CITY OF SAN JOSE

PARKLET TERMS AND CONDITIONS

The following terms and conditions ("Parklet Terms and Conditions") apply to the encroachment permit issued to the Permittee ("Permit") pursuant to the Declaration of the Director of Emergency Services of the City of San José Suspending Enforcement of Certain Provisions in Land Use Permits and Approvals and Zoning and Encroachment Requirements in the San José Municipal Code issued June 26, 2020, as amended by the City Council on September 1, 2020 ("Emergency Order"). The Emergency Order allows the City to issue permits for the Permittee’s business use of the vehicle parking spaces on the public street adjacent to its business that have been repurposed for seating and business use ("Parklet") by separating the area from vehicular and bicycle traffic with physical barriers approved, paid for and installed by the City.

In its use of the Parklet, Permittee hereby agrees as follows:

1. **Permit.** The Permit allows the Permittee to conduct its business operations and place, maintain, occupy and use in the Parklet tables, chairs, benches, umbrellas, other moveable furniture, barriers required by the California Department of Alcoholic Beverage Control, equipment and other items reasonably necessary to the Permittee’s business (collectively, “Encroachment”). The Permit incorporates and shall be subject to: (1) these Parklet Terms and Conditions; (2) the Emergency Order, which is incorporated herein by reference; and (3) the Parklet Regulations adopted by the Director of Public Works and posted on the City’s website as of the date the Permit was issued, which are incorporated herein by reference.

2. **Subject Premises.** For purposes of the Permit, “Subject Premises” means the area within the Parklet that is coextensive with the Permittee’s business frontage. The Permit allows the Permittee to use the Parklet only within the Subject Premises. The Permittee shall not use any areas within the Parklet that extend beyond the Permittee’s business frontage unless the Permittee has provided and the City has approved a site diagram showing the location of these areas and written consent from the neighboring property, in which case the Subject Premises also shall include such areas.

3. **Revocable License.** The Permit shall be allowed only as a revocable license, shall be personal to the Permittee and not transferable or assignable. The City shall not be estopped from ordering removal of the Encroachment or demanding compliance with any of Permittee’s obligations under the Permit. The Permit shall not be construed to create any property right in the Subject Premises or Parklet that the Permittee did not possess prior to receiving the Permit. The Permittee shall be solely responsible for all costs of complying with its obligations under the Permit.

4. **Conformance with Permit.** The Encroachment shall be in strict conformance with the Permit. The Permit has been granted upon each and every term and condition set forth herein and shall be strictly construed against the Permittee. The City grants the Permittee no privileges that are not explicitly set forth in the Permit.

5. **Revocation.** The City may revoke the Permit if: (i) the Permittee is in Default; (ii) the City determines to use the Subject Premises for a public purpose; (iii) the City determines that the Encroachment conflicts with the public’s current or prospective use of the public...
property; (iv) the City determines that the Encroachment constitutes a public nuisance; or (v) the Encroachment is declared unlawful by a court of competent jurisdiction. The City’s revocation shall be effective immediately upon providing Permittee with written notice.

6. **Expiration.** If not earlier revoked, the Permit shall automatically expire upon the termination or expiration of the Emergency Order.

7. **Default.** Permittee shall be in default under the Permit if it breaches, or fails to timely observe and perform any obligation under, the Permit and fails to timely cure such breach or failure in accordance with the Permit (“Default”). The Director of Public Works shall notify the Permittee in writing of any breach or failure to perform. If the Permittee does not cure the breach or failure to perform to the City’s satisfaction within one (1) day, the Permittee shall be in Default, and the Permittee hereby grants to the City any consent or right necessary for the City to remedy the Default. The Permittee shall be responsible for all of the City’s costs to remedy the Default. In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled to specific performance of Permittee’s obligations under the Permit and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.

8. **Maintenance and Repair of Encroachment.** The Permittee shall maintain the Encroachment and Subject Premises to the City’s satisfaction so that it is in a safe condition and good working order for the intended purpose, except where a higher standard is required by applicable law.

9. **City’s Right to Enter and Cure.** Notwithstanding anything to the contrary in the Permit, the City may remove the Encroachment at the Permittee’s expense if the City determines that it represents a dangerous condition or threat of danger to life or property.

10. **City Access and Inspection.** The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over the Subject Premises at all times without notice to the Permittee, including portions covered by furnishings, materials or equipment, for any lawful purpose for which the Subject Premises may be used.

11. **Permittee Responsibility for Encroachment.** The Permittee shall be solely responsible for the design, maintenance, repair, occupancy, use and removal of the Encroachment, and the City shall not be liable for its review, approval, inspection or removal of any aspect or portion of the Encroachment. The Permittee’s design, maintenance, repair, occupancy, use and removal of the Encroachment shall not interfere with, impede or make more costly the City’s operation, maintenance or improvement of the public property.

12. **Risk of Loss.** The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, “City Indemnitees”) shall not be liable for any injury to persons or property arising out of, pertaining to or relating to the Encroachment. The Permittee acknowledges that it bears the full risk of loss or damage to the Encroachment and hereby waives any right to make or prosecute any claims or
demands against the City Indemnitees for any loss or damage arising from or relating to the Encroachment. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises, Parklet or any portion of the public property and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.

