

**Sidewalk Cafés Sidewalk and Street Cafés
Proposed Ordinance By: Danielle Vols**

I. INTRODUCTION: THE NEED FOR ORDINANCE PERMITTING TEMPORARY OBSTRUCTION AND CLOSURE OF THE PUBLIC RIGHT-OF-WAY

The ongoing outbreak of the respiratory disease Coronavirus Disease (COVID-19), has taken the world by storm.¹ On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic.² In response to the pandemic, many state governors, including Pennsylvania’s Governor Tom Wolf, declared a state of emergency.³ This emergency declaration required social distancing, masking, and other mitigation measures to be employed to protect workers and patrons of businesses.⁴ It had been advised that individuals practice social distance by keeping at least 6 feet apart.⁵ As a result of the emergency order all nonlife sustaining businesses were forced to temporarily close.⁶ When nonlife sustaining businesses were permitted to reopen they were limited.⁷ In order to maintain social distancing guidelines; occupancy of indoor restaurant dining was limited to 25% of stated fire code maximum occupancy for indoor dining.⁸

¹ Anthony S. Fauci, H. Clifford Lane & Robert R. Redfield, Covid-19 - Navigating the Uncharted(2020), <https://www.nejm.org/doi/full/10.1056/nejme2002387> (last visited Sep 22, 2020).

² *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19--11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://perma.cc/U22L-B6WB>.

³ Governor Wolf, Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures, (July 15, 2020) <https://www.governor.pa.gov/wp-content/uploads/2020/07/20200715-TWW-targeted-mitigation-order.pdf>

⁴ *Id.*

⁵ *Id.*

⁶ Governor Tom Wolf, All Non-Life-Sustaining Business in Pennsylvania to Close Physical Locations <https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/> (last visited Sep 22, 2020)

⁷ *Id.*

⁸ Alexander Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, Harvard Business School, [https://www.hbs.edu/faculty/Publication Files/20-102_1c8a5b54-d400-4a8d-b136-d6890cf876dd.pdf](https://www.hbs.edu/faculty/Publication%20Files/20-102_1c8a5b54-d400-4a8d-b136-d6890cf876dd.pdf) (last visited Sep 24, 2020).

Small businesses employ approximately fifty percent of American workers.⁹ The restaurants are particularly vulnerable to the impacts of coronavirus.¹⁰ Businesses that embrace sustainability in their core strengths are better equipped to understand the impact their presence has on communities, ecosystems, consumers, and business partners.¹¹ According to experts, all the ground work that has been done in the past decade and before, has helped businesses be more resilient in the face of COVID-19 crisis, with sustainability becoming more indispensable to business in the process.¹² Businesses with sustainability in their business plans and core concepts are prepared to respond more quickly when problems arise.¹³

The unique nature of the COVID-19 crisis poses a new set of challenges for US small businesses as they claw their way toward recovery.¹⁴ For restaurants, capacity is a particular issue.¹⁵ In response, many municipalities have been allowed businesses to set up tables on sidewalks and public areas.¹⁶ One way this was achieved was by municipalities enacted ordinances to permit this process.

Enacting ordinances that permit outdoor business activity is essential for the future, not just during this pandemic. Outdoor business activities provide a unique character to the experience. This unique experience will draw the attention of more patrons and in turn stimulate

⁹ Donald Eubank, What we've learned from how sustainability and sustainable companies have weathered the Covid-19 crisis Eco-Business.com (2020), <https://www.eco-business.com/opinion/what-weve-learned-from-how-sustainability-and-sustainable-companies-have-weathered-the-covid-19-crisis/> (last visited Sep 22, 2020)

¹⁰ Bartik, *supra* note 8

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Andre Dua et al., US small-business recovery after the COVID-19 crisis McKinsey & Company (2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/us-small-business-recovery-after-the-covid-19-crisis> (last visited Nov 19, 2020).

¹⁵ *Id.*

¹⁶ *Id.*

the local economy.¹⁷ The intent and purpose of the proposed model ordinance is to authorize and create a system for issuing permits or the use of public streets, right-of-way and public places within the Tri-county region. The model ordinance intends to support local businesses, while also improving the community relationships for businesses and patrons. The proposed model ordinance is designed to establish a process which will enable small businesses and local municipalities to expand their outdoor activities in a sustainable way. Further, the proposed model ordinance will be in place for future generations of small businesses to access and utilize.

