

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN JOSE SUSPENDING ENFORCEMENT OF LAND USE PERMITS AND PROVISIONS OF THE SAN JOSE MUNICIPAL CODE TO TEMPORARILY ALLOW OUTDOOR BUSINESS OPERATIONS ON PRIVATE PROPERTY FROM FEBRUARY 1, 2022 THROUGH DECEMBER 31, 2022

WHEREAS, on March 10, 2020, the City Council of the City of San José (“City”) ratified the Director of Emergency Service’s Proclamation of Local Emergency due to the outbreak of a novel coronavirus in the City; and

WHEREAS, Government Code Section 8634 and Section 8.08.250 of Chapter 8.08 of Title 8 of the San José Municipal Code empower the Director of Emergency Services to make and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such emergency; and

WHEREAS, Section 8.08.250 of the San José Municipal Code requires such rules and regulations made and issued by the Director of Emergency Services to be confirmed by the City Council at the earliest practicable time; and

WHEREAS, on March 31, 2020, the Health Officer of the County of Santa Clara (“County Health Officer”) issued a public health order directing all individuals to continue to shelter in place and requiring essential businesses to implement a Social Distancing Protocol; and

WHEREAS, provisions in land use permits and planning approvals issued by the City and/or provisions in the San José Zoning Code prohibit the use of adjacent outdoor areas for the purposes of conducting business activities without first obtaining the City’s authorization through specified application processes; and

WHEREAS, on June 4, 2020, in order to facilitate compliance with the Social Distancing Protocol and protect public health, the Director of Emergency Services issued a declaration (“Private Property Declaration”) suspending enforcement of certain provisions in land use permits and approvals and zoning and encroachment requirements in the San José Municipal Code to allow many businesses without existing permits for outdoor operations or seating to expand their operations outside in privately-owned outdoor areas, such as parking lots, and onto public sidewalks; and

WHEREAS, on June 9, 2020, the City Council adopted Resolution No. 79558, which ratified and confirmed the Private Property Declaration; and

WHEREAS, on August 4, 2020 (Resolution No. 79661), September 1, 2020 (Resolution No. 79704), December 8, 2020 (Resolution No. 79823), March 30, 2021 (Resolution No. 79947) and December 7, 2021 (Resolution No. _____), the City Council amended the terms and conditions of the Private Property Declaration, including by extending it until January 31, 2022; and

WHEREAS, since the County Health Officer’s March 31, 2020 public health order, the California State Public Health Officer and County Health Officer have issued a number of revised and additional public health orders and guidance that have relaxed requirements for indoor gatherings and rescinded the Social Distancing Protocol for many businesses, but continue to recommend that indoor activities be moved outside when possible to mitigate the spread of COVID-19; and

WHEREAS, the current state of emergency caused by the COVID-19 pandemic will continue for the foreseeable future and local businesses will continue to need additional outdoor space to serve customers in order to carry out the public health recommendation to move activities outdoors when possible;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

1. Subject to the conditions and limitations contained in Exhibit A hereto, which are incorporated herein and shall constitute part of this ordinance, the City shall suspend enforcement of provisions contained in land use permits or other planning approvals and the provisions of the San José Municipal Code, including, without limitation, those contained in Title 20, that are in conflict with the terms of this ordinance. This ordinance shall apply only to businesses operating from a building within the City; mobile businesses of any type are not covered by this ordinance. Except as expressly exempted in Exhibit A, businesses shall continue to comply with all other requirements in their approved land use permits or other planning approvals and applicable City, County, State and Federal laws, orders and regulations, including, without limitation, Orders from the County of Santa Clara Health Officer, the California Retail Food Code, the California Alcoholic Beverage Control Act and regulations and notices issued by the Department of Alcoholic Beverage Control (“ABC”), the San José Fire Code, the San José Building Code and the Americans with Disabilities Act (“ADA”).

2. This ordinance shall become effective as of 12:01 a.m. on February 1, 2022 and remain in effect until 11:59 a.m. on December 31, 2022, unless it is earlier terminated or modified by the City Council.

PASSED FOR PUBLICATION of title this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk

EXHIBIT A
CONDITIONS AND LIMITATIONS FOR
USE OF ADJACENT PRIVATE PROPERTY

Businesses may expand their existing permitted operations outdoors onto privately-owned, paved areas contiguous to their existing building, including parking lots or vacant lots, subject to the following conditions and limitations.

