



COUNCIL AGENDA: 12/08/20  
FILE: 20-1580  
ITEM: 3.7

## Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Kim Walesh

**SUBJECT:** SEE BELOW

**DATE:** December 2, 2020

Approved D. DSYL

Date **12/3/2020**

**SUBJECT: AMENDMENT TO DECLARATION SUSPENDING ENFORCEMENT OF CERTAIN PROVISIONS IN LAND USE PERMITS AND APPROVALS AND THE SAN JOSE MUNICIPAL CODE ISSUED JUNE 4, 2020**

### **RECOMMENDATION**

Adopt a resolution of the City Council amending the Declaration issued June 4, 2020 by the Director of Emergency Services of the City of San José, as amended, to authorize the Chief of Police to immediately suspend outdoor business operations on private property when there is an imminent threat to the public health, safety or welfare.

### **OUTCOME**

The recommended Council action will authorize the Chief of Police to immediately suspend outdoor business operations on private property where those operations pose an imminent threat to public health, safety, or welfare.

### **BACKGROUND**

On May 13, 2020, the Joint Meeting for the Rules and Open Government Committee and Committee of the Whole approved a memorandum from Mayor Liccardo and Councilmember Davis<sup>1</sup> directing the City Manager to bring forward for Council consideration, recommendations that would simplify and expand the process for businesses to operate outdoors, referred to as San

<sup>1</sup> Memorandum: <https://sanjose.legistar.com/View.ashx?M=F&ID=8334658&GUID=ECB1EAA5-1945-4AAC-9BCF-D8F29E0542AA>

José Al Fresco. The goal was to provide additional space for hard-hit businesses to operate within the public health restrictions that are in place to combat the COVID-19 pandemic.

Between June and September 2020, the City Manager, in his capacity as Director of Emergency Services, issued five Emergency Declarations allowing the expansion of business operations while maintaining compliance with the County's Order and Social Distancing Protocol. These declarations included expansion of business uses into adjacent private property (Outdoor Business Areas), on public sidewalks, into on-street parking spaces (Parklets), onto public streets that the City has closed to vehicular and bicycle traffic (Street Business Areas), in City-owned parking lots and into public parks and plazas. Each declaration further assisted in the economic recovery of businesses in the City. The Director of Emergency Services found these actions necessary to protect life and property by helping to ensure that businesses had adequate space to comply with current State and County Health Orders and Social Distancing Protocol.

Under the San José Al Fresco streamlined process, 116 businesses have self-registered to conduct outdoor business operations on private property; 28 businesses have received a permit for business operations in a Parklet, on a public sidewalk, or both; and 12 businesses have received a permit to operate in a street closed to vehicular traffic. Two businesses conducted outdoor operations in a City-owned parking lot or garage and 7 permits have been issued for al fresco operations in a City park. Three streets have been closed under San José Al Fresco – two in the Downtown Core (San Pedro and Post Streets) and one in South San José (Coronado Avenue).

On November 3, the City Council voted to extend the Private Property and Sidewalk Declaration, Street Business Area Declaration, Parklet Declaration, and Public Parking Declaration until June 30, 2021, and the Parks and Plazas Declaration until March 31, 2021, or until such time as they are terminated or modified by the City Council or the termination of the local state of emergency, whichever occurs first.

## **ANALYSIS**

The Private Property and Sidewalk Declaration was intended to provide a simple and streamlined way for a significant number of businesses in the city to expand business operations outdoors. Staff was not (and is not currently) resourced to review proposed private property set-ups or inspect outdoor business operations on private property. As a result, outdoor business operations on private property were established as a self-registration process, rather than a process that consisted of City review and the issuance of a separate permit.

In the Private Property and Sidewalk Declaration, an Outdoor Business Area is defined as a privately-owned, paved outdoor area that is adjacent to a business' existing building(s) and that measures up to a maximum of 125 feet from the face of the building and subject to the parameters outlined in the Declaration. Private property owners and businesses are responsible for ensuring that their employees, contractors, and guests are safe while in Outdoor Business Areas.