This narrative will address the economic, social, and environmental impacts of outdoor business activities. This narrative will discuss the problems that a right-of-way ordinance can resolve within the tri-county region. This narrative will then address the current inadequacy of ordinances pertaining to permissible right-of-way obstructions. The narrative will then discuss why the model ordinance is essential to solving this problem. The narrative will contain subsequent discussion and overview of how other municipalities have addressed the issue. Finally, this narrative will provide recommendations for successful implementation and administration of the ordinance.

II. LIMITED ACCESS TO OUTDOOR BUSINESS SPACE

There are several issues that come with businesses not being able to access the public right-of-way in a safe and efficient manner. However, a model ordinance has the potential to limit these issues and provide a safe administration and regulation. The following will discuss some of the major issues associated with the gap in laws for permissible right-of-way obstructions.

¹⁷ Kayla Lowber, Outdoor Cafes/ Widened Sidewalks, https://depts.washington.edu/open2100/pdf/2_OpenSpaceTypes/Open_Space_Types/KaylaLowberOutdoorcafes.pdf (last visited Sep 22, 2020).

A. Economic Concerns for Businesses

There are approximately one million small businesses in Pennsylvania.¹⁸ These small businesses employ 2.5 million individuals – about half of the state’s private workforce.¹⁹ Many small businesses are financially fragile and deeply affected by the current crisis.²⁰ The restaurant industry was heavily hit by temporary closures and limited indoor dining.²¹ Nearly 40 percent of small businesses in the restaurant sector operate at a loss or just break even, according to our survey.²² And any increased costs for accommodating changed expectations would come with a bigger hit on relatively slim operating margins.²³ Restaurants with access to private outdoor dining space were able to get some business back.²⁴ Small businesses that do not have access to outdoor business space may be substantially and irreversibly affected. Unfortunately, many small businesses without access to outdoor dining were financially forced to permanently close their doors.²⁵ Many small businesses operate with low profit margins, making it difficult to absorb a large decline in revenue sustained over several months.²⁶ In order to provide business with access to outdoor dining space, many cities temporarily waived outdoor dining permits or closed off

¹⁸ Small Businesses in Pennsylvania, PA Business One-Stop Shop(2020), <https://business.pa.gov/pa-proud/small-businesses-in-pennsylvania/> (last visited Sep 22, 2020).

¹⁹ See *supra* note 9

²¹ Neil Streb, Costly COVID-19 mistakes: Pa. restaurants need consistent rules and more government help York Daily Record (2020), <https://www.ydr.com/story/news/2020/08/07/costly-covid-19-mistakes-pa-restaurants-lobby-bailout/5461026002/> (last visited Sep 22, 2020)

²² See *supra* note 8

²³ See *supra* note 14

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

to main streets.²⁷ However, this is only a short term fix. To establish a safe way of permitting use of the public right-of-way local government needs to be involved to establish standards and regulations for administration.

Further, COVID-19 will continue to bring economic challenges to the small business economy. Adapting to such challenges will require that small businesses find new business and operating models and accelerate the adoption of new technologies.²⁸ But those solutions will not be easy and will require an economy-wide effort to provide financing, restore demand, and improve small businesses' capability and resilience.²⁹ Local governments need to support small businesses to ensure their economic resilience by being involved in their planning and assisting in their growth.

B. Lack of Community Engagements and Appeal

Permitting outdoor business activities is an effective way to bring new life to a street or municipality. Main streets across America are suffering from the large competitor retailers such as Walmart, and small businesses do not have enough customers to keep business open, but recently great revitalization efforts have been made by cities nationwide.³⁰ Permitting outdoor cafes and widened streets have the potential to become colorful, friendly, and vibrant places where people appreciate and frequent.³¹

²⁸ See *supra* note 14

²⁹ *Id.*

³⁰ See *supra* note 17.

³¹ *Id.*

C. Outdoor Dining and Weather Conflicts

Outdoor dining has been a lifeline for restaurants during the pandemic, as its universally considered safer than indoor dining.³² As weather gets colder a solution is required to provide restaurants with space and ensure for social distancing. Issue arises when restaurants begin utilizing outdoor dining space with winter solutions, like tents and heaters and other without supervision by government.

D. Proper Regulation for Obstruction of Public Right-of-Way

Although outdoor business activities bring flare to a city and enhance the economy, there are challenges to implementing sufficient regulations. It is important that municipalities are aware of these challenges. Some of which include potential cluttered appearance of sidewalks, reducing pedestrian flow, and the unattractiveness if not properly maintained.³³

III. LOCAL ORDINANCES CANNOT ADEQUATELY ADDRESS THE PROBLEM

The Tri-County Planning Commission does not have an adequate ordinance to address permissible use of the public right-of-way for business activities, specifically sidewalk cafes. permissible right-of-way obstructions. Section 1859 of the Tri-County model zoning ordinance which addresses outdoor cafés is no longer sufficient.³⁴

³² Michael Machosky, Pittsburgh restaurants embrace outdoor dining with heat lamps, tents, igloos and greenhouses NEXTpittsburgh(2020), <https://nextpittsburgh.com/eatdrink/pittsburgh-restaurants-embrace-outdoor-dining-with-heat-lamps-tents-igloos-and-greenhouses/> (last visited Nov 6, 2020).

