



June 10, 2021 – FACT SHEET

## City of Benicia Seeks Relief From Superior Court to Ensure Safety of Patrons and Public From Unlawful Encroachment on Public Sidewalk

### Superior Court Hearing Set for June 16, 2021

- In 1992, the City of Benicia City Council approved the Sidewalk Tables Policies and Standards, allowing downtown businesses to obtain a permit to place furniture on the sidewalk outside their business. In April 2019, the City Council revised the Policy, and authorized permittees, subject to an encroachment agreement, to establish a perimeter barrier around their business.
- The Loft Wine Bar & Restaurant obtained a Sidewalk Tables Permit in 2012. Once the Council updated the policy, the Loft began installing a perimeter barrier around the sidewalk tables' area but did so without having obtained an encroachment agreement.
- Between April and December 2019 the City informed the Loft on multiple occasions that an encroachment agreement was required. The Loft submitted an application for an encroachment agreement, but it was not approved, as various corrections were needed, including proof of the safety of a light trellis. In December 2019, the City learned that the perimeter barrier was placed on the common area of the Harborwalk Benicia Corporations ("Association") property without permission. The City directed the Loft to submit a corrected application. The Loft failed to correct their application and the City issued administrative citations in March and September 2020 for encroaching on city property without a permit and encroachment agreement.
- The Loft attempted to correct their application, but they were repeatedly found deficient for failure to demonstrate safety of the light trellis, and presence of items in the Association common area. In the interest of trying to assist the Loft obtain its permit, the City provided numerous extensions to submit an application. The Loft, however, continued to violate the terms of the extension. By November 30, 2020, the Loft submitted a completed application and on December 7, 2020, the City denied the application, stating the light trellis was not safe, the lights were detrimental to the well-being of neighbors, and noted the Loft violated the terms of the extension to submit the application.
- On January 14, 2021, the City held a hearing to consider the appeal of the denial of an application for a sidewalk dining permit and encroachment agreement related to the business known as the Loft Wine Bar, located at 280 First Street in Benicia. The appeal was denied.
- After the denial of the appeal the City ordered The Loft to remove all encroachments within the public right of way within 15 days by February 19, 2021 and pay all outstanding fines. The City **WILL ALLOW** the Loft to continue to provide outdoor dining to its patrons. To continue to utilize the City sidewalk for table service, the Loft need only sign an encroachment agreement, which was provided to Mr. Diavatis, and submit the requested insurance forms.
- On February 28, 2021 after Mr. Diavatis failed to comply with the City Order, the City of Benicia filed a compliant for Preliminary and Permanent Injunction to Abate a Public Nuisance with the Superior Court of the State of California. The Hearing on Motion for Preliminary Injunction is set for June 16, 2021.
- On Wednesday, April 14, 2021 Mr. Diavitis was served with the Court pleadings and motion.
- On Thursday, April 15, 2021 Mr. Diavits contacted City staff to seek a settlement with the City of Benicia. City staff, the City Manager and City Attorney through the Deputy City Manager conveyed to Mr. Diavatis key deal points that Staff would take to the City Council for their consideration.

- On Thursday, April 22, 2021 the City Council met in Closed Session and directed staff to proceed with a proposed settlement that consisted of the following:
  1. Enter into a Stipulated Judgement approved and signed by the Court that would specify in detail the limits of your encroachment agreement, and require you to comply with the Executed Agreement and your Conditional Use Permit (CUP).
  2. Require you to remove your light posts and all items that exceed 42 inches above the ground by Friday, May 7<sup>th</sup>, this will be clearly delineated in the Executed Encroachment Agreement.
  3. The City would agree to put in abeyance all fines (approximately \$18,000) and Attorney Fees and costs, (approximately \$40,000 to date) for a period of 3 years. This means so long as you adhere to the Encroachment Agreement, your existing CUP and Stipulated Judgement you would not pay ANY Fines or Fees.
- On Monday, April 26, 2021 Mr. Diavatis countered the City's settlement offer with a wholly inadequate response, effectively rejecting the City's offer to settle.

### **Contentions Made by Mr. Diavitis during his Appeal and City's Response:**

- **Contention 1: The City had notice of Mr. Diavatis' intent to encroach, approved of his ongoing encroachment, and he complied with all requirements**

**Findings on Appeal:** The Loft was informed on multiple occasions an encroachment agreement was required and that it would be required to demonstrate safety. The City's election to work with Mr. Diavatis in legalizing the unpermitted encroachment did not mean that Mr. Diavatis had obtained ongoing permission to encroach without actual approval. The Loft did not meet all requirements, and the request to encroach on the City's property was properly denied.

- **Contention 2: The encroachment is safe.**

**Findings on Appeal:** The Loft hired a civil engineer to evaluate the structure who concluded that the structure would be safe if it were bolted to the sidewalk. Sidewalk Table Policy 1.6 prohibits furniture to be bolted to the sidewalk. The City properly denied the application.

- **Contention 3: Harm due to incurred cost.**

**Findings on Appeal:** The Loft proceeded to construct the barrier with full knowledge that it may be required to expend money to take corrective actions to gain approval. The City repeatedly provided paths to approve the encroachment agreement, which the Loft elected not to follow. The Loft proceeded rather than asking the City to complete its review was a risk the Loft elected to take on its own.