

Recording Requested By:
City of Benicia

When Recorded Return To:
City Engineer
City of Benicia
250 East L Street
Benicia, CA 94510

SPACE ABOVE THIS LINE FOR RECORDER'S USE

CONTRACT # _____ - _____

(Exempt from recording fees pursuant to Government Code Sections 6103 and 27383.)

ENCROACHMENT AGREEMENT AND PERMIT

THIS AGREEMENT and permit are granted and entered into, respectively, on this ___ day of February, 2021, by and between the City of Benicia (hereinafter "**City**"), and Jason Diavatis and their successors (hereinafter collectively referred to as "**Permittee**") regarding that certain real property located at 280 First Street, Benicia, CA (APN 0080400160) ("**Property**").

AGREEMENT

For the following considerations, covenants, promises and conditions, the parties agree as follows:

1. Pursuant to Benicia Municipal Code Chapter 12.12 "Encroachments," City grants Permittee permission to place and maintain the following objects in and on the following described public right-of-way (hereinafter "right-of-way") under the terms hereof and for the following period of time.

(a) Permitted sidewalk dining permit furniture to be temporarily placed and maintained in the public right-of-way (Encroachment Area), as further depicted in Exhibit "A", attached hereto and made a part hereof during city-approved business hours:

Outdoor dining tables and chairs.

(b) Period of time during which the permission herein granted is effective:

Indefinitely unless: (1) terminated pursuant to Section 3 of this Agreement, (2) there is a change of business ownership, or (3) the underlying entitlements and permits for the outdoor dining, including a sidewalk dining table permit have been revoked, expired, or otherwise rendered null and void.

(c) The real property is depicted on the map attached hereto as Exhibit "B" and incorporated by reference.

2. The full terms and conditions under which this Encroachment Permit is issued are set forth below, and as further set forth in Chapter 12.12 of the Benicia Municipal Code, which terms Permittee hereby specifically acknowledges and agrees to.

(a) Permittee further acknowledges and represents that Permittee shall not encroach on the "HOA Property" or, "HOA Common Area" as more specifically depicted in Exhibit "A".

3. The City reserves the right to order the removal or relocation of the objects listed in paragraph 1 at Permittee's cost in the event same is required by the City. Whether or not said removal or relocation is required shall be left to the unfettered discretion of the City. Permittee hereby grants to the City the right to remove or relocate said objects and to come upon Permittee's land (described in Exhibit "C" attached hereto) to effect said removal or relocation if deemed necessary by the City. Permittee waives any claim or right he/she/it may have for inverse condemnation, damages, or loss of income or business resulting from said removal. Upon removal or relocation of said objects, all rights of Permittee under this agreement and the permit itself shall terminate.

4. Permittee shall acknowledge that as of the recording date of this document, Permittee shall be aware of all zoning regulations, governmental requirements, site and physical conditions (including sub-surface conditions), Pacific Gas & Electric requirements for access to its existing subsurface utility vault as depicted on Exhibit A, and other matters affecting the use and condition of the right-of-way.

5. All work performed by Permittee or at the behest of Permittee in said right- of-way shall be in accordance with the Benicia Municipal Code and all other applicable codes, rules, regulations and laws of the City of Benicia, the State of California and/or the federal government.

6. Permittee shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with this Agreement. The cost of such insurance shall be borne by Permittee.

6.1 Minimum Scope of Insurance. Coverage shall be 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 Permittees with employees).

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

6.2 Minimum Limits of Insurance.

Permittee 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.

6.3 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 Permittee shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

6.4 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 Permittee.

(b) The Permittee'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 Permittee'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.

6.5 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.

6.6 Verification of Coverage.

Permittee shall furnish the City with original certificates and amendatory endorsements effecting coverage required by this clause. The endorsements should be on forms provided by the City or on other than the City's forms, provided those endorsements or policies conform to the requirements. All certificates and endorsements are to be received and approved by the City before work commences. The City reserves the right to require complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by this Agreement at any time.

7. Any notice, demand, request, consent, approval, or communications that either party desires or is required to give to the other shall be in writing and be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Permittee: Jason Diavatis
280 First Street
Benicia, CA 94510

To City: City of Benicia
City Manager
250 East L Street
Benicia, CA 94510

8. To the fullest extent permitted by law, Permittee hereby agrees to indemnify, release, defend, and shall hold the City, its elective and appointed boards, commissions, officers, agents, and employees ("indemnitees"), harmless from any liability, claims, actions, damages, including attorney's fees, for personal injury, including death, or for property damage, inverse condemnation and/or nuisance brought by any person, including Permittee, which may arise out of or in any way be connected with defects in, damage to, the quality of, the construction of, the maintenance of and/or the condition of the right-of-way and/or improvements or objects located thereon. The aforesaid hold harmless and indemnification obligation shall apply to all damages and claims for damages of every kind, suffered, or alleged to have been suffered, by reason of any of the aforesaid events, regardless of whether or not City has prepared, supplied, or approved of plans submitted in connection with work to be performed or objects to be placed in said right-of-way and irrespective of the grant of permission contained herein and irrespective of City's inspection of the works performed, the improvements constructed, or objects placed within said right-of-way. Said indemnification and hold harmless obligation shall not include damages, liabilities and/or claims arising out of or caused by the City's sole negligence or willful misconduct, but shall include liabilities, claims and/or damages arising out of City's passive or partial negligence.