³³ See *supra* note 17

³⁴ Tri-County Regional Planning Commission Model Zoning Ordinance. <https://static1.squarespace.com/static/56dc3f9cb654f9876576bab7/t/5756f0e3746fb921225739a3/1465315557401/ModelZoningOrdinance.pdf>, Article 18, 18-48. (adopted April 24, 2008).

The Section merely states:

The utilization of sidewalk space beyond the building line, as well as the use of lawn or yard area, including decks, patios or porches, shall be permitted to accommodate the serving of food to patrons fronting on that space. The use of the sidewalk shall consist of tables and chairs set in front of the restaurant or establishment permitted to serve food to patrons. There shall be some type of partition which shall separate the outdoor café from the public portion of the sidewalk.³⁵

The current model ordinance does not provide adequate clarity currently required to regulate and permit outdoor cafes. One important thing the model ordinance fails to address is how much of the public space may be utilized.³⁶ Further the current model ordinance does not require a permit or address who will ensure that the cafés are being operated safely.³⁷ The model ordinance also does not protect the municipality from liability if someone was injured on the public space.³⁸ This model ordinance is generally outdated and does not provide the information necessary to safely permit sidewalk cafes. With the current pressing need to provide for effective administration and regulation of sidewalk cafes it is essential that a comprehensive ordinance is adopted, to be utilized for years to come.

IV. HOW THE PROBLEM HAS BEEN ADDRESSED IN OTHER JURISDICTIONS

A. Temporary or Long Term Ordinances.

In order to protect small businesses, numerous municipalities within the United States have recently adopted ordinances permitting outdoor cafes or sidewalk cafes. Considering the need for

³⁵ See *supra* note 34.

³⁶ Cheltenham Township, Montgomery County.
<https://cheltenhampa.municipalcms.com/files/documents/20200610OrdinanceNo2410-20OutdoorSeatingEmergency1680100852061020PM.pdf>. (adopted June 20, 2020).

³⁷ See *supra* 24

³⁸ 61 Planning & Environmental Law No. 9, p. 3

enabling authority jurisdictions adopted ordinances in a short amount of time, some municipalities adopted municipalities adopted interim ordinances.³⁹

Other municipalities adopted right-of-way obstructions into their permanent municipal codes.⁴⁰ The following will discuss four local ordinances adopted by Pennsylvania municipalities of varying sizes.

The first ordinance discusses is a temporary ordinance, also known as an interim ordinance. Interim zoning (sometimes called “stop-gap” zoning) are techniques used by local governments to preserve the status quo or at least to limit the extent of change while the local government creates and adopts a new plan or zoning ordinance or while it addresses some other local policy issue.⁴¹ Sometimes interim controls are adopted in response to a sudden change in circumstances, such as a rapid acceleration in growth rates.⁴² The unforeseen and rapid spread of coronavirus is the perfect example of a sudden change in circumstances justify temporary regulations. Lower Merion Township, Pennsylvania, adopted a temporary resolution 2020-15, in response.⁴³ This resolution was adopted in order to regulate outdoor dining and merchandise sales during COVID-19.⁴⁴ This regulation permits the installation our outdoor sales of food and merchandise at existing businesses in the township during the coronavirus pandemic.⁴⁵

³⁹ See *supra* note 38

⁴⁰ Temporary Regulations for Outdoor Dining and Merchandise Sales, News | Lower Merion Township, PA(2020), <https://www.lowermerion.org/Home/Components/News/News/5039/50> (last visited Sep 22, 2020).

⁴¹ See *supra* note 38

⁴² *Id.*

⁴³ See note 40

⁴⁴ *Id.*

⁴⁵ *Id.*

Some municipalities choose not to enact ordinances for temporary purposes and enacted ordinances into their permanent municipal codes. Unlike the temporary regulation adopted by Lower Merion Township, the ordinances adopted by Lancaster⁴⁶, Gettysburg⁴⁷ and Middletown⁴⁸ have been adopted into their Municipal Codes. The Tri-County Planning Commission is seeking to adopt a model ordinance that will be implemented into municipal codes long term. Therefore, the ordinances that have been adopted into the municipalities planning code are similar to the intent to Tri-County Planning Commission.

