DIRECTOR OF EMERGENCY SERVICES ORDER NO. 20-3

AN ORDER OF THE DIRECTOR OF EMERGENCY SERVICES (CITY MANAGER) OF THE CITY OF BENICIA REGARDING OUTDOOR ACTIVITIES AND ENCROACHMENTS FOR BUSINESSES OPERATING IN COMPLIANCE WITH SOCIAL DISTANCING REQUIREMENTS

WHEREAS, California Government Code Section 8630 empowers the City Council to proclaim the existence or threatened existence of a Local Emergency when the City is affected or likely to be affected by a public calamity; and,

WHEREAS, Government Code Section 8634 empowers the City to promulgate orders and regulations to provide for the protection of life and property; and,

WHEREAS, pursuant to Benicia Municipal Code section 2.36.050(A)(1), the Director of Emergency Services has declared the existence of a Local Emergency, which Local Emergency has been ratified by the City Council on March 19, 2020; and,

WHEREAS, the Director of Emergency Services does hereby find that conditions of extreme peril and a crippling disaster, which severely impairs the safety of persons or property, have arisen within the City caused by the virus COVID-19 and its rapid transmission as reported by various local, state and national health organizations; and,

WHEREAS, the aforesaid conditions of extreme peril warranted and necessitated the proclamation of the existence of a Local Emergency; and

WHEREAS, on March 18, 2020, the County of Solano Health Officer issued a County-wide shelter-in-place directive that requires individuals to isolate in their places of residence, except as needed for the performance of essential activities; and

WHEREAS, on March 19, 2020, the Governor of the State of California ("Governor") issued Executive Order N-33-20, which provides that individuals living in the State of California are required to stay at home except as needed to maintain continuity of operations of the critical infrastructure sectors; and

WHEREAS, in mid-May 2020, the Governor of the State of California and the California Department of Public Health published guidance regarding the opening of certain businesses subject to stages established by the State; and

WHEREAS, the City has an important governmental interest in maintaining a thriving business community and protecting the health, safety, and economic welfare of its citizens and businesses; and

WHEREAS, in order to protect the health and safety of the City, while fostering economic wellbeing of the City's citizens and businesses, the City wishes to assist both essential and non-essential businesses in remaining open, or re-opening when lawfully permitted to do so;

WHEREAS, when non-essential businesses are permitted to re-open pursuant to State and County orders, laws, and/or guidance, the City will suspend certain permit and license requirements in order to facilitate business operations in a manner that is consistent with social distancing requirements, and protects the health and safety of the citizens of Benicia;

WHEREAS, in the interest of public health and safety, as affected by the emergency caused by the spread of COVID-19, it is necessary to issue and implement this Order to protect life, property and civil order.

NOW, THEREFORE, THE DIRECTOR OF EMERGENCY SERVICES OF THE CITY OF BENICIA DOES HEREBY ORDER AS FOLLOWS:

SECTION 1. Outdoor Activities Permitted. To facilitate the reopening of businesses in a manner that is consistent with State and local social distancing requirements, all City of Benicia laws, regulations and/or policies that would otherwise prohibit businesses from engaging in their business activities outside are hereby suspended.

SECTION 2. Eligible Businesses. Only those businesses that require outdoor space in order to effectively run their business while complying with State and local social distancing requirements are eligible to operate pursuant to this Order. Nothing in this Order shall authorize a particular business to operate outside unless and until that business is authorized to operate pursuant to State and County Orders. All businesses must be in full compliance with all State and County Orders regarding business reopening and operation in order to comply with this Order.

SECTION 3. Temporary COVID-19 Outdoor Activities and Encroachment Agreement. To be eligible to engage in outdoor activities pursuant to this Order, businesses shall be required to enter into a Temporary COVID-19 Outdoor Activities and Encroachment Agreement (hereinafter the "Outdoor Activities Agreement") attached hereto and incorporated herein by reference.

The Director of Emergency Operations (hereainafter the "Director") or her designee shall be authorized to enter into an Outdoor Activities Agreement with the applicant and shall be entitled to seek the review of any City staff regarding any and all site-specific considerations related to the proposed outdoor activities. The Director may choose to enter into an Outdoor Activities Agreement on any terms she deems necessary, including but not limited to modifications to the proposed location of outdoor activities, to ensure ongoing protection of the public health and safety of the City.

The City shall only enter into an Outdoor Activities Agreement that authorizes activities which are consistent with State and County orders regarding essential businesses.

SECTION 4. Encroachment Into Public Right-of-Way. To streamline the issuance of temporary rights of encroachment into the public right-of-way, the City hereby amends its encroachment permit and agreement process as follows:

1. The following requirements set forth in the Benicia Municipal Code Chapter 12.12 regarding encroachment permits and encroachment agreements shall not apply to businesses seeking to encroach into the public right of way for purposes of conducting business in compliance with State and local social distancing requirements: BMC §§ 12.12.020, 12.12.060, 12.12.070, and 12.12.270.

