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FILING FEE EXEMPT PURSUANT TO GOVERNMENT CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

PEOPLE OF THE STATE OF CALIFORNIA; AND CITY OF BENICIA,

Plaintiffs,

v.

JASON DIAVATIS; and DOES 1 through 50, inclusive,

Defendants.

Case No. FCS056113

JFAP: Honorable Christine A. Carringer
Dept. 12

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing on Motion for Preliminary Injunction
Date: June 16, 2021
Time: 8:30 a.m.
Dept.: 12

Complaint Filed: February 26, 2021
Trial: None

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I. INTRODUCTION

The City of Benicia ("City") seeks to enjoin an unpermitted encroachment placed in the public right-of-way in violation of the Benicia Municipal Code ("BMC") at The Loft Wine Bar & Restaurant (hereinafter "The Loft"), located at 280 First Street in Benicia.

This action is a straightforward code enforcement matter, where The Loft refuses to comply with the City's requirements for being granted a **privilege** to allow dining within the City's public right-of-way. At issue is the City's public right-of-way, and its ability to control it from unpermitted encroachments. Defendant insists he has an unfettered right to locate his business on the City's sidewalks. He does not. After patiently seeking to explain this to Defendant, he continues to refuse to obtain the City's consent. The Loft's illegal encroachment fails to meet City requirements, is unsafe, and not authorized by the City. The City has ordered The Loft's illegal encroachment to be removed, but the owner, Jason Diavatis ("Defendant"), refuses to comply. Therefore, the City must resort to this Court to enjoin this nuisance.

The evidence accompanying this Motion demonstrates that Defendant's encroachment violates well established law, puts the public in harm's way, and is a public nuisance per se which must be enjoined. The City seeks the Court's assistance ejecting Defendant's unsafe and unlawful encroachment from the public right-of-way through this preliminary injunction.

II. FACTUAL AND PROCEDURAL SUMMARY.

This action centers on encroachments on the public sidewalk outside a business on the City's main pedestrian street in downtown Benicia. As explained below, the City authorizes encroachments on the public right-of-way in certain limited circumstances, but such permission is not unlimited. (Declaration of Mario Giuliani (hereafter "Giuliani Decl.") ¶ 2.)

A. The Loft Wine Bar & Restaurant Sidewalk Table Permit.

The City authorizes in certain limited circumstances the use of the sidewalks adjacent to businesses in the downtown district through the issuance of a Sidewalk Table Permit.[1] In 1992, the City created the process for issuing those permits when it first approved its Sidewalk Table

[1] The City also currently authorizes such use through a COVID-19 Temporary Outdoor Activities and Encroachment Agreement. However, Defendant has elected not to seek such a temporary permit through this program.

Policies and Standards through Resolution 92-202. (Request for Judicial Notice (hereafter "RJN") ¶ 4, Exhibit D.) At that time, the policy included the following pertinent provisions:

> **Policy 1.7.** Furniture and trash receptacles shall be removed completely from the sidewalk area daily prior to the close of business.
>
> **Policy 3.4**. Applicants shall obtain an approved Sidewalk Tables Permit from the Planning Department prior to the use of tables in the sidewalk area.

(RJN ¶ 4, Exhibit B)

Defendant first obtained a Sidewalk Table Permit for The Loft, in 2012. (Giuliani Decl. ¶ 3.) Consistent with the applicable policy, Defendant was allowed to, and did, place tables and chairs on the sidewalk outside his premises during business hours and then vacated the sidewalk area each night, leaving the public right-of-way unobstructed. (Giuliani Decl. ¶ 4.)