B. Key Aspects of Gettysburg, Lancaster and Middletown Pennsylvania's Ordinances

When comparing the three ordinances adopted by Gettysburg, Lancaster, and Middletown they have both similar and contrasting provisions and requirements. All three require a permit⁴⁹ or license⁵⁰ to operate a outdoor dining café. To obtain a permit from any of these municipalities a fee must be paid. However, application fees vary, Lancaster for example prorate the application fee according to seating.⁵¹ a sidewalk café seeking to operate with up to ten seats is subject to \$150.00 and more than ten seats is subject to a \$200.00 fee. Compared to the Gettysburg and Middletown ordinances which state that the permit application fee amount is to be established

⁴⁶ Lancaster County, Pennsylvania, Ordinance No. 06-2020

<https://ecode360.com/LA1674/laws/LF1194499.pdf> (adopted July 28, 2020).

⁴⁷ Gettysburg, Pa., Ord. No. 1429-15 ch. 13, § 13-1101. (2015) <https://ecode360.com/30961526>, (accessed Oct. 1, 2020)

⁴⁸ Middletown, Pa., Ord. ch. 235 § 235-40. (1995)

<https://ecode360.com/33597807?highlight=dining,outdoor%20dining&searchId=27701327428717781> (accessed Oct. 1, 2020).

⁴⁹ See note 47 and 48

⁵⁰ See note 46

⁵¹ Id.

from time to time by resolution the Borough Council.⁵² All permit application requirements of the three ordinances are subject to similar provisions.

The application must provide the name of the applicant, the address of the business, the business license, the proposed outdoor area sought to be used, the dimensions drawn to scale with intended use of equipment (such as tables, partitions, lamps, tents etc), proof of liquor license where applicable, proof of insurance.⁵³ Another important provision of the application is that the applicant Execute an indemnification and hold-harmless agreement in favor of the Borough against all claims and losses, including costs and expenses, resulting from injury to person or property as a direct or indirect result of the operation of the restaurant sidewalk dining area.⁵⁴ Permits or licenses are not transferable are subject to termination if the business changes ownership.⁵⁵ Permits may be renewed.⁵⁶ Lancaster and Middletown both require that the location where the sidewalk café dining area must be inspected prior to the issuance of permit or licenses.⁵⁷

One of the most important portions of each ordinance relates to safety. For sidewalk cafes to be operated in a safe manner they must not obstruct the right-of-way in an way that adversely affects pedestrians, especially those with disabilities. To ensure this Middletown will not permit a sidewalk café unless it provides an be an unobstructed path available for pedestrian traffic a minimum of 48 inches wide and does not obstruct access to or be 48 inches a bus stop, fire

⁵² See *supra* note 47

⁵³ See *supra* note 46, 47, 48

⁵⁴ See *supra* note 47.

⁵⁵ See *supra* note 46, 48

⁵⁶ *Id.*

⁵⁷ *Id.*

hydrant, light post, mailbox, planter, street sign or similar public structure.⁵⁸ Each municipality subjects the operators of sidewalk cafes to fees and penalties for violations of operation.⁵⁹ Gettysburg provides that violations are subject to a fine of no more than \$600.00 plus costs incurred by the Borough.⁶⁰ Lancaster however identifies not only. Affine for violation but also the potential suspension or revocation of license for violations.⁶¹

C. How Lancaster, Gettysburg and Middletown Solve the Problems

Lancaster, Gettysburg and Middletown adopted ordinances to provide an avenue for businesses to safely operate by identifying standards and procedures to be employed by the business when operating an outdoor dining café in the public way. The specific requirements of each ordinances makes abiding by them clear and simple. Adoption of these model ordinances also establishes an avenue for the local government to ensure safety of pedestrians and patrons by implementing repercussion for violations.

D. Benefits of an Outdoor Dining Ordinance

1. Economic Benefits

There are numerous economic lessons gained by observing how local municipalities and small businesses responded to the global pandemic. This shock to America's small firms that has little parallel since the Great Depression of the 1930s.⁶² At the forefront of these lessons is the importance of well-designed and

