

I. Pop-Up Patio Program: Terms and Conditions

By applying to the Pop-up Patio Program (“Program”), Applicant agrees and shall comply with all terms and conditions included in this Program Guide and any related permit issued by the City of Dayton (“City”), including the terms and conditions detailed herein.

Each Permittee agrees and shall abide by the following standard terms and conditions:

1. Definitions.

- a. “Program” refers to the Pop-Up Patio Program, which allows the City case-by-case authority to permit proprietors temporary privilege to expand customer service operations into public rights-of-way via a Pop-Up Patio permit issued by the Engineering Division or on private property via a zoning certificate issued by the Zoning Administrator.
- b. “Program area” includes property used for the Program, including public rights-of-way for customer service areas and private, outdoor customer service areas.
- c. “Permittee” includes applicants receiving permission to establish outdoor dining area (“Permittee”) through the Pop-Up Patio Program.

2. City Discretion.

Applicant agrees and acknowledges that the City Manager, or his or her designee, retains full authority and the sole discretion to grant, deny, and revoke temporary permits under this Program. This includes the authority to condition or revoke approvals deemed to have been improvidently granted or inappropriate in light of new information or changed circumstances. In addition, the City Manager, or his or her designee, may impose conditions on new or existing approvals in order to promote the public health, safety, and welfare and to mitigate adverse impacts that have arisen or may arise in connection with a new or expanded outdoor dining area or outdoor customer service area approved under this Program.

3. Modification, Termination or Revocation.

The Program is subject to modification or termination at the City’s sole discretion. The City may modify or supplement the Program from time to time in order to protect and promote the public health, safety, and welfare. Further, the City may, in its sole discretion, limit, reduce, or revoke any permit issued that presents health, safety, or traffic circulation concerns. The City shall have the right to revoke or alter, at its sole discretion, the Program and Permittee’s participation therein, upon providing written notice to Permittee.

4. Obligation to Remove Encroachment.

Within 14-days of permit revocation or termination, unless otherwise agreed to by the City, Permittee shall remove the encroachment and restore the public right-of-way to a condition that is acceptable to the City. If Permittee fails to timely remove the encroachment and restore the public right-of-way as required under the Program, the City may do so at Permittee’s expense. Private property shall be restored to prior condition.

All obligations of Permittee hereunder that have accrued but have not been fully performed as of the effective date of the termination of Program participation shall survive such termination until fully performed.

- 5. Property Transfer or Change of Business.** Upon Permittee's sale, transfer, or termination of its business, Program participation shall automatically terminate. Program participation is personal to Permittee, shall not inure to the benefit of Permittee's successors-in-interest with respect to Permittee's property, and shall not be recorded in the public records. Permittee shall provide the City thirty (30) days' prior written notice of its intent to close on the sale or transfer of Permittee's property. Program participation may take effect for transferee upon closing, if prior to closing the City grants permission and transferee accepts. Except with such agreement between City and transferee, Permittee shall restore the public right-of-way to an acceptable condition to the City. Private property shall be restored to prior condition.
- 6. Maintenance of Program Area.** Following the Permittee's establishment, operation, or expansion of Program area, Permittee shall maintain the area in good, clean, and safe condition and repair and in accordance with applicable City, State, and Federal rules and regulations. If the City determines that the Program poses a hazardous condition, has caused damage to City property, or is otherwise not being properly maintained, the City may revoke permit or require Permittee to immediately take such action as is necessary to rectify the situation to the City's satisfaction. If Permittee fails to correct the identified hazardous condition, improper maintenance, damage, or other problem caused by the Program, the City may correct it; whereupon Permittee shall pay all costs incurred by the City, together with interest thereon from the date that the City pays or incurs such costs at a reasonable rate of interest determined by the City, within thirty (30) days after the City's written demand.
- 7. Expenses.** All expenses associated with the Permittee's establishment and operation of the Program shall be borne by Permittee. The City shall not be responsible for any costs associated with the Program, including, but not limited to, establishment, operation, or dismantling Program-associated structures.
- 8. Adjacent Properties.** Permittee shall undertake all reasonable efforts to avoid undue adverse impacts to and/or uses of adjacent properties that may arise from Program construction, operation, modification, or removal. Applicant shall be responsible for coordinating permissions required from neighboring operators affected by Program participation.
- 9. Appeals.** Anyone who wishes to challenge Program approval or denial may seek reconsideration by the City Manager or his or her designee by submitting the challenge the approval or denial via email at carl.daugherty@daytonohio.gov for questions related to zoning certificates and private property installations or joe.weinel@daytonohio.gov for questions related to pop-up patio permits and public rights-of-way installations. This shall be the exclusive means of appealing any approvals granted or revoked under this Program. The City Manager or