2. Businesses seeking to encroach into the public right way for purposes of conducting business in compliance with State and local social distancing requirements, shall execute an Outdoor Activities Permit in lieu of obtaining (1) encroachment permits and encroachment agreements required by BMC Ch. 12.12 and (2) sidewalk table permits.

SECTION 5. No Interference with Private Property. Nothing in this Order relieves a business from any obligations or laws requiring consent of adjacent property owners for use of private property. Businesses seeking to operate outdoors shall obtain consent of any private property owners whose property will be used for outdoor operations.

SECTION 6. Building Permit and Design Review Required. Nothing in this Order relieves a business from the requirement to obtain a building permit for outdoor activities if a building permit would otherwise be required, nor does this order relieve a business from complying with all provisions of the Building Code, including but not limited to, maximum occupancy requirements. Nothing in this Order relieves a business from the requirement to undergo design review for exterior alterations if such design review is required pursuant to the City of Benicia Downtown Historic Conservation Plan, except that temporary installments, including but not limited to, tents, fencing, barriers and enclosures, may be authorized to facilitate proposed outdoor activities.

SECTION 7. County Permits. Nothing in this Order relieves a business from the requirement to obtain any and all County permits regarding the provision of food and dining services.

SECTION 8. Violations of Order. Any violation of this Order or any other local, State, or Federal law shall constitute an imminent threat to the public health and is hereby declared to be a public nuisance and shall be subject to enforcement as such; violations of this order may result in the immediate termination of an Outdoor Activities Agreement and the cessation of any activities authorized by said Agreement and this Order.

SECTION 9. Effective Date of Order. This Order shall become effective on the date signed by the Director of Emergency Operations for the City of Benicia and shall expire when repealed or upon a declared termination of the state of emergency regarding COVID-19 by the Benicia City Council. This Order shall only apply to the extent businesses are authorized to operate pursuant to State and County orders regarding essential businesses.

SECTION 10. The City Clerk shall certify the adoption of this Order and shall cause a certified Order to be filed in the Office of the City Clerk.

PASSED and ADOPTED this 22nd day of May 2020.

Attest:

Lisa Wolfe, City Clerk

Lorie Tinfow, Director of Emergency Services/City Manager

Approved as to Form:

Benjamin Stock, City Attorney

TEMPORARY COVID-19 OUTDOOR ACTIVITIES AND ENCROACHMENT AGREEMENT

1. Business Identification

Business Name (Permittee): _____
Mailing Address: _____
Business Address: _____
Business Phone: _____
Business Email: _____

2. Type of Business [Check one]

Restaurant ☐
Retail ☐
Other ☐ Please Describe _____

3. Proposed Encroachment [Check one or more if Business Proposes to Use Public Right-of-Way for Outdoor Activities]

Outdoor Dining ☐
Outdoor Food Sales ☐
Outdoor Retail Display ☐
Outdoor Retail Sales ☐
Other ☐ Please Describe _____

4. Will proposed outdoor activity require the use of private property not owned or leased by Permitee? ☐ Yes ☐ No

If response to above question is yes, has Permitee obtained all required authorizations (including but not limited to written agreements, licenses, and/or leases) to use said private property? ☐ Yes ☐ No

5. Proposed Activities. Please provide the following information on separate attachment: (1) a description of the Business, (2) proposed outdoor activities, (3) a description of all improvements, structures and/or materials to be used to facilitate outdoor activities, (4) description of area in which proposed outdoor activities will take place along with a drawing, map or other visual depication showing said area, improvements, structures and/or materials to be placed in said area.

6. Requested Start Date of Outdoor Activities: _____

7. Proposed Duration of Outdoor Activities: _____

8. Amendments to Proposal by City and/or Additional Terms of Agreement [To be Completed by City]:

_____

9. Terms of Agreement:

A. 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 of Benicia, its agents, and employees from and against any and all liability actions, claims, damages, costs, or expenses which may be asserted by any person or entity, including Permittee, arising out of or in connection with the willful act or negligence of Permittee engaging in the activities associated with this Agreement, whether or not there is concurrent negligence on the part of the City, but excluding liability due to the sole active negligence or sole willful misconduct of the City.

B. The City reserves the right to order the removal or relocation of the improvements listed in paragraphs 3-6, above, at Permitee's cost in the event same is required by the City and/or a Utility. Whether or not said removal or relocation is required shall be left to the unfettered discretion of the City and/or a Utility. Permitee hereby grants to the City the right to remove or relocate said improvements and to come upon Permitee's land to effect said removal or relocation if deemed necessary by the City and/or a Utility. Permitee waives any claim or right he/she/it may have for inverse condemnation, damages, or loss of income or business resulting from said removal. However, the City will be responsible for repairing any physical damage caused to Permitee's structure(s) or property by the City's but not a Utility's removal or relocation of said improvements. Upon removal or relocation of said improvements, all rights of Permitee under this agreement and the permit itself shall terminate.