⁵⁸ See *supra* note 48

⁵⁹ See *supra* note 46, 47, 48

⁶⁰ See *supra* note 47

⁶¹ *Id.*

⁶² Bartik *supra* note 8

sustained economic and health policy measures.⁶³ COVID-19 took a substantial hit to restaurants, because they are already subject to relatively fixed costs and slim profit margins.⁶⁴ Space constraints make it harder to carry out required social distancing.⁶⁵ The smaller the restaurant the more significantly, social distancing, restrictions limit the customers that can be served.⁶⁶ Outdoor dining has risen from about a fifth of revenue for many restaurants before the pandemic to as much as 40%.⁶⁷ Municipalities that welcome restaurants to utilize public space for dining allow them to recapture some lost revenue.⁶⁸ With the state of the economy and the future effects of COVID-19 it is essential that businesses and local government work with small businesses and restaurants to cope with and prepare for the unexpected. In Pennsylvania, 82% of surveyed small business owners reported a significant negative impact from the pandemic.⁶⁹ The greatest number – 41% – predicted it would take more than six months to recover.⁷⁰ The survey further showed that small businesses have reopened across the state in recent weeks.⁷¹

⁶³ Bartik, *supra* note 11

⁶⁴ Dua, *supra* note 14

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Dave Sebastian & Julie Wernau, Restaurants Prolong Outdoor Dining With Igloos, Heaters The Wall Street Journal (2020), <https://www.wsj.com/articles/restaurants-prolong-outdoor-dining-with-igloos-heaters-11601823600> (last visited Oct 2, 2020).

⁶⁸ Winter woes: What's the plan when it's too cold to dine outdoors?, National Restaurant Association (2020), <https://restaurant.org/articles/news/what-to-do-when-its-too-cold-to-dine-outside> (last visited Nov 6, 2020).

⁶⁹ James McGinnis, Pennsylvania second wave business shutdowns coronavirus economy pandemic business close The Times (2020), <https://www.timesonline.com/story/news/local/2020/08/13/covid-whatsquos-next-pa-companies-brace-for-second-shutdown/42207103/> (last visited Sep 25, 2020).

⁷⁰ Id.

⁷¹ Id.

1. Sustainability Benefits

In terms of sustainability effects of climate change, businesses should start to educate their teams across the organization and enable all levels and roles to be able to reach into the sustainability tool box to strengthen their operations.⁷² Among other sustainability themes, businesses should focus on having improving resilience, accepting the new normal and enhancing their sustainability strategy, and implementing long-term planning so that they could suitably weather 8 to 12 months of local or global instability.⁷³ Dr. Mark Milestein, director of the Center for Sustainable Global Enterprise and Clinical Professor of Managements at Cornell University, stated that “Sustainability, just as important as it ever was, if not more so” and “because these issues that we’re dealing with today are directly linked to sustainability issues that the field has been talking about for decades.”⁷⁴ This has limited the social spread of coronavirus while also allowing individuals to engage within the local economy.

Although outdoor dining is typically thought to be limited to summer or spring months, businesses are thinking outside the box. Restaurants have set up tents and partial outdoor enclosures to keep out the cold wind.⁷⁵ Many businesses are considering prolonging the use of outdoor dining with igloos.⁷⁶ Further, many local restaurants are investing in the ubiquitous tall, lantern-like space heaters to keep diners safe and warm outside.⁷⁷ It has been stated that “outdoor dining is definitely feasible this fall, but it will

⁷² Eubank, *supra* note 14

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Machosky, *supra* note 32

⁷⁶ *Id.*

⁷⁷ *Id.*

become more complicated as we move into the winter months, especially up North,”

“There will be success stories, but restaurants will have to be very creative.”⁷⁸

Issues may arise when these cold weather solutions are utilized and there is no regulation of potential safety hazards. Local jurisdictions would have to work fast and be sensible about how they issue permits allowing for these types of dining solutions.⁷⁹ To ensure safe administration and utilization local government must be involved.

2. Environmental Benefits

It is hard to say the long term environmental effects of outdoor dining since it has not been a focus until recently. Outdoor dining has enabled restaurant to follow social distancing guidelines and limit the social spread of COVID-19. There are many other known benefits to eating outdoors. With an outdoor space—particularly one that’s enclosed—operators can protect customers from annoying insects, inclement weather, and harmful UV rays.⁸⁰ Another benefit is the vitamin D provided by the sunlight when eating outdoors during the day.⁸¹ At least 1,000 different genes governing virtually every tissue in the body are now thought to be regulated by the active form of vitamin D, including several involved in calcium metabolism and neuromuscular and immune system functioning.⁸²

⁷⁸ See *supra* note 68

⁷⁹ *Id.*

⁸⁰ Stoett Industries, Why it's important to have-and use-an outdoor dining space Restaurant Business (2020), <https://www.restaurantbusinessonline.com/operations/why-its-important-have-use-outdoor-dining-space> (last visited Nov 6, 2020).

