The following terms and conditions (“Street Business Area 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 July 22, 2020 (“Emergency Order”). The Emergency Order allows the City to issue permits for the Permittee’s business use of portions of the public street adjacent to its business that has been repurposed for seating and business use (“Street Business Area”) by closing the area to vehicular and bicycle traffic with physical barriers approved, paid for and installed by the City.

In its use of the Street Business Area, 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 Street Business Area 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 Street Business Area Terms and Conditions; (2) the Emergency Order, which is incorporated herein by reference; and (3) the Street Business Area 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 Street Business Area from the face of curb to the centerline of the street that is coextensive with the Permittee’s business frontage. The Permit allows the Permittee to use the Street Business Area only within the Subject Premises. The Permittee shall not use any areas within the Street Business Area 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 each neighboring property upon which these areas are intended to be located, 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 Street Business Area 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 or use of the Street Business Area. The City makes no
representations or warranties regarding the suitability, condition or fitness of the Subject
Premises, Street Business Area 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 Street Business Area 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 Street Business Area and any
other actions in connection with the Permit.

16. Severability. If any provision of these Street Business Area 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 Street Business Area Terms and Conditions.

19. **Days.** All references to days in these Street Business Area 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 Street Business Area Terms and Conditions.

21. **Choice of Law.** These Street Business Area 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.
DECLARATION OF THE DIRECTOR OF EMERGENCY SERVICES OF THE CITY OF SAN JOSE SUSPENDING ENFORCEMENT OF CERTAIN PROVISIONS IN LAND USE PERMITS AND APPROVALS AND ZONING AND ENCROACHMENT REQUIREMENTS IN THE SAN JOSE MUNICIPAL CODE

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, pursuant to California Government Code Section 8634 and San José Municipal Code Section 8.08.250, I am empowered upon the proclamation of a local emergency 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, on March 31, 2020, the Health Officer of Santa Clara County issued an Order directing all individuals to continue to shelter in place and requiring essential business to implement Social Distancing Protocols; and

WHEREAS, on May 18, 2020, the Health Officer of the County of Santa Clara issued a further Order continuing the Social Distance Protocol but allowing retailers to open with curbside/outdoor pick up, supply chains for retail establishments to reopen, and certain outdoor activities to resume; and

WHEREAS, on June 1, 2020, the Health Officer of the County of Santa Clara issued a further Order effective June 5, 2020 continuing the Social Distance Protocol but allowing certain additional businesses to resume operations, including outdoor dining at restaurants, in-store shopping at retail and shopping centers and limited services that do not require customer contact, subject to limitations; and

WHEREAS, on July 2, 2020, the Health Officer of the County of Santa Clara issued a further Order effective on the later of (1) 12:01 a.m. on July 13, 2020 or (2) 12:01 am two days following approval by the State Department of Public Health of a “variance” under the State’s “Resilience Roadmap” as described at covid19.ca.gov, which updated the Social Distance Protocol and allowed certain additional businesses to resume operations, subject to limitations; and

WHEREAS, on July 13, 2020, the California State Public Health Officer issued an order that, amongst other things: (1) required a number of businesses statewide to immediately cease indoor operations, (2) required certain additional businesses in Santa Clara County
to cease indoor operations effective July 15, 2020, and (3) allowed businesses to modify operations to provide outdoor services; 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 property to conduct business activities without first obtaining the City’s authorization through specified application processes; and

WHEREAS, Title 13 of the San José Municipal Code prohibits encroachments or special events in the public right-of-way or other public property without first obtaining a permit from the City through specified application processes; and

WHEREAS, to ensure compliance with the County Social Distancing Protocol, businesses need additional outdoor areas to serve customers and allow customers to queue while waiting to enter the business premises; and

WHEREAS, under conditions of the emergency and in the interest of public health and safety, it is deemed necessary to suspend enforcement of certain provisions in land use permits and planning approvals issued by the City and certain provisions in the San José Municipal Code; and

WHEREAS, life and property are deemed to be in peril and speed is of the essence.

