



## TEMPORARY COVID-19 OUTDOOR ENCROACHMENT AGREEMENT

\_\_\_\_\_ (“Permittee”) hereby acknowledges, understands and agrees to the following:

1. **Incorporation of Application.** The information stated in Permittee’s Application for Temporary Use of Public Sidewalks and Parking Spaces (the “Application”) is true and correct and is incorporated herein by this reference.
2. **Definitions.** The definitions set forth in Sections 19, 30, 41, and 52 of the Third Revised Eighteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency (the “Order”) apply to the words and phrases used in this Agreement. In addition, as used herein, the phrase “public space” refers to the specific public space—sidewalk, Pier, Promenade outdoor dining area, parking lane, or loading space—identified for temporary use in Permittee’s Application. For purposes of clarity, as used herein and as further defined in the Order, the term “sidewalk” includes those portions of the Santa Monica Pier designated for temporary outdoor dining or eligible business activities pursuant to regulations promulgated by the Director of the Community Development Department or designee.
3. **Term.** The term of this Agreement shall become effective as of the date of its execution and shall continue in effect while the County Department of Public Health’s Safer at Home Order, including any later amendments or successors thereto, is in place plus an additional 30 days thereafter, unless terminated earlier pursuant to paragraph 7.
4. **Terms and Conditions Specific to Temporary Encroachment on Sidewalk or Promenade Outdoor Dining Area**
  - 4.1. **Incorporation of and Agreement to Conditions.** The conditions for operation of Temporary Outdoor Dining Extension as set forth in Section 23 of the “Order”, Temporary Outdoor Dining Extension For Third Street Promenade as set forth in Section 34 of the Order, and Temporary Outdoor Business Activity Use Extension as set forth in Section 44 of the Order (collectively, “sidewalk conditions of operation”) are incorporated herein by this reference. Permittee expressly agrees to abide by each and every one of the sidewalk conditions of operation to the extent that the use of any sidewalk or Promenade outdoor dining area space is identified in Permittee’s Application.
  - 4.2. **Consent of Neighboring Building Owner or Tenant.** If the Permittee is using the public space on the sidewalk or the Promenade outdoor dining area in front of a neighboring tenant space or building, the Permittee has obtained written



consent of the owner. The Permittee acknowledges and agrees that it may engage in use of the public space on the sidewalk or the Promenade outdoor dining area in front of a neighboring tenant space or building only for as long as such consent is granted, and in no case any longer than the term as set forth in paragraph 3 above.

**4.3. Removal or Relocation of Structures on Sidewalk or Promenade Outdoor Dining Area.** Permittee agrees that pursuant to the sidewalk conditions of operation, no structures are permitted in the sidewalk or the Promenade outdoor dining area. City reserves the right to order the removal or relocation of any such structure at Permittee's cost. Permittee hereby grants to City the right to remove or relocate any such structure and to come upon Permittee's premises to effect said removal or relocation if deemed necessary by City. Permittee waives any claim or right it may have for inverse condemnation, damages, or loss of income or business resulting from said removal. Upon removal or relocation of such structures, all rights of Permittee under this Agreement and the permit itself shall terminate.

## **5. Terms and Conditions Specific to Temporary Parklet Use**

**5.1. Incorporation of and Agreement to Parklet Conditions.** The conditions for operation of Temporary Parklet Authorization as set forth in Section 55 of the Order (the "parklet conditions of operation") are incorporated herein by this reference. To the extent the use of public space extends to the use of a parklet, Permittee expressly agrees to abide by each and every one of the parklet conditions of operation of operation.

**5.2. Incorporation of and Agreement to Parklet Design and Safety Specifications.** The design and safety specifications for parklets are set forth in Section 56 the Order and are incorporated herein by this reference. To the extent the use of public space extends to the use of a parklet, Permittee agrees to abide by each and every one of the aforementioned design and safety specifications, unless the parklet is in a street where the City has authorized a parking lane closure for the entire City block or segments thereof.

**5.3. Consent of or, If Applicable, Notice to Neighboring Building Owner or Tenant.** If the Permittee is using a parking or loading space for a parklet that is substantially in front of a neighboring tenant space or building, the Permittee has obtained written consent of the owner or tenant or provided notice as required by Section 55(o) the Order. In the event Permittee has obtained written consent from owner or tenant and that owner or tenant thereafter withdraws such consent, Permittee shall inform City within 10 business days. Permittee agrees that the City shall have the discretion on whether the parking or loading space



substantially in front of a neighboring tenant space or building may continue to be used as a parklet by the Permittee despite any withdrawal of consent by the property owner or tenant of the neighboring tenant space or building.