⁸¹ *Id.*

⁸² *Id.*

Adopting a model ordinance permitting outdoor dining enables businesses and local governments to access the social, economic and environmental benefits of outdoor dining.

II. RECOMMENDATIONS

This section will discuss recommendations to the Tri-County Planning Commission and the key elements of the model ordinance to ensure that the proposed model ordinance can be effectively implemented. After researching, analyzing, and assessing multiple outdoor dining model ordinances of several jurisdictions, the following are recommendations to help implement a sidewalk café ordinance.

This proposed model ordinance is intended to be applied to any restaurant looking to operate a sidewalk café, in the public right-of-way. The purpose of this model ordinance is to provide uniform standard and procedure for the regulation and safe operation of sidewalk cafes.

It is recommended that the sidewalk café permit be subject to an application process. This process is recommended to be reviewed by the Zoning Hearing Board. The application is subject to standard information such as name of applicant, name of business and location. It is also recommended that the application include a site plan that is drawn to scale. This is to ensure that the applicant abides but what they presented at the time of application. This is to ensure for safe travel on the sidewalk or public area for pedestrians especially those subject to disabilities.

Prior to issuance of a permit, it is recommended that the property is inspected by the zoning officer in order to ensure that the property can meet all safety standards. In order to fund the operating costs of the sidewalk café, a permit application fee is recommended. The proposed model ordinance provides that the application fee is established by an annual recommendation of the Zoning Hearing Board. To ensure ease of administration it was decided that allowing municipalities to decide what amount works for them is best for adoption.

It is also recommended that the Zoning Officer provide the notice of all approvals or denials to applicants. to ease administration the model ordinance provides determinations by the Zoning Officer shall include information of the appeals process. This way each municipality may adopt an appeal process that is individually obtainable.

It is further recommended that permits are valid for 12 months and may be renewed. However, an applicant may be barred from renewal or subject to suspension or termination of violations of the ordinance. Per suggestions by local government persons in violation of any provision of the model ordinance shall be subject to pay a fine of no less than \$100 and no more than \$2000. This strong fee is predominantly to deter individuals from operating sidewalk cafes without a permit.

III. CONCLUSION

Local government involvement is essential to maintaining the small business economy and providing small businesses the opportunity to flourish by engaging with the community. Municipalities acting on behalf of small businesses will provide a sustainable future for those

businesses. Jurisdictions that have enacted ordinances to permit outdoor business activities in the public right of way have allowed small businesses to pick up some of the pieces that the global pandemic has taken. The global pandemic has displayed how fragile small businesses are, especially restaurants. The pandemic has also shown that there are so many benefits of having a responsive local government.

The long-term impacts of the coronavirus are unclear. However, it is clear that local government and communities need to support small businesses. Preparing for the unexpected and adopting ordinances that provide the opportunity for economic growth will provide more sustainable business.

Sidewalk Café Model Ordinance
ORDINANCE NO. _____

Section 1. Short Title.

This Ordinance shall be known and may be cited as the “The Sidewalk Café Ordinance of (Municipality).”

Section 2. Purpose.

This ordinance is intended:

- (1) To provide uniform standard and procedure for the regulation and operation of sidewalk cafes.
- (2) To encourage the establishment of outdoor dining areas as part of a distinctive outdoor dining experience.¹
- (3) To ensure that adequate space will be provided for safe pedestrian travel and circulation through the areas where outdoor dining areas are operated.²
- (4) To ensure adequate and safe access to adjacent properties and businesses.³
- (5) To ensure the comfort, safety and welfare of persons with disabilities, including but not limited to those persons with disabilities related to vision or mobility.⁴
- (6) To attract and enhance revenue opportunities for businesses within the Municipality.⁵

¹Gettysburg, Pa., Ord. No. 1429-15 ch. 13, § 13-1101. (2015) <https://ecode360.com/30961526>, (accessed Oct. 1, 2020)

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Section 3. Authority.

The [Council – Board] of [Municipality], under and the authority granted by the Act of Jul 31, 1968 (PL. 805, No. 247), known as the Pennsylvania Municipalities Planning Code authorizes this article under Article I, Section 105 and Article V, Section 501.⁶ does hereby enact and ordain this ordinance as authorized by Act 247, Pennsylvania Municipalities Planning Code.⁷

Section 4. Definitions.⁸

The following words and phrases when used in this ordinance shall have the meaning given to them in this section unless the context clearly indicates otherwise:

“Agency.” Municipal entity designated with authority to oversee implementation, administration and enforcement of this ordinance.

“Abutting Property.” Property contiguous to a public street right-of-way on which a sidewalk café will be operated under the terms of this article.

