provisions for Temporary Use Permits
- Attachment 3 – Planning Regulations provisions for Sidewalk Cafes and Parklets
- Draft Regular Ordinance
- Draft Urgency Ordinance