C. Permitee shall comply with all applicable local, State, and Federal laws and regulations at all times during the effective period of this agreement, including but not limited to laws regarding the obstruction of vehicular traffic, the Americans with Disabilities Act and County health laws regarding provision of food services.

D. <u>If Permitee's proposed activities encroach into public right-of-way and/or a public easement</u>, Permitee shall procure and maintain for the duration of this Agreement, and furnish proof of along with this Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with this Agreement, as set forth in this section. The cost of such insurance shall be borne by Permitee. Permitee's whose activities do not encroach into public right-of-way and/or a public easement, shall not be required to obtain said insurance.

<u>Minimum Scope of Insurance</u>. Permittee shall obtain and all times during duration of this Outdoor Activities Agreement maintain coverage at least as broad as:

(a) Insurance Services Office Commercial General Liability coverage (occurrence form CG 0001).

(b) Workers' Compensation insurance as required by the State of California and Employer's Liability insurance (for Permitees with employees).

(c) Property insurance against all risks of loss to any tenant improvements or betterments.

Permitee shall maintain limits no less than:

(a) General Liability: **$1,000,000** per occurrence for bodily injury, personal injury and property damage. If Commercial General 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.

(b) Employer's Liability: **$1,000,000** per accident for bodily injury or disease.

(c) Property Insurance: Full replacement cost with no coinsurance penalty provision.

Deductibles and Self-Insured Retentions.

Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the Permitee shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

Other Insurance Provisions.

The general liability policy is to contain, or be endorsed to contain, the following provisions:

(a) The City, its officers, officials, employees and volunteers are to be covered as insureds with respect to liability arising out of ownership, maintenance or use of the premises/property owned by or leased to the Permitee.

(b) The Permitee's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees or volunteers shall be excess of the Permitee's insurance and shall not contribute with it.

(c) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

Acceptability of Insurers.

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII unless prior approval is received from the City Attorney.

E. If Permitee proposes to sell or serve alcohol as a part of a its outdoor activities, Permitee shall furnish, along with this Agreement, proof of a liquor liability coverage endorsement or policy.

F. Violation of Agreement. Any violation of this Agreement or any other local, State, or Federal law shall constitute an imminent threat to the public health and is hereby declared to be a public nuisance and shall be subject to enforcement as such; violations of this Agreement and/or Emergency Order No. 20-3 may result in the immediate termination of this Agreement and the cessation of any activities authorized by this Agreement and Emergency Order No. 20-3.

G. No Vested or Ongoing Rights Conferred. Permittee understands and agrees that this Agreement and Order No. 20-3 confer no vested rights to any ongoing or continued activities, and any and all activities authorized by this Agreement and Order are temporary in nature and granted solely to enable businesses to operate in compliance with State and local orders regarding social distancing and COVID-19. All improvements, structures and installments approved pursuant to this Agreement shall be removed in their entirety upon expiration of this Agreement.

H. 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.

I. Entire Agreement. This instrument 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 instrument shall be of no force and effect excepting a subsequent modification in writing, signed by the party to be charged and duly recorded.

THE UNDERSIGNED AGREES THAT THE PROPOSED ACTIVITIES DESCRIBED ABOVE SHALL BE IN ACCORDANCE WITH AND SUBJECT TO THIS AGREEMENT'S TERMS AND CONDITIONS, CITY OF BENICIA EMERGENCY ORDER NO. 20-3, AND ALL OTHER APPLICABLE LOCAL, STATE AND FEDERAL LAWS, INCLUDING BUT NOT LIMITED TO STATE AND COUNTY EMERGENCY ORDERS REGARDING THE COVID-19 PANDEMIC.

_____ _____

Permitee Date

_____ _____

Lorie Tinfow Date
City Manager
Director of Emergency Services
City of Benicia

CONSENT TO USE PRIVATE PROPERTY
FOR TEMPORARY OUTDOOR ACTIVITIES

[This form must be completed if proposed outdoor activity requires the use of private property which is neither owned nor leased by Permitee]

I, _____, declare that:

1.I am the record title owner of the property located at:
_____, Benicia, California,
(Physical Address)

2. I am aware that the Permitee _____(Business name) is in the process of entering into a Temporary COVID-19 Outdoor Activities and Encroachment Agreement with the City of Benicia to use my property, described in paragraph 1, for certain outdoor activities described in the Agreement.

3. I consent and agree to use of my property for the outdoor activities described in the Agreement.

Signed this _____ day of _____, 20

_____
(Landowner Signature)