“Owner.” Includes any owner of fee simple title, part owner, joint owner, tenant in common, tenant in partnership, joint tenant or tenant by the entirety of the whole of land contiguous to the street right-of-way on which a sidewalk café is operated under the authority of this article.

“Pedestrian Walkway.” The portion of a sidewalk area which is free of any obstruction, fixture or appurtenance and is used for pedestrian travel.

“Permit.” A temporary public right-of-way occupancy permit authorized under this article.

⁶ Pennsylvania Municipalities Planning Code Act of 1968, P.L. 805, No. 247 (23rd ed. 2017).

⁷ *Id.*

⁸ Lancaster, Pa., Ord. No. 5-1995 ch. 240, § 240-13. (1995) <https://ecode360.com/8118981>, (accessed Oct. 1, 2020)

“Permitee.” The person authorized to occupy an area of the public right-of-way.

“Person” Includes a partnership, association, trust, estate or other legally recognized entity, as well as an individual.

“Restaurant.” A food service establishment where food is purchased and served in individual portions for consumption on the premises. This term shall not include an establishment which operates exclusively as a caterer, a commissary, a food processing establishment, a mobile food unit, a retail food store or a temporary food service establishment.

“Right-of-way.” Any sidewalk, court, alley, street or other area dedicated or otherwise designated for public use and held by the city.

“Sidewalk.” The portion of the City street right-of-way reserved for sidewalks.

“Sidewalk café.” An outdoor dining area operated by a restaurant located on a sidewalk area or other designated public place and containing removeable tables, chairs, plants and related appurtenances, which is not located on or does not encroach upon the pedestrian walkway as established under this article. It shall not be enclosed by fixed walls and shall be open to the air, except that it may have a canopy. It may but is not required to abut its sponsoring restaurant.

“Zoning Officer.” The zoning officer of the municipality

Section 5. General Sidewalk Operating Requirements.

- (a) Compliance. A person operating a sidewalk café shall act in compliance with all applicable Municipal Code requirements and other applicable county, state and Federal legal requirements with regard to operation of a restaurant and must also meet requirements set forth in this article and otherwise described in the Municipal Code.⁹

⁹ Middletown, Pa., Ord. ch. 235 § 235-40. (1995)
<https://ecode360.com/33597807?highlight=dining,outdoor%20dining&searchId=27701327428717781> (accessed Oct. 1, 2020).

(b) Sidewalk Café Usage. The use of public sidewalk space adjacent to a restaurant for a sidewalk cafe shall only take place following the issuance of a valid permit under this article and the satisfaction of any and all conditions as may be applied by the Municipality through the Municipal Code.¹⁰

(c) Inspection Requirement. Prior to the issuance of a permit, the restaurant sidewalk café area shall be inspected by the Zoning Officer for compliance with this article.¹

Section 6. Permit Required.

No owner or operator of a business establishment shall occupy any portion of abutting property, pedestrian walkway, right-of-way or sidewalk area without first obtaining a permit in accordance with this article.

(1) It shall be unlawful to sell, offer for sale, vend, operate, maintain, serve or give any item from a sidewalk café without a valid permit by the Administrative Agency.¹²

(2) Permits for sidewalk cafes shall only be available under the terms of this article. The Administrative Agency has no authority to grant permits for sidewalk cafes for any reason except as provided by this article.¹³

(3) Sidewalk cafes shall be permitted only when such operated and serviced by a restaurant where all food preparation, sanitation and related services for the sidewalk café shall be performed.¹⁴

¹⁰ Middletown, Pa., Ord. ch. 235 § 235-40. (1995)

¹¹ *Id.*

¹² Lancaster, Pa., Ord. No. 5-1995 ch. 240, § 240-14. (1995) <https://ecode360.com/8118981>, (accessed Oct. 1, 2020)

¹³ *Id.*

¹⁴ *Id.*

- (4) Acceptance of sidewalk café permit is an express acknowledgement and consent to the terms and restrictions set by this article and the health officer. The grant and usage of such license is a privilege, not a right, subject to reasonable restrictions as set out herein or as may be promulgated by the regulatory authority.¹⁵
- (5) As an express condition of the acceptance of a license hereunder, the recipient agrees to police for trash and debris an area extending 15 feet in each direction from the outermost portion or boundary of the sidewalk cafe at least daily.¹⁶

Section 7. Permit Application.¹⁷

The permittee shall provide such information on the application as the Zoning Hearing Board may require by regulation, including:

- (1) The name and street address of the applicant.
- (2) The name and street address of the owner of the sidewalk café, of the owner of the underlying property and/or abutting property owner if not the same person.
- (3) A description of the owner of the abutting property, if other than a natural person, including the legal status (corporation, partnership, etc.) and a general description of the type of business operated on the abutting property.
- (4) The name and street address of the operator, manager to other person responsible for the operation of the sidewalk café.
- (5) The name under which the sidewalk café will be operated.