designee shall have the sole discretion to approve or reject a challenge, but such determination shall consider application requirements, Program guidelines, and public health, safety, and welfare needs.

- 10. Compliance with all applicable laws.** The Permittee shall comply and further shall cause its employees, agents, guests, invitees, and contractors to comply with these terms and conditions and any other rules or regulations established by the City concerning the Program. Permittee shall at all times maintain compliance with all applicable federal, state and local laws, regulations, ordinances, or other rules, including and emergency orders. This Program does not supersede applicable building codes, health codes, accessibility laws, or other laws, rules, or regulations, including food service and liquor service compliance laws.
- 11. Accessibility.** Program participation conditioned on maintenance of accessible conditions in areas to, from, and within the Program area, including public rights of way. Permittee shall maintain a minimum path of travel of at least 48” in width at all points adjacent to and within the Program area, which area shall be permitted to be narrowed due to existing fixtures (e.g., light posts, fire hydrants, and other fixtures), but in no case shall be narrower than 36” for a length of more than two feet.
- 12. Waiver of Claims for Damage.** The City shall have no responsibility or liability for theft, loss, or damage to any person or property associated with the Program or in the Program area, including without limitation damage caused by the general public, trespassers, graffiti, thrown objects, wind, hail, fire, or other casualty, no matter how such damage is caused. As a material inducement to the City to grant this outdoor customer service area privilege, Permittee hereby waives, as against the City and its elected officials, officers, employees, agents, guests, invitees, and contractors, all claims and liability, and on behalf of Permittee’s insurers, rights of subrogation, with respect to property damaged or destroyed by fire or other casualty or any other cause, no matter how caused.
- 13. Insurance.** During Permittee’s participation in the Program, Permittee shall maintain a policy of General Liability insurance with respect to the Program area in an amount not less than One Million Dollars per occurrence, combined single limit, naming the City as an additional insured. Permittee shall furnish to the City a certificate of insurance evidencing such insurance prior to establishing Permittee’s Program Area, unless otherwise authorized by the City.
- 14. Indemnification.** Permittee shall indemnify, defend, and save the City, its elected officials, officers, employees, agents, and contractors harmless from and against any and all losses, damages, settlements, costs, charges professional fees, and other expenses and liabilities of every kind and character (including without-limitation attorney fees) arising out of or related to any and all claims, liens, demands, obligations, actions, proceedings, or causes of action of every kind and character in connection with Permittee’s Program participation. Indemnification includes without limitation any of the foregoing that may arise or be claimed with respect to any death, personal injury, or loss of or damage to property on or about

public rights-of-way. Permittee shall assume the defense (with counsel acceptable to the City) and settlement of any and all such suits or other legal proceedings brought against the City and shall pay all judgments entered in such suits or other legal proceedings. The assumption of liability and indemnity obligations of Permittee under this outdoor customer service area privilege shall survive the termination of this Program with respect to matters arising prior thereto.

- 15. Governing Law.** This Permit is governed and construed under the laws of the State of Ohio, without giving effect to choice-of-law provisions. By execution hereof, Permittee irrevocably submits to the original jurisdiction of the courts located within the County of Montgomery, State of Ohio, with regard to any controversy arising out of, relating to, or in any way concerning the execution or performance of this Permit.