On April 2, 2019, the Benicia City Council revised the Sidewalk Table Policies and Standards. The City adopted Resolution No. 19-32, approving a revised policy, now called the "Outdoor Dining Sidewalk Table Policy." (RJN ¶ 5, Exhibit E; Giuliani Decl. ¶ 5.) The revised policy now includes the following pertinent policies:

> **Policy 1.6:** Furniture and trash receptacles shall be removed completely from the sidewalk area daily prior to the close of business, except that furniture may remain in the designated sidewalk table area if enclosed by a perimeter barrier. Furniture and receptacles shall not be bolted or otherwise anchored to the sidewalk. A perimeter barrier means an enclosure, whether affixed to the sidewalk or removable, that is provided around the outside edge of a sidewalk dining area.
>
> **Policy 3:** Ensure that the use of sidewalk tables is compatible with the downtown area, and that they do not create conditions detrimental to the well being of business, customers, and residents of the downtown.
>
> **Policy 3.5:** . . . . Dining areas that are enclosed by a perimeter barrier shall meet the following requirements:
>
> **d.** No boring, footing nor other sidewalk alteration shall be permitted unless approved by the Director of Public Works subject to an encroachment agreement. . . .
>
> **e**. Perimeter barriers shall not obscure visibility to the restaurant and seating area and shall not exceed 42" in height at any point. . . .
>
> **Policy 4:** Ensure the Sidewalk Table Permits are issued in a manner that is consistent with this policy and do not expose the City to undue liability or create health and safety risks to the City and public at large.

> **4.1** Permittees shall adhere to all procedures for the issuance of Sidewalk Table Permits as set forth in Resolution No. 19-32.

(RJN ¶ 5, Exhibit E.)

Resolution 19-32, also included a process to implement the updated policy, including that Sidewalk Table Permits were to be issued by the Director of Public Works. (*Id*.) To issue the permit, the Director must determine that the applicant can meet the following criteria:

> a. Applicant has submitted a complete Sidewalk Table Permit application and paid all required fees.
>
> b. Applicant executed an Encroachment Agreement with the City.
>
> c. Applicant has shown that he/she can and will comply with all criteria and standards of the Sidewalk Table Policies . . . .

(RJN ¶ 5, Exhibit E.)

On April 15, 2019, prior to obtaining any encroachment agreement or approval from the City, Defendant commenced construction of a perimeter barrier on the public right-of-way surrounding his sidewalk dining table area. (Declaration of Suzanne Thorsen (hereafter "Thorsen Decl.") ¶¶ 5 – 6; Declaration of Daniel Sequeira (hereafter "Sequeira Decl.") ¶ 4(a); Giuliani Decl. ¶ 6.) At the outset, staff informed Defendant he was required to obtain an encroachment agreement. (Thorsen Decl. ¶¶ 5 -7; Sequeira Decl. Exhibit A (email chain).) However, rather than make Defendant remove his encroachment or interrupt his business, the City attempted to work with him to enter into an encroachment agreement while he was constructing the perimeter barrier. (Giuliani Decl. ¶¶ 6 - 7.) The City was incredibly patient.

In a time period spanning over 19 months, the City tried to assist Defendant in gaining approval for his encroachment. (Giuliani Decl. ¶¶ 6 – 20; Thorsen Decl. ¶¶ 5 – 12; Sequeira Decl. ¶¶4 – 25; Declaration of Erik Upson (hereafter "Upson Decl.") ¶¶ 3 – 6.) Throughout that time, City staff provided comments and suggested corrections to his application which would allow it to issue a permit and encroachment agreement. However, instead of complying, Defendant ignored City directives and requirements for issuance of an encroachment agreement. The City's efforts include the following specific instances of the City seeking to bend over backwards to assist Defendant with his permit application:

1. On September 11, 2019, while emailing with the Defendant regarding insurance requirements, Public Works staff noted that the application could not be approved and would be on hold until he submitted, among other items, structural calculation for lighting poles affixed to his perimeter barrier, stamped by a licensed civil/structural engineer showing them to be safe. (Sequeira Decl. ¶ 4(g), Exhibit G; Thorsen Decl. ¶ 10, Exhibit C.)

    a. As noted and described below, Defendant did not supply such calculations until November 30, 2020, over a year later. (Sequeira Decl. ¶ 23.)