**5.4. Removal or Relocation of Unauthorized Structures.** Permittee agrees that pursuant to the parklet conditions of operation, no structure other than a deck or traffic barrier that conforms to the design and safety specifications in Section 56 of the Order may be constructed or placed in the parklet. City reserves the right to order the removal or relocation of any unauthorized structure at Permittee's cost. Permittee hereby grants to City the right to remove or relocate any such unauthorized structure and to come upon Permittee's premises to effect said removal or relocation if deemed necessary by City. Permittee waives any claim or right it may have for inverse condemnation, damages, or loss of income or business resulting from said removal. Upon removal or relocation of any such unauthorized structure, all rights of Permittee under this Agreement and the permit itself shall terminate.

## **6. Monthly Fees; Annual Adjustment; Payment; Council Resolution.**

**6.1. Monthly Fees.** In consideration of using the public space, Permittee agrees to pay City a monthly fee in advance, on the first day of each month, commencing no earlier than November 1, 2020 and after City has provided 30 days written notice to the Permittee that monthly fees shall commence. The monthly fee shall be based on the square footage of the public space and shall comply with the rates for "Outdoor Dining Area without a Barrier," as adjusted annually in accordance with the Consumer Price Index, as set forth in Resolution No. 10586 (CCS), adopted by the City Council on June 21, 2011, regardless of whether the Permittee is conducting outdoor dining as opposed to other eligible business activities in the public space. The rate for a Permittee operating on portions of the Pier designated for temporary outdoor dining or eligible business activities shall be the same as the rate identified in Resolution No. 10586 (CCS) for "Other Streets." Notwithstanding the foregoing, City may not assess a fee for any month if, as of the first of that month, the County Department of Public Health's Safer at Home Order has not authorized the Permittee's business to resume indoor operations at 50% or greater occupancy. For purposes of clarity, the monthly rate per square foot for "Outdoor Dining Area without a Barrier" in 2020 is as follows:



Location	Outdoor Dining Area without a Barrier
3rd Street Promenade	\$2.66
Transit Mall (Santa Monica Boulevard/ Broadway)	\$2.66
Ocean Avenue	\$2.48
Montana Avenue	\$2.20
Wilshire Boulevard	\$2.12
Main Street	\$2.12
Ocean Park Boulevard	\$2.12
Pico Boulevard	\$2.12
Other Streets	\$2.12

**6.2. Payment of Monthly Fee.** Payments of the monthly fee to City shall be made payable to the “City of Santa Monica” and delivered to the office of the Economic Development Division, located at 1901 Main Street, Suite E, Santa Monica, CA 90405. If the monthly fee is not received by City within three days after it is due, then without any requirement of notice to Permittee, Permittee shall pay to City a late charge equal to 10% of the overdue amount. Acceptance of the late charge by City will not constitute a waiver of Permittee’s default with respect to the overdue amount, nor will it prevent City from exercising any of the other rights or remedies granted under this Agreement. In the event that a late charge is payable hereunder, whether or not collected, for three consecutive installments of the monthly fee, then the monthly fee will automatically become due and payable quarterly in advance, rather than monthly, notwithstanding any provision of this Agreement to the contrary. The late charge required by this paragraph will be deemed to be additional monthly fee under this Agreement.

**6.3. Monthly Fee Subject to Council Resolution.** The City reserves the right to adjust the monthly fee at any time during the term of this Agreement in accordance with the adoption of a resolution by the City Council of the City of Santa Monica establishing new monthly fees for use of the public space authorized by the Order.



## 7. Termination.

**7.1. Termination for Default.** If Permittee fails or refuses to perform any of the provisions in this Agreement at the time and in the manner required hereunder, Permittee will be deemed in default in the performance of its obligations under this Agreement. City may thereafter terminate this Agreement and take exclusive possession of the public space and any personal property of Permittee and storing such items at the expense of Permittee. If the default is a monetary default that is not cured within a period of three days after receipt of written notice of default from City to Permittee, specifying the amount owed and the steps necessary to cure the default, City may terminate this Agreement forthwith by giving Permittee written notice of the termination. If the default is a nonmonetary default, the City may terminate this Agreement immediately and any activities authorized by this Agreement or the Order shall thereafter cease immediately. In such a case, City will provide written notice of termination to Permittee.

**7.2. Termination or Suspension for Emergency.** If City determines that there is an emergency situation that poses a risk to the public health, safety or welfare, it may terminate or suspend this Agreement immediately. In such a case, City will provide written notice of termination or suspension as soon as reasonably possible.