1. LOCATION OF OUTDOOR OPERATIONS

For purposes of this ordinance, 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 one hundred twenty-five feet (125’) from the face of the building, subject to the following:

- a. An Outdoor Business Area shall not be within fifteen feet (15’) of a fire hydrant in any direction and cannot block any San José Fire Department connections.
- b. An Outdoor Business Area shall not restrict access to or encompass more than fifty percent (50%) of the total available parking spaces of the business’ parking area and shall not restrict existing ADA accessible parking spaces or improvements.
- c. An Outdoor Business Area shall not restrict an emergency vehicle access route.
- d. The boundaries of an Outdoor Business Area shall be a minimum of fifty feet (50’) away from any residential property, except that the residential portion of a mixed use development shall not be considered when determining whether this requirement is satisfied for an Outdoor Business Area that is part of the same mixed use development.

2. ELIGIBLE BUSINESSES

The only businesses eligible to use an Outdoor Business Area under this ordinance shall be those (1) allowed to operate under the Health Orders of the State of California and Santa Clara County, as amended, and (2) with any of the following zoning designations as identified in Table 20-90 of the City’s Zoning Code:

- a. General Retail
- b. Education and Training
- c. Entertainment and Recreation
- d. Food Services
- e. General Services
- f. Health and Veterinary Services, except Animal Grooming
- g. Offices and Financial Services

- h. Public, Quasi-Public and Assembly Uses
 - i. Sale, Vehicle Parts only within the category of Vehicle Related Uses
3. LIMITATIONS ON PERMITTED OPERATIONS

Businesses may conduct their permitted business operations in an Outdoor Business Area, subject to the limitations in this section.

- a. Canopies shall not exceed seven hundred (700) square feet in floor area.
- b. Tents shall not exceed four hundred (400) square feet in floor area.
- c. Canopies or tents exceeding the foregoing size limitations, as well as structures of any type or size, are not allowed to be erected in an Outdoor Business Area pursuant to this ordinance. However, businesses may submit a separate application with the City for a permit to erect such canopies, tents or structures in an Outdoor Business Area. 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. The applicant shall be responsible for the cost to apply for and obtain this separate permit.
- d. Flames of any type shall not be used in the Outdoor Business Area, including, without limitation, stoves, burners and candles, with the sole exception of heat lamps operated and stored in compliance with San Jose Fire Department regulations and guidelines.
- e. Cooking or food preparation shall not be allowed in the Outdoor Business Area.
- f. Generators – gas or diesel – shall not be used in the Outdoor Business Area.
- g. Electrical extension cords may be used in the Outdoor Business Area subject to the following:
 - i. Extension cords shall be listed and labeled as outdoor rated in accordance with UL 817;
 - ii. Extension cords shall be secured in a manner that is compliant with ADA accessibility standards, does not impede any person's path of travel and does not constitute a tripping hazard; and
 - iii. All extension cords shall be disconnected from their electrical sources each day at the conclusion of operations in the Outdoor Business Area.
- h. Amplified sound or entertainment shall not be allowed in the Outdoor Business Area.
- i. Business may be conducted in an Outdoor Business Area located in the Downtown Primary Commercial zone as reflected on the City's Zoning Map daily between the hours of 7 a.m. and 12 a.m. Business may be conducted

in an Outdoor Business Area located outside the Downtown Primary Commercial zone daily between the hours of 7 a.m. and 10 p.m.

- j. Notwithstanding anything to contrary in this ordinance, the Chief of Police and Director of Planning, Building and Code Enforcement may adopt additional limitations on uses allowed in an Outdoor Business Area necessary to protect the public health, safety or welfare.

4. OTHER REQUIREMENTS

- a. All businesses operating in an Outdoor Business Area shall install and at all times maintain traffic safety barriers to help mitigate the risk of vehicle intrusion into the Outdoor Business Area. A list of acceptable traffic barriers and guidelines for how the barriers may be set up will be posted to the City's website.
- b. Nothing in this ordinance authorizes an eligible business to operate in an Outdoor Business Area that it does not have the legal right to use. Eligible businesses shall be responsible for obtaining any consent from property owners or others necessary to use an Outdoor Business Area.
- c. The text of this ordinance shall be posted in each Outdoor Business Area and a copy of the site diagram submitted as part of a business' registration shall be kept at each respective business premises.
- d. Notwithstanding anything to the contrary in this ordinance, Title 16 or the regulations adopted pursuant to Title 16, a Relocated Cardroom, as defined in Section 20.200.995 of the San José Municipal Code and identified in Table 20-90 of the City's Zoning Code, may use an Outdoor Business Area for the operation of gaming. Before using an Outdoor Business Area for the operation of gaming, a Relocated Cardroom shall obtain written approval from the Administrator, as defined in Section 16.02.210 of the San José Municipal Code, and the Chief of Police. The Administrator shall not provide his/her written approval unless the Relocated Cardroom has first obtained necessary consents or approvals to allow outdoor gaming operations from all other governing bodies or agencies, including, without limitation, the County of Santa Clara and California Gambling Control Commission. The Chief of Police and Administrator shall have the discretion to implement Cardroom Regulations that govern outdoor gaming operations that are in conformance with or more stringent than State gambling law and regulations. The Cardroom Regulations shall be posted to the City's website. The Administrator's written approval shall require compliance with the Cardroom Regulations and set forth other conditions for operation of gaming in the Outdoor Business Area. Except as expressly exempted by the Administrator's written approval, all provisions of a Relocated Cardroom's existing cardroom permit shall remain in full force and effect and apply to any outdoor gaming operations. Conditions for outdoor