2. In December 2019, Defendant Diavatis submitted an application for the encroachment. Upon review the City determined that his application included an erroneous statement regarding his authority to place items in the common area of the Harbor Walk of Benicia Corporation ("Association" or "HOA").[2] (Giuliani Decl. ¶¶ 11 - 12.) This was confirmed by a letter from the law firm of Angius & Terry, LLP, who represent the Association. (Giuliani Decl. ¶ 12, Exhibit C (attachment to letter).) As a result, the City deemed Defendant's application invalid due to the misrepresentation. The Defendant was advised and encouraged to correct and resubmit his application by either removing the items from the Association common area or obtain consent to use the area. (Giuliani Decl. ¶ 12, Exhibit C.)

    a. Defendant did not remove the items from the common area until November 2020. (Sequeira Decl. ¶¶ 21 - 23.)

3. The City issued multiple administrative citations for violations of the Property Maintenance Ordinance for maintaining an encroachment without a permit and creating a public nuisance. Defendant did not challenge those citations and they are now final. The first citation was issued on March 11, 2020, and the second on September 11, 2020. (Chadwick Decl. ¶ 3, Exhibits B and D.)

4. Defendant was given numerous extensions to amend and submit his multiple applications for a permit and encroachment agreement. The City conditioned the last extension upon compliance with various terms, including turning off the lights on his unpermitted light structure until he obtained his permit. Defendant violated that term. (Sequeira Decl. ¶¶ 8 – 11, 14 – 15, 17 - 23.)

After many months of Defendant's delay, on November 30, 2020, Defendant finally had removed all items from the common area and submitted a complete application with structural calculations stamped by a civil engineer. (Sequeira Decl. ¶ 23.) The City immediately commenced its review of his application. On December 7, 2020, after completing the review, the City denied the application for an encroachment agreement. (Sequeira Decl. ¶¶ 24 - 25.) The City

[2] The City is informed and believes that the Association is a "Homeowners Association." That is, the Association is an association of all owners of the condominiums located in the building where The Loft is located, and that The Loft is a member of the Association and that Association members have entered into an agreement regarding their use of the building, including in regards to the use of the common areas.

denied the application for a permit and encroachment agreement for the following reasons:

1. The engineer's calculations for the light trellis stated that it would need to be bolted to the sidewalk to be safe. The City's Outdoor Dining Sidewalk Table Policy 1.6 only permits structures that are not required to be affixed to the sidewalk. There is an exception to that rule for perimeter enclosures, but those structures are limited to 42" in height. The trellis affixed to his perimeter barrier is estimated to be no less than 10' tall (120"), which would violate the policy. As such the light trellis was found to be unsafe and violated the policy as constructed. (Sequeira Decl. ¶ 25, Exhibit S.)
2. The lights to be used as part of the sidewalk dining permit and encroachment agreement were found to be detrimental to the well-being of neighbors, which violates Policy 3 of the Outdoor Dining Sidewalk Table Policy. The City reached this conclusion after receiving numerous complaints from neighbors. (Sequeira Decl. ¶ 25, Exhibit S.)
3. Defendant violated the terms of an extension to submit his completed permit and encroachment agreement application late, which he was informed would nullify his application. The denial also noted that that the use permit for the outdoor operation prohibits outdoor lighting that disturbs the normal privacy and use of adjoining residences, which these lights did. (Sequeira Decl. ¶ 25, Exhibit S.)

The denial also informed Defendant that he could submit a new application; however, he would need to submit an application without the light trellis or overhead lights. (Sequeira Decl., Exhibit S.) To put it more clearly, Defendant could have obtained the encroachment agreement if he were to simply remove the light structure, a fact communicated to him on numerous occasions over the previous months. (Sequeira Decl. ¶¶ 6 - 25.)