II. Pop-Up Patio Program and Public Rights-of-Way

- 1. Establishment of Outdoor Customer Service Area.** Licensees are permitted to use the public right-of-way for outdoor dining and other approved purposes, and the Program permit allows no additional permissions, including, but not limited to, food storage and preparation, unless specifically approved by the City as part of the Permittee's plans.
- 2. Temporary License Restrictions.** Applicant acknowledges that Program permits on a public right-of-way issued by the City shall be a revocable, temporary license permitting the applicant to operate a temporary outdoor dining area or customer service area. Any permit issued creates no other property interest than a revocable license. This Program or any permit issued does not create a private right to occupy the public right-of-way or diminish the City Manager's, or his or her designee, authority to oversee and manage the use of the public right-of-way in the City's best interests.
In establishing, maintaining, or dismantling the Program, Permittee shall not modify, alter, or demolish existing curbs, sidewalks, streets, or other encroachments within or near the public right-of-way or attach furniture or other fixtures using fasteners, adhesives, or other invasive means, unless specifically approved by the City as part of the City's approval of Permittee's plans.
- 3. City's Right to Enter Property.** Permittee acknowledges that the City and its authorized representatives have the unlimited right to enter upon the public right-of-way at any time for any purpose, including without limitation to inspect the public right-of-way and Program compliance; provided, however, the City shall have no duty to inspect.
- 4. Rights of Utility Companies.** All rights herein granted to Permittee on the Program Area are subject and subordinate to the rights of any and all utility companies that may now or hereafter have utility lines and/or other utility installations within the public right-of-way. Permittee shall not alter, relocate, or otherwise interfere with such utility lines and installations and shall not do anything that will impair such utility companies' right to enter upon the public

right-of-way from time to time for all purposes associated with the operation, maintenance, repair, replacement or removal of such utility lines and installations. Permittee shall ensure that such utility companies have continued access to the subject area, 24 hours per day, 7 days per week, 52 weeks per year.

III. Pop-Up Patio Program and Private Property

- 1. General Terms and Conditions.** Applicant acknowledges and agrees that any approval to operate new or expanded temporary outdoor customer service areas under this Program will indicate the duration of approval and confirm that legal nonconforming status is not conferred upon the affected property beyond the period of approval. In addition, applicant acknowledges and agrees that approval may be rescinded if the affected property is not operated in compliance with applicable conditions of approval, e.g. if outdoor entertainment is being utilized, spacing requirements are not met, or permitted occupancy is exceeded. Applicant acknowledges and agree that approvals granted under this Program are not building permits or zoning permits.
- 5. Establishment of Program Area.** Permission to establish or expand Program Area does not authorize the Permittee to physically modify, alter, or demolish existing structures and site improvements or to erect new structures or site improvements; provided, however, Permittees may install temporary barriers or separations, re-stripe parking lots, and make use of temporary ramps to ensure accessibility, and otherwise accommodate the establishment or expansion of Program areas. The construction, modification, alteration, and demolition of structures and site improvements will typically require the issuance of a building permit, and the Permittee is encouraged to work with the City to determine if certain improvements will require a building permit.
- 2. Personal Privilege; No Transfer; No Nonconforming Use.** Program participation is personal to Permittee and it may not be transferred without the express prior written consent of the City. In addition, this privilege shall not run with the land and shall not be recorded in the public records. Permittee acknowledges and agrees that the privilege extended under the Program shall not have the effect of conferring legal nonconforming status on the Program Area. Permittee shall provide the City thirty (30) days' prior written notice of its intent to cease operation or transfer its business operations to another operator.
- 3. City's Right to Enter Upon Property.** Permittee authorizes the City and its authorized representatives to enter its Program area during normal operating hours in order to inspect the area and confirm Program compliance; provided, however, the City shall have no duty to inspect.