NOW, THEREFORE, BE IT RESOLVED, I, David Sykes, as Director of Emergency Services, declare that the City shall, subject to the conditions and limitations contained in Exhibit A hereto, which are incorporated herein and shall constitute part of this regulation, 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 Titles 13 and 20, that are in conflict with the terms of this regulation. This regulation shall apply only to businesses operating from a building within the City; mobile businesses of any type are not covered by this regulation. Except as expressly exempted herein, 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); and

BE IT FURTHER RESOLVED that this regulation shall become effective as of 12:01 a.m. on July 22, 2020 and remain in effect until December 31, 2020, such time as it is terminated or modified by the City Council or the termination of the local state of emergency, whichever occurs first; and
BE IT FURTHER RESOLVED, any violation of this regulation shall be subject to enforcement and penalty as provided under San José Municipal Code Section 8.08.260.

07/22/20
Date

David Sykes
Director of Emergency Services
EXHIBIT A
CONDITIONS AND LIMITATIONS FOR
USE OF STREET BUSINESS AREAS

Businesses may provide seating and conduct permitted business activities within areas of the public street adjacent to their business premises that the City has closed to vehicular and bicycle traffic, subject to the following conditions and limitations.

1. LOCATION OF USE
   For purposes of this regulation, a “Street Business Area” is defined as the portion of the public street abutting a business’ property that has been 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”). Street closures pursuant to this regulation shall be determined and carried out by the City in its sole discretion, including, without limitation, Street Business Area locations, dimensions, materials and closure times. Nothing in this regulation shall require the City to provide Traffic Barriers or permit a Street Business Area in any particular location or at any particular time.

2. ELIGIBLE BUSINESSES
   The only businesses eligible to use a Street Business Area under this regulation shall be those (1) allowed to operate under the Health Orders of Santa Clara County and the State of California, 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. Any uses within the category Education and Training, except School, driving (Class C & M license);
      d. Entertainment and Recreation;
      e. Personal services only within the category General Services; and
      f. Museums, libraries, parks, playgrounds, or community centers only within the category Public, Quasi-Public and Assembly Uses.

3. LIMITATIONS ON PERMITTED OPERATIONS
   a. A business shall not utilize a Street Business Area in any location that extends 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 Street Business Area. Businesses shall obtain a temporary sidewalk seating permit prior to using the public sidewalk adjacent to a Street Business Area.
   c. Each Street Business Area shall be subject to the Street Business Area Regulations adopted by the Chief of Police and Director of Public Works and posted on the City’s website. The Street Business Area Regulations shall address location criteria, allowed and prohibited uses, hours of operation, maintenance and other requirements.
4. OTHER REQUIREMENTS
   a. Each business shall obtain an encroachment permit from the City prior to operating within a Street Business Area. Each business shall be subject to all requirements contained in its permit. The City shall review applications and issue permits based on the criteria set forth in the Street Business Area Regulations. Notwithstanding the City’s issuance of permits to businesses to operate within a Street Business Area, operations within Street Business Areas shall be deemed activities on a street conducted by a governmental agency acting within the scope of its authorized functions for purposes of San José Municipal Code Section 13.14.210.B.
   b. Traffic Barriers are and shall remain the City’s property. No part of a Street Business Area, including Traffic Barriers, or any other public property shall be physically altered pursuant to this regulation, including by attaching any objects to the street surface or 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.
   c. This regulation shall not supersede or take precedence over any other permits or authorizations from the City, which shall remain in full force and effect. Businesses operating in a Street Business Area pursuant to this regulation shall be suspend or modify operations as necessary to accommodate a special event for the same area that is permitted pursuant to the City’s Municipal Code.

5. APPLICATION PROCESS
   Eligible businesses shall apply online for an encroachment permit to use a Street Business Area in accordance with the following:
   a. Businesses shall apply for a Street Business Area 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 Street Business Area. There shall be no application or approval fee.
   b. If the City determines that the proposed street is a candidate for a Street Business Area, it will contact the business to gather additional information such as evidence of local business and resident support, help finalize a complete street closure plan including a traffic control plan as necessary, and discuss next steps, including conditions for the City’s issuance of an encroachment permit to use the Street Business Area.

6. ADMINISTRATION
   The provisions relating to the City’s creation of Street Business Areas in this Exhibit A shall be under the administration of the Chief of Police. The provisions relating to the issuance of permits for businesses to use a Street Business Area shall be under the administration of the Director of Public Works.