Since the ratification of the Private Property and Sidewalk Declaration, serious incidents involving significant bodily injury or death have occurred at businesses not registered under the San José Al Fresco initiative. These tragic incidents prompted a review of the program and identified the need to be able to address serious public nuisance incidents occurring at registered locations as quickly as possible.

Section 1.13.050 of the San José Municipal Code defines a public nuisance as the maintenance or use of property in the city in a manner that jeopardizes or endangers the health, safety, or welfare of persons on the premises or in the surrounding area. Public nuisance activities include, but are not limited to, acts of violence, acts of vandalism, disturbing the peace, illegal drug activity, public drunkenness, unreasonably loud noise, prostitution, and illegal gambling.

With respect to the recommended Council action, the Chief of Police's determination that there is an imminent threat to the public health, safety or welfare will be based on one or more of the following: that there is an urgent need to take immediate action to protect the public from a substantial threat of serious bodily injury or death existing in or within 150 feet of the business's Outdoor Business Area; or there has been a violation of any condition or limitation on the use of an Outdoor Business Area that creates an imminent danger to the public health, safety, or welfare in or within 150 feet of the business's Outdoor Business Area; or the business has conducted its outdoor operations in a manner that creates or results in a public nuisance, as defined in Section 1.13.050 of the San José Municipal Code or Sections 3479 and 3480 of the California Civil Code, and that public nuisance creates an imminent danger to the public health, safety, or welfare in or within 150 feet of the business's Outdoor Business Area. When the Chief of Police determines there is an imminent threat to the public health, safety, or welfare pursuant to San José Municipal Code or California Civil Code, the Chief will contact the business to notify it that it must immediately cease use of the Outdoor Business Area and implement compliance measures that will, in the Chief's judgment, effectively abate the imminent threat to the public health, safety or welfare. The business shall implement the compliance measures to the Chief's satisfaction prior to resuming use of the Outdoor Business Area.

In contrast to outdoor business operations on private property, the encroachment permits issued to businesses conducting outdoor operations on public property have a process in place to deal with public nuisance and permit non-compliance issues. For example, the Public Works Director can revoke a permit if the permittee's operations constitute a public nuisance or, after notice and opportunity to cure, the permittee is in default of their permit conditions. The City also can immediately remove encroachments at the permittee's expense if the outdoor operations pose a threat to life or property.

Staff's recommendation to provide the Chief of Police with the ability to suspend outdoor business operations in an instance where public safety is in jeopardy allows the City to immediately address issues that threaten the public safety and provides time for the Police

Department and the business owner to collaboratively review their outdoor operations and make necessary safety-related operational or logistical adjustments.

### **CONCLUSION**

The proposed San José Al Fresco program adjustment is intended to protect and preserve public safety by providing the Chief of Police with the ability to suspend outdoor operations at a business that poses an imminent threat to the public's welfare.

### **EVALUATION AND FOLLOW-UP**

Staff will continue to facilitate, manage, and support outdoor business operations under San José Al Fresco to the best of its ability with the resources that have been allocated to the initiative. Staff will also monitor the need for the initiative and its effectiveness over the next five months and return to Council with any necessary amendments or extensions.

### **CLIMATE SMART SAN JOSE**

The recommendation in this memo does not affect Climate Smart San José energy, water, or mobility goals.

### **PUBLIC OUTREACH**

This memo will be posted on the City website for discussion at the December 8, 2020 City Council meeting.

### **COORDINATION**

This memorandum has been coordinated with the Police Department and the City Attorney's Office.

### **COMMISSION RECOMMENDATION/INPUT**

No commission recommendation or input is associated with this action.

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**COST SUMMARY/IMPLICATIONS**

No immediate cost summary/implications are associated with this action.

**CEQA**

Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment.

/s/

KIM WALES

Deputy City Manager

For questions, please contact Blage Zelalich, Downtown Manager, at (408) 535-8172.