operations unrelated to gaming shall be coordinated with and approved by the Director of Planning, Building and Code Enforcement and the director of any other department normally charged with enforcement of the applicable condition. The Administrator's written approval shall incorporate any conditions for outdoor operations unrelated to gaming and supersede any conflicting provisions in Sections 1, 3 and 5 of this Exhibit A.

5. REGISTRATION PROCESS

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

- a. The business shall register their use of an Outdoor Business Area through the City's web site. There shall be no fee for registering.
- b. As part of the online registration process, businesses must provide the following:
 - i. The business' name and address;
 - ii. The business owner's contact information;
 - iii. The contact information for the business' primary on-site contact person;
 - iv. Business Tax Certificate Number;
 - v. A site diagram showing all of the following:
 1. Dimensions of the proposed Outdoor Business Area;
 2. Distance and physical relationship between a business' existing building, the proposed Outdoor Business Area and vehicle parking and circulation areas, if applicable;
 3. The layout of any furnishings, materials or equipment to be used in the Outdoor Business Area; and
 4. An outline of the boundaries of the proposed area where alcohol will be served, if applicable.
 - vi. A copy of the business' approved authorization from ABC for the business to serve alcohol in the Outdoor Business Area.
- c. Following registration, a business may immediately begin using the Outdoor Business Area pending the City's review of the registration submission to determine whether it meets the requirements of this ordinance.
- d. If a submittal does not comply with the registration requirements, the City will contact the business, which shall immediately cease use of the Outdoor Business Area and correct any deficiencies prior to continuing to use of the Outdoor Business Area.
- e. If a business had registered to use an Outdoor Business Area pursuant to the Private Property Declaration, and that registration was valid as of the termination date of the Private Property Declaration, then that business shall not be required to submit a new registration pursuant to this ordinance.

- f. If, after the effective date of this ordinance, any business obtains a permit from the City for outdoor business operations on private property, the provisions of this ordinance shall cease to apply to the business' outdoor operations, which shall be governed exclusively by that permit.

6. ENFORCEMENT

- a. Enforcement Pursuant to the San José Municipal Code
 - i. All businesses operating in an Outdoor Business Area shall be in full compliance with the conditions and limitations contained herein at all times in order to be exempt from enforcement of the San José Municipal Code.
 - ii. Nothing in this ordinance shall prohibit the City from exercising any available remedies it has under state or local laws to protect the public health, safety and welfare, including, without limitation, Title 6 of the San José Municipal Code.
- b. Suspensions to Address Imminent Threats to Public Health, Safety or Welfare
 - i. The Chief of Police may immediately suspend the outdoor operations of any business using an Outdoor Business Area when the Chief determines there is an imminent threat to the public health, safety or welfare.
 - ii. The Chief of Police's determination that there is an imminent threat to the public health, safety or welfare shall be based on one or more of the following:
 - 1. 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 one hundred fifty feet (150') of the business's Outdoor Business Area; or
 - 2. 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 one hundred fifty feet (150') of the business's Outdoor Business Area; or
 - 3. 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 one hundred fifty feet (150') of the business's Outdoor Business Area.
 - iii. When the Chief of Police determines there is an imminent threat to the public health, safety or welfare pursuant to subsection b.ii. above,

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.

- iv. For purposes of this Section 6.b., the "Chief of Police" shall mean the Chief of Police or the Chief's designee.

7. ADMINISTRATION

The provisions of this Exhibit A relating to Relocated Cardrooms and imminent threats to the public health, safety or welfare shall be under the administration of the Chief of Police in coordination and with approval from the directors of any other department normally charged with enforcement of specific conditions not currently regulated under Title 16 or Title 6. All other provisions of this Exhibit A shall be under the administration of the Director of Planning, Building and Code Enforcement.