Defendant timely filed an appeal of the denial of his application. (Upson Decl. ¶ 7; Giuliani Decl. ¶ 22.) The City provided the required hearing pursuant to the appeals procedure outlined in BMC chapter 1.44. The appeal was heard by the City Manager, as required by BMC section 1.44.100. The hearing took place on January 14, 2021, and on February 4, 2021, after consideration of Defendant's claims during the appeal and reviewing the record, in a detailed decision, the City Manager denied the appeal. (Upson Decl. ¶¶ 8 – 12, Exhibit E.) The decision and order detailed the factual history and the claims made by Defendant, and concluded with the following decision and order:

> As a result of the hearing, I have decided to uphold the decision to deny the Loft's application for a sidewalk dining tables encroachment agreement. In conjunction with that decision, I also make the following orders:
>
> 1. The Loft is ordered to remove all encroachments within the public right-of-way within 15 days of today, **February 19, 2021**. You continue to have an

existing permit to use the sidewalk area outside your business by placing and removing daily sidewalk tables and chairs in the designated sidewalk table area consistent with the Outdoor Dining Sidewalk Table Policy (adopted April 2, 2019). However, in order to continue using your existing permit, you were required to obtain an encroachment agreement by December 31, 2020, for the daily use consistent with the City's policy. Until you obtain any such agreement, your existing permit is suspended.

2. The Loft is ordered to pay outstanding administrative penalties in the amount of $18,300 plus interest on the citations ($1,500 accruing on March 11, 2020; $16,800 accruing on September 11, 2020).

At the appeal hearing, and on various occasions, Defendant claimed that the City's decision would close down his business. (See Upson Decl., Exhibit C (transcript, pg. 7 – 8, Exhibit F; Sequeira Decl., Exhibit T.) In an effort to address these concerns, accompanying the City's final administrative decision, the City Manager emailed Defendant an encroachment agreement that would be acceptable to the City that would allow Defendant to continue operating his business on the City's public right-of-way. (Upson Decl. ¶ 12, Exhibit E.)

Rather than accept the City's offer, Defendant wrote to Mr. Upson on February 8, 2021, expressing his disagreement with the decision and order, and informed Mr. Upson that he would not comply. (Upson Decl. ¶ 13, Exhibit F.) In addition to defying the decision and order, Defendant has not simply continued to operate, but has increased the encroachment by moving tables and chairs back onto the Association's common area, and turned on and used his light trellis, thereby markedly increasing his defiance of the City's final administrative decision. (Upson Decl. ¶ 15; Giuliani Decl. ¶ 24; Sequeira Decl. ¶ 28; Thorsen Decl. ¶ 13.)

III. ARGUMENT

A. DEFENDANT'S ONGOING UNPERMITTED ENCROACHMENT IS A NUISANCE *PER SE*.

1. LEGAL STANDARD

When deciding whether to issue a preliminary injunction, the Court evaluates two interrelated factors: (1) whether there is a reasonable likelihood that the City will prevail on the merits; and (2) the relative harm to the parties from the issuance or non-issuance of the injunction. (*IT Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) The general balancing test

for injunctive relief does not apply when a public entity is seeking relief based on statutory authority and courts do not engage in the traditional balancing of harms. (*IT Corp, supra*, 35 Cal.3d at 70.) A rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. (*IT Corp, supra*, 35 Cal.3d at 72.)

2. THE CITY WILL PREVAIL ON THE MERITS WHEN DEFENDANTS ACTIVITIES ARE A PUBLIC NUISANCE *PER SE*.

The California Constitution gives cities broad power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. XI, § 7.) The legislative "police power [of a city] under this provision . . . is as broad as the police power exercisable by the Legislature itself." (*Candid Enterprises, Inc. v. Grossmont Union High School District* (1985) 39 Cal.3d 878, 885 (citing *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140).) And when a legislative body expressly declares a specific activity or conduct, by its very existence, to be a nuisance, it is a "nuisance *per se*." (*Beck Development Co. v. Southern Pacific Transp. Co*. (1996) 44 Cal.App.4th 1160, 1206-07.) Unlike a general nuisance, which requires proof that the injury is substantial and unreasonable, a nuisance *per se* can be enjoined without proof beyond the actual fact of its existence. (*City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 379, 385.) The declaration of a nuisance is a legislature's policy ruling that the harm and effect on the community are such that the mere existence of the activity or conduct can be enjoined. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1107; *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93; *People v. Lim* (1941) 18 Cal.2d 872.) Accordingly, once an activity or conduct is declared a nuisance, the harmful effect is conclusively established and the only issues for a trial court's consideration are whether the statutory violation exists and whether the underlying statute is constitutionally valid. (*People ex rel. Dept. of Transp. v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1076.)