9. This instrument shall bind and inure to the benefit of the respective heirs, personal representatives, successors and assigns of the parties hereto.

10. 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.

11. In the event of any controversy, claim or dispute relation to this instrument, the breach thereof or the performance thereunder, the prevailing party shall be entitled to recover from the losing party reasonable expenses, attorney's fees and costs.

12. Invalidity of any one of these covenants by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect.

13. Time is of the essence to each and every provision hereof.

14. Permittee represents and warrants that he/she/it enjoys full fee title interest in the real property described in Exhibit "C" and that he/she/it has full authority and the right to enter into this agreement and encumber the real property described in Exhibit "C" as aforesaid.

15. Permittee warrants and represents that he/she/it has consulted with legal counsel and has been informed of and understands the legal implications of executing this document and with that knowledge voluntarily and willfully consent executes same.

[SIGNATURES ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the undersigned execute this agreement on the date first written above.

PERMITTEE

CITY OF BENICIA
A Municipal Corporation

BY: _____

BY: _____
CITY MANAGER

Title: _____

Dated: _____

Dated: _____

APPROVED AS TO FORM:

CITY ATTORNEY

(Attach Notary Acknowledgment)

Attachments: Exhibit A: Depiction of Encroachment Area
Exhibit B: Map
Exhibit C: Real Property Description

Exhibit A

Depiction of Encroachment Area

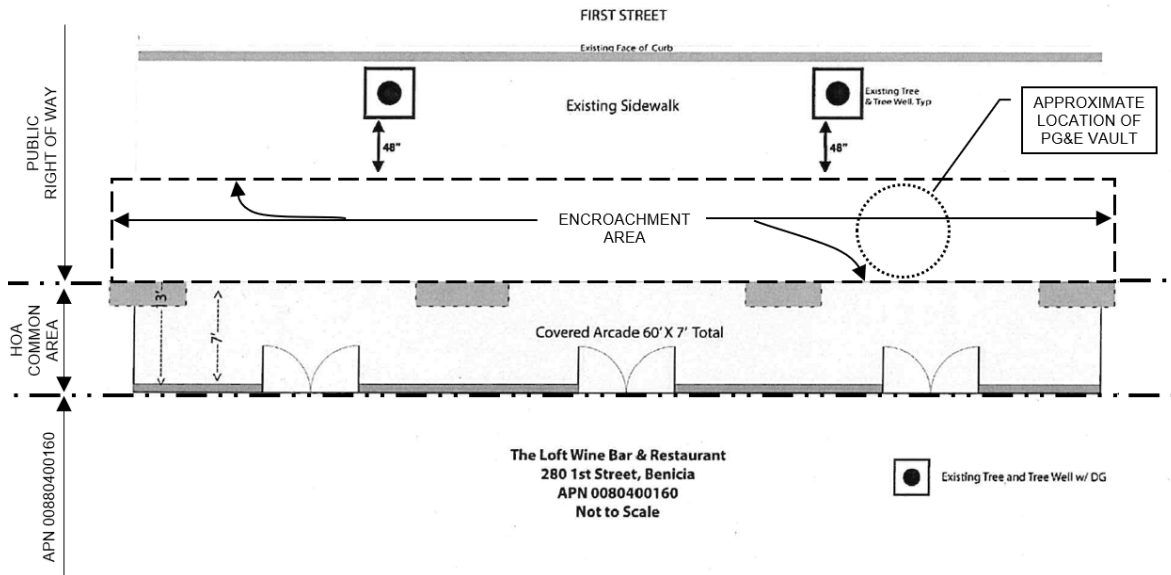


Exhibit B
Map



Exhibit C
Real Property Description

The real property commonly known as 280 First Street in Benicia, and described more particularly as:

**Unit Number 40 of Condominium Plans for Harbor Walk Subdivision
Consisting of 36 Residential Units and 4 Commercial as provided for
in Exhibit A of the Harbor Walk Declaration of Restrictions (CC&Rs)
filed August 31, 2005 (Document Number 200500133157), Solano
County Records (the “Property”).**