**7.3. Termination Without Cause.** Either party may at any time, without cause, terminate this Agreement on 30 days' prior written notice to the other party, except, however, that prior to or immediately following the City's written notice that monthly fees shall commence under paragraph 6.1, Permittee may terminate this Agreement on 14 days' prior written notice to City.

**7.4. Payment Upon Termination.** Upon any termination or suspension, Permittee must pay to City that portion of the applicable monthly fee in accordance with paragraph 6 that is accrued and unpaid prior to the effective date of the termination or suspension.

**7.5. No Holding Over.** Any attempted holding over by Permittee after the expiration of the term or termination of this Agreement, or by any extension or renewal thereof, will not constitute a renewal or extension of the term of this Agreement.

**7.6. Nonexclusive Remedy.** Termination of this Agreement by either party will be a nonexclusive remedy for default and will be without prejudice to any other right or remedy of such party.

**8. No Waivers.** A waiver by City of any breach of any term, covenant or condition contained herein will not be deemed to be a waiver of any subsequent breach of the



same or any other term, covenant or condition contained herein, whether of the same or a different character.

9. **Release of Liability.** For and in consideration of the use of public space, Permittee hereby freely and voluntarily waives, releases, and discharges the City of Santa Monica, members of its City Council, boards and commissions, officers, agents, representatives, contractors, employees, and volunteers (collectively, the “City Indemnitees”) from any and all claims for liability, judgment, or damage arising from any personal injury, death, loss, or property damage sustained by Permittee, or any of Permittee’s agents, representatives, contractors, employees, and volunteers, in connection with Permittee’s use of the public space. Permittee agrees to waive, release, and discharge the City Indemnitees regardless of any negligence or carelessness on the part of any of the City Indemnitees.
10. **Indemnification.** Permittee agrees to accept all responsibility for loss or damage to any person or entity and to indemnify, hold harmless, and defend and release the City Indemnitees from and against any and all liability actions, claims, damages, costs, or expenses which may be asserted by any person or entity, arising out of or in connection with willful acts or negligence of Permittee (including Permittee’s agents, representatives, contractors, employees and volunteers) while engaging in the activities associated with this Agreement, whether or not there is concurrent negligence on the part of any of the City Indemnitees, but excluding liability due to the sole active negligence or sole willful misconduct of the City Indemnitees.
11. **Insurance.** Permittee agrees to procure and maintain for the duration of this Agreement, and furnish along with this Agreement proof of, insurance against claims for injuries to persons or damages to property that may arise from or in connection with this Agreement, as set forth in Attachment A to this Agreement. The cost of such insurance shall be borne by Permittee. No later than 14 days after the requested start date of outdoor activities, Permittee shall add the City as an additional insured on Permittee’s CGL policy in compliance in compliance with Attachment A and obtain a waiver of subrogation in compliance with Attachment A.
12. **Duty to Comply with the Law.** Permittee agrees to comply with all applicable local, State, and Federal laws and regulations at all times during the term of this Agreement, including, but not limited to, the Order, the Governor’s Stay at Home Order, the County Department of Public Health’s Safer at Home Order, including any amendments and successors thereto, laws regarding the obstruction of vehicular traffic, the Americans with Disabilities Act, ABC regulations and orders relating to the service of alcohol, and County health laws regarding provision of food services.



13. **No Vested or Ongoing Rights Conferred.** Permittee understands and agrees that this Agreement and the Order confer no vested rights to any ongoing or continued activities, and any and all activities authorized by this Agreement and the Order are temporary in nature and granted solely to enable businesses to operate in compliance with State, County, and local orders regarding social distancing and COVID-19.
14. **Non-Transferable.** This Agreement is non-transferable. Only the Permittee with whom this Agreement was entered shall be permitted to engage in the activities authorized herein.
15. **Independent Contractor.** It is understood and agreed that Permittee, in the performance of this Agreement, will be acting in a wholly independent capacity and not as agent, employee, partner, or joint venturer of City.
16. **Supersession and Entire Agreement.** This Agreement terminates and supersedes all other agreements between the Permittee and City relating to the temporary use of public space authorized by the Order. This Agreement contains the entire agreement between the parties relating to the rights herein granted and the obligations herein assumed. Any oral representations of modifications concerning this Agreement shall be of no force and effect excepting a subsequent modification in writing, signed by the party to be charged and duly recorded.