As discussed below, a statutory violation does exist and the underlying law is valid.

a. A STATUTORY VIOLATION EXISTS.

The City has declared that encroachments maintained without City authorization are a public nuisance under BMC chapter 12.12 (Encroachments), and are also a violation of the

Property Maintenance Ordinance under chapter 8.04 (Property Maintenance Ordinance). (See RJN Exhibits B and C.) As both violations have been declared a public nuisance, their existence equates to a public nuisance *per se*. First, the BMC section that addresses encroachments, Section 12.12.020, prohibits any person from encroaching on the public right-of-way without a permit or a permit agreement. (RJN, Exhibit C.) In addition BMC Section 12.12.150 allows the City to establish standards and specifications as necessary for the construction, use and maintenance of encroachments, and that any work done under an encroachment permit shall conform to such standards and specifications. (RJN, Exhibit C.) Section 12.12.300 of the Benicia Municipal Code establishes that "[a]ny encroachment erected, installed, maintained or constructed in violation of this chapter is hereby declared to be a public nuisance." (RJN, Exhibit C.) Here, Defendant never obtained the required permit agreement, as he failed to meet the standards and specifications required. As such, Defendant maintains an encroachment in violation of chapter 12.12, and such maintenance of an encroachment is a public nuisance pursuant to BMC section 12.12.300. (Sequeira Decl. ¶ 6; Chadwick ¶ 4; Exhibits A, B, and D.)

Second, the Property Maintenance Ordinance, codified at BMC chapter 8.04, governs property maintenance violations and describes various conditions of property which amount to a public nuisance. Section 8.04.030 of the BMC provides that, "…[i]t shall be unlawful and a public nuisance for any person owning, renting, leasing, occupying or having charge or possession of any real property in the city to maintain, or allow or permit others to maintain, such property…" in any of the numerous conditions listed in that chapter. (RJN, Exhibit B.) Among the listed conditions is BMC section 8.040.030 (N), which makes the following a violation: "…[o]bstruction or encroachment upon any public property including, but not limited to, any public street, sidewalk, highway, right-of-way, park or building, without a valid permit. Such obstructions or encroachments include, but are not limited to, overgrown trees and shrubs; building materials; merchandise or other personal property; and buildings or portions of buildings or structures protruding onto public property…." (RJN, Exhibit B.) Here, Defendant erected improvements on the right-of-way outside his business, and did so without authorization. (Sequeira Dec. ¶ 7.) As such, Defendant is in violation of BMC section 8.04.030(N).

Additionally, Defendant is in violation of BMC section 8.04.030 (CC), which makes the following a violation: "…[a]ny condition recognized in law or in equity as constituting a public nuisance, or any condition existing on property which constitutes visual blight, or is a health or safety hazard to the community or neighboring properties…." (RJN, Exhibit B.) Here, Defendant's encroachment has been determined a public nuisance pursuant to BMC section 12.12.300, since he is maintaining an encroachment in violation of Chapter 12.12. Due to that public nuisance, Defendant's property is in violation of the Property Maintenance Ordinance, BMC section 8.04.030(CC). (Chadwick Decl. ¶ 4, Exhibits A, B, and D.)

Section 8.04.050 of the BMC establishes that any violations of the Property Maintenance Ordinance are a public nuisance and subject to abatement. (RJN, Exhibit B.) The City issued its final decision that Defendant's improvements are unlawful encroachments within the public right-of-way under the City's Municipal Code. (Upson Decl. ¶ 10, Exhibit D.) This decision was never challenged, but even if it was, the City's interpretation of its Municipal Code is entitled to deference. (*City of Monterey v. Carrnshimba* (2013) 215 Cal. App. 4th 1068, 1091.) Therefore, Defendants actions are a nuisance *per se*. Given that Defendant never filed any mandamus action challenging the City's final administrative decision, Defendant cannot rebut that a public nuisance per se exists. (*City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 719; *Manderson-Saleh v. Regents of University of California* (Cal.App. 4 Dist. 2021) (Under the Judicial Exhaustion doctrine, a party is barred from contradicting a fact found by an administrative tribunal unless it has first successfully challenged the administrative determination by a writ of mandamus); *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243 (Unless writ review is sought, an administrative hearing adjudication binds the parties on the issues litigated).)