13. **Indemnity/Hold Harmless.** To the fullest extent permitted by law, Permittee shall indemnify, hold harmless and defend the City Indemnitees from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively “Claims”), which arise out of, relate to or result from: (i) any act or omission of the Permittee, its independent contractors, agents, officers, employees or invitees pursuant to or in connection with the Permit or while in or about the Parklet for any reason; (ii) the design, maintenance, repair, occupancy, use and removal of the Encroachment; and/or (iii) any violation of the Permit or applicable law by the Permittee, its independent contractors, agents, officers, employees or invitees, in each case whether or not caused by the negligence of the City Indemnitees, except for Claims resulting from the City’s sole negligence. The foregoing obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligations arise at the time such claim is tendered to Permittee by the City and continues at all times thereafter until satisfied.

14. **Insurance.** Permittee shall, at Permittee’s sole cost and expense and for the full term of the Permit, obtain and maintain at least the following minimum insurance. Commercial General Liability: $1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit. Said insurance shall name the City as additional insured and shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) calendar days' prior written notice has been given to City.

15. **Compliance with Law.** Permittee agrees to comply with all applicable laws, ordinances and regulations in its use of the Subject Premises and Parklet and any other actions in connection with the Permit.

16. ** Severability.** If any provision of these Parklet Terms and Conditions is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions.

17. **Survival.** The provisions under Sections 11-13 and 20-22 shall survive the expiration or termination of the Permit.

18. **Headings.** The headings used herein are for convenience only and shall not be used in the interpretation of these Parklet Terms and Conditions.

19. **Days.** All references to days in these Parklet Terms and Conditions shall mean calendar days, unless specified otherwise.
20. **Time is of the Essence.** Time is of the essence in performing each and all obligations under these Parklet Terms and Conditions.

21. **Choice of Law.** These Parklet Terms and Conditions shall be construed according to the laws of the State of California.

22. **Venue.** Any dispute arising under the Permit shall be adjudicated in California State Court in and for the County of Santa Clara, or in the Federal Court in and for the Northern District of California, as appropriate.
EXHIBIT A

CONDITIONS AND LIMITATIONS FOR USE OF PARKLETS

General Retail, Food Services and certain General Services and Education and Training businesses may provide seating and conduct business activities within a Parklet adjacent to their property, subject to the following conditions and limitations.

1. LOCATION OF USE

For purposes of this regulation, a “Parklet” is defined as the vehicle parking spaces within the public street adjacent to a business’ property that are repurposed for seating and business use by separating the area from vehicular and bicycle traffic with physical barriers approved, paid for and installed by the City (“Traffic Barriers”). Parklet locations, dimensions and materials shall be determined by the City. Nothing in this regulation shall require the City to provide Traffic Barriers or permit Parklets in any particular location.

2. ELIGIBLE BUSINESSES

The only businesses eligible to use a Parklet under this regulation shall be those (1) allowed to operate under the Health Orders of 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. Food Services;
c. Dry Cleaner and Personal Care uses only within the category General Services; and
d. Instructional Art Studios and Private Instruction, Personal Enrichment uses only within the category Education and Training.

3. LIMITATIONS ON PERMITTED OPERATIONS

a. A business shall not utilize any areas within a Parklet that extend beyond the business’ frontage without the written consent of the neighboring property. This written consent shall be provided to the City prior to the business’ use of the additional area(s).
b. This regulation only allows eligible businesses to conduct permitted operations within a Parklet. Businesses shall obtain a temporary sidewalk use permit prior to using the public sidewalk adjacent to a Parklet.
c. All Parklets shall be subject to the Parklet Regulations adopted by the Director of Public Works and posted on the City’s website. The Parklet Regulations shall address location criteria, allowed and prohibited uses, hours of operation, maintenance and other requirements.

4. OTHER REQUIREMENTS

DRAFT – Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.
a. Traffic Barriers are and shall remain the City’s property. No part of a Parklet, including Traffic Barriers, or any other public property shall be physically altered pursuant to this regulation, including by attaching any objects to the Traffic Barriers, without the City’s prior written consent. Businesses shall not move Traffic Barriers once installed by the City. The City will remove Traffic Barriers after the expiration or termination of this regulation unless it determines, in its discretion, to remove the Traffic Barriers at an earlier time.

b. This regulation shall not supersede permits or authorizations from the City for existing parklets, which shall remain in full force and effect.

5. APPLICATION PROCESS

Eligible businesses shall apply online for a Parklet in accordance with the following:

a. Each business shall apply for a Parklet through the City’s website. The application will require that businesses: (a) consent to standard terms and conditions, (b) provide the City with proof of insurance meeting the requirements set forth on the application website, and (c) submit a site diagram of the proposed Parklet. There shall be no application or approval fee.

b. If the City determines that the applicant is an eligible business and the Parklet may be installed in the requested location, the City will contact the business to notify it that its application has been approved, discuss next steps and coordinate installation of Traffic Barriers.

6. ADMINISTRATION

The provisions of this Exhibit A shall be under the administration of the Director of Public Works.