\_\_\_\_\_  
Permittee

\_\_\_\_\_  
Date

\_\_\_\_\_  
Director of Community Development  
Department or Designee

\_\_\_\_\_  
Date



## ATTACHMENT A

### (Insurance Requirements)

Permittee shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property that may arise from or in connection with the Permittee's possession, occupancy, operation or use of the premises by the Permittee, its agents, representatives, employees, subcontractors, and guests.

#### Minimum Scope and Limits of Insurance

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury and personal and advertising injury, with limits of no less than \$1,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (Insurance Services Office Form CG 25 04) or the general aggregate limit shall be twice the required occurrence limit.
2. **Liquor Liability:** Permittee agrees that if it proposes to sell or serve alcohol as part of its outdoor activities, Permittee shall furnish, along with this Agreement, proof of liquor liability coverage.
3. **Workers' Compensation:** Workers' Compensation insurance as required by the State of California, with Statutory Limits and Employers' Liability Insurance with limits of no less than \$1,000,000 per accident for bodily injury or disease (see footnote #1).

If the Permittee maintains broader coverage or higher limits than the minimums shown above, the City of Santa Monica requires and shall be entitled to the broader coverage or higher limits maintained by the Permittee. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the City of Santa Monica.

#### Other Insurance Provisions

1. The insurance policies are to contain, or be endorsed to contain, the following provisions:



- a. **Additional Insured Status:** The City of Santa Monica, its officers, officials, employees and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of the use, occupancy, operations or maintenance of the leased premises, including work or operations performed by or on behalf of Permittee. CGL coverage can be provided in the form of an endorsement to the Permittee's insurance (at least as broad as Insurance Services Office Form CG 20 10 11 85, or if not available, through the addition of **both** CG 20 10, CG 20 26, CG 20 33, or CG 20 38 **and** CG 20 37).
- b. **Primary Coverage:** For any claims related to this Agreement, the Permittee's insurance shall be primary coverage as least as broad as Insurance Services Office Form CG 20 01 04 13 as respects the City of Santa Monica, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the City of Santa Monica, its officers, officials, employees or volunteers shall be in excess of the Permittee's insurance and shall not contribute with it.
- c. **Notice of Cancellation:** Each insurance policy required herein shall state that coverage shall not be cancelled except after notice has been given to the City of Santa Monica.
- d. **Waiver of Subrogation:** Permittee hereby grants to the City of Santa Monica a waiver of any right of subrogation which any insurer of said Permittee may acquire against the City of Santa Monica by virtue of payment of any loss. Permittee agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City of Santa Monica has received a waiver of subrogation endorsement from the insurer.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City of Santa Monica for all work performed by the Permittee, its employees, agents and subcontractors.

- 2. The insurance policies are to contain a description of the areas, including address(es), where the outdoor activities permitted under this Agreement are taking place.

### **Self-Insured Retentions**

Self-insured retentions must be declared to and approved by the City of Santa Monica. The City of Santa Monica may require the Permittee to purchase coverage with a lower retention or provide satisfactory proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention. The policy language



shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the name insured or the City of Santa Monica.

### **Acceptability of Insurers**

Insurance is to be placed with insurers authorized to conduct business in California with a current A.M. Best rating of no less than A:VII, unless otherwise acceptable to the City of Santa Monica.

### **Verification of Coverage**

Permittee shall furnish the City of Santa Monica with original certificates and amendatory endorsements (or copies of the applicable policy language effecting coverage provided by this clause). All certificates and endorsements are to be received and approved by the City of Santa Monica before the lease commences. However, failure to obtain required documents prior to the lease beginning shall not waive the Permittee's obligation to provide them. The City of Santa Monica reserves the right to require complete, certified copies of all required insurance policies, including the endorsements required herein, at any time.

### **Failure to Maintain Insurance Coverage**

If Permittee, for any reason, fails to maintain insurance coverage which is required pursuant to this Agreement, the same shall be deemed a material breach of contract. The City of Santa Monica, at its sole option, may terminate this Agreement and obtain damages from the Permittee resulting from said breach.

### **Maintenance/Permittee Improvements**

Permittee shall require and verify that all contractors hired by the Permittee maintain CGL with limits of no less than \$1,000,000 per occurrence and comply with the insurance requirements stated herein for all maintenance, repair and Permittee improvements performed on the leased premises. All exceptions must be approved in writing by the Risk Manager.

### **Footnote**

**# 1:** Workers' Compensation insurance coverage is not required if the Permittee does not have employees. The Permittee must, however, execute the City's Workers' Compensation Coverage Exemption Declaration Form.