However, even if given the chance to challenge the final administrative decision, Defendant would be unable to refute that a violation exists.

b. DEFENDANT CANNOT SHOW THE EXISTENCE OF A PERMIT AND ENCROACHMENT AGREEMENT.

Defendant may argue that because he had an existing permit he was not required to obtain an encroachment agreement. However, Resolution 19-32 flatly rejects this argument, stating that

existing permittees were required to obtain an encroachment agreement by December 31, 2020. (RJN, Exhibit 5.) Therefore, Defendant's dining area located within the City's public right-of-way without an encroachment agreement is a nuisance *per se*.

Allowing Defendant's unpermitted nuisance violates the policy that spurred the City to allow in certain circumstances outdoor dining. Outdoor Sidewalk Dining Policy, Policy 4, provides that the Sidewalk Table Policy is to "[e]nsure that Sidewalk Table Permits are issued in a manner that is consistent with this policy and do not expose the City to undue liability or create health and safety risks to the City and public at large." (RJN, Exhibit E (attachment to Resolution).) Allowing structures to be built on the City's main pedestrian public right-of-way without City approval or any oversight would lead to increased exposure to liability and create health and safety risks both for members of the public passing the unpermitted structure and for those dining under the illegal structure. In fact, that is the chief reason Defendant's application was denied. (Sequeira Decl. ¶ 25(a), Exhibit S.) Defendant's own engineer determined that in order to make the light trellis safe, Defendant must anchor the structure into the sidewalk, in violation of the Sidewalk Table Policy 1.6. (Sequeira Decl. ¶¶ 23, 25(a).)

Finally, the City's Municipal Code regulating encroachments is grounded in well-established law that cities have the ability to decide what to allow in its public right-of-way. (See, e.g., *Laura Vincent Co. v. City of Selma* (1941) 43 Cal.App.2d 473, 476, 476 ("A city council has broad general powers with respect to maintaining streets and sidewalk for the use of the public, prohibiting and preventing encroachments upon or obstructions in or to such sidewalks and streets, and providing for the removal of any such obstructions.").)

As such, the City properly exercised its police power with permitting in limited circumstances use of the right-of-way by private businesses.

3. DEFENDANTS CANNOT OVERCOME THE REBUTTABLE PRESUMPTION THAT THE HARM TO THE CITY AND THE PUBLIC OUTWEIGHS ANY HARM TO DEFENDANT'S INTERESTS.

This Court must presume that the City will be harmed if an injunction does not issue. When a public entity seeks to enjoin the violation of an ordinance which provides for injunctive

relief, and establishes that it is reasonably likely to prevail on the merits, a rebuttable presumption exists that the potential harm to the public outweighs the potential harm to the defendants. (*IT. Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.) Only "(i)f the defendant shows that it would suffer **grave or irreparable harm** from the issuance of the preliminary injunction, [must] the court examine the relative harm to the parties." (*Id.* (Emphasis added).)

Here, Defendant cannot show any grave or irreparable harm from the issuance of the preliminary injunction. Defendant may argue that issuing this injunction will harm his business to the point of closing him down. The City disputes that Defendant's harm has reached such a dramatic point, in particular because the City has gone out of its way to offer alternatives to Defendant to allow outdoor dining if he merely took down the offending structure. (Upson Decl. ¶ 12, Exhibit E; Sequeira Decl., Exhibits H and L.) Additionally, Defendant was able to successfully operate without such an encroachment from 2012 until he unlawfully erected the encroachment in April 2019. (Giuliani Decl. ¶ 3.) Thus, Defendant's prior successful operation of his business for 7 years demonstrates he does not face any grave or irreparable harm caused by the issuance of a preliminary injunction.

Further, ordering Defendant to remove the encroachment will not interfere with any legitimate interest, as the encroachment is not on Defendant's property, but on the public's. That is, the public is the one harmed. Defendant is requesting the *privilege* to use the public right-of-way. Despite his statements to date, he has no property right to use the public right-of-way. He suffers no grave or irreparable harm from taking public space for his own private financial gain, and doing so in a manner his own civil engineer deemed unsafe. (Sequeira Decl. ¶ 25.)

The balancing test required is balancing the potential harm to the public against the potential harm to Defendant. (*IT Corp. v. County of Imperial*, supra, 35 Cal.3d 63, 72.) In this case, Defendant is obstructing the public right-of-way in an unsafe manner. By making the public sidewalk more unsafe, the public suffers a substantial harm. It should be noted that this encroachment is not in an obscure part of the City, but rather in the heart of First Street, and is along one of the most heavily trafficked areas in the entire City. (Sequeira Decl. ¶ 6.) Weighing against this substantial harm to the public is a Defendant taking the public space for his own use to offer expanded restaurant service. But Defendant is not prohibited from serving patrons

whether or not the injunction is issued, the only impact is on where he may serve them. Balancing the harm against each other, the harm clearly weighs on the side of the public who is subjected to an unsafe structure, and the loss of its public space. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1348 (blocking a public sidewalk constitutes a public nuisance per se); (*Ex parte Taylor* (1890) 87 Cal. 91, 94 (streets include sidewalks, as well as the road-way, and that the obstruction of a sidewalk is a public nuisance); (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, (violation of municipal ordinance which prohibited converting off-street residential parking facilities to other uses created a public nuisance); (*City of Stockton v. Frisbie & Latta* (1928) 93 Cal.App. 277 (city may enforce police regulations by injunction, where personal welfare and property rights of large number of inhabitants would be detrimentally affected by violation of ordinance).)

In addition to the physical encroachment, Defendant's light trellis creates harm to the neighbors when the lights are turned on. These lights are multicolored and flashing and due to their location reflect on the residences just above The Loft. (Upson Decl., Exhibit D (see Exhibit 3.) This ongoing annoyance has been reported to the City on various occasions. Defendant's use of the lights violates Sidewalk Table Permit Policy No. 3, that seek to "ensure that the use of sidewalk tables is compatible with the downtown area, and that they do not create conditions detrimental to the well being of business, customers, and residents of the downtown." (Sequeira Decl. ¶ 25(b), Exhibit S; Thorsen Decl. ¶ 13.) Here, due to the annoyance caused by the lights on the residents who live above, The Loft's sidewalk dining is detrimental to residents of the downtown. Even if the lights structure was found safe, it was being used in a manner that was detrimental to the residents downtown in violation of the policy. (Upson Decl. ¶ 10, Exhibit D; Sequeira Decl.¶ 25(b).)

Even if Defendant's business suffers harm, any such harm is Defendant's own making. Defendant has elected not to meet the requirements as explained to him over the previous 19 months which would have resulted in the approving of an encroachment agreement. In addition, the City provided Defendant the option to continue to operate his outdoor dining, but he rejected that option. (Upson Decl. ¶¶ 12 – 13, Exhibit E and F.) Any injunction is not shutting Defendant's business down, and if there is harm, it is solely of Defendant's own making. The

Defendant cannot overcome the rebuttable presumption of harm and must be made to comply otherwise it is the public who is put at risk.

Finally, no bond or undertaking is required of the City, as public entities are exempt from such requirement. (Code Civ. Proc. § 529(b)(3); *City of South San Francisco v. Cypress Lawn Cemetery Ass'n* (1992) 11 Cal.App.4th 916, 921-922.)

IV. CONCLUSION

As the unrefuted evidence shows, Defendant continues to illegally encroach on the public right-of-way in complete disregard to the City's laws, in a manner that his own engineer has stated is a detriment to the public, and ignore the well-being of neighboring residents. The City requests that this Court issue the requested Preliminary Injunction to address Defendant's blatant Municipal Code violations.

Dated: April 7, 2021

BURKE, WILLIAMS & SORENSEN, LLP

By: _____

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