¹⁵Lancaster, Pa., Ord. No. 5-1995 ch. 240, § 240-14. (1995) <https://ecode360.com/8118981>, (accessed Oct. 1, 2020)

¹⁶ *Id.*

¹⁷ Lancaster, Pa., Ord. No. 5-1995 ch. 240, § 240-16. (1995) <https://ecode360.com/8118981>, (accessed Oct. 1, 2020)

- (6) The street address and the city food establishment license number of the restaurant operating and servicing the sidewalk café.
- (7) A site plan drawn to a scale of 1/2 inch equals one foot, showing:¹⁸
 - (i) The entirety of the sidewalk abutting the property of the owner;
 - (ii) the designated area provides at least 30 inches of unobstructed space for pedestrian travel;
 - (iii) the frontage of the property proposed for the sidewalk café;
 - (iv) all abutting properties;
 - (v) all existing sidewalk features, including but not limited to trees, utility poles, sign poles, fire hydrants, permanent litter receptacles, telephone booths, news vending racks and mailboxes;
 - (vi) any bus stops within 48 inches on either side of the proposed sidewalk cafe area; and
 - (vii) detailed drawings of legible proportions showing the limits of the proposed sidewalk cafe site, the design dimension and proposed location of all proposed temporary structures (i.e., canopies, umbrellas, planters, landscaping, tables, chairs, all exterior lighting, electrical outlets, etc.), the proposed pedestrian walkway and the side and front elevations of the proposed sidewalk cafe.
- (8) The seating capacity of the proposed sidewalk cafe.
- (9) A copy or copies of the certificate or certificates of insurance required to be provided.
- (10) If the serving of alcoholic beverages is proposed, proof that the applicant has a state liquor license that will allow or can be amended to allow applicant to serve alcoholic beverages in the sidewalk café.

Section 14. Liability.

The permittee shall also complete the following prior to issuance of permit:

- (1) Execute an indemnification and hold-harmless agreement in favor of the Borough against all claims and losses, including costs and expenses, resulting from injury to person or property as a direct or indirect result of the operation of the restaurant sidewalk dining area.
- (2) Provide proof of liability insurance in the amount of \$100,000 per individual and \$300,000 per occurrence.

Section 8. Application Fees.

The permit fee for a sidewalk café shall be based on the customer seating capacity, and such a permit shall be valid to the end of the calendar year in which the license was issued. An annual fee in an amount to be established by the recommendation of the Zoning Hearing Board.

Section 13. Regulatory Conditions.

- (a) Preliminary Conditions to Permit. The following conditions must be met prior to the issuance of a permit to operate a sidewalk café and continued compliance is required during the term any permit is issued:

- (1) Comply will all plans submitted and approved by health officer.
- (2) Serve alcoholic beverages only in conformance with Pennsylvania Liquor Control Board requirements.

- (3) Serve no food or beverages to a patron of a sidewalk café unless that patron is seated at a table.
- (4) Limit outdoor furnishings to nonpermanent partitions, tables, chairs, umbrellas, canopies and safely operated heat lamps.
- (5) Remove all outdoor furnishings from the sidewalk café area at the close of each business day.
- (6) Store outdoor furnishings within an interior structure when the sidewalk café area is closed each business day.
- (7) Use a nonpermanent partition to separate the sidewalk café area from the unobstructed pedestrian sidewalk.
- (8) Use of high-top or pub-style tables and chairs is prohibited.
- (9) Maintain sidewalk café area from all trash and debris.
- (10) Comply will all other provisions of the codified ordinances of the [Municipality/ Borough/City], [County], Pennsylvania.

Section 9. Approval and Denial.¹⁹

- (a) Application. The application must be completed in accordance with the appropriate information required by Section 7 and this article.
- (b) Notification of approval or denial. The processing of a complete application shall take no more than thirty (30) days. The notification documentation shall include the following:
 - (1) Reason for approval or denial of permit by Zoning Officer.
 - (2) Approval determinations shall attach the permit created by the Zoning Officer.
 - (3) Denial determinations shall include a statement notifying the permittee of the decision and the reasons for the denial.
 - (4) The determination shall include information of appeal process for reapplication.
- (c) The Zoning Officer or Zoning Hearing Board shall deny any permit application that is incomplete or demonstrates inability to comply with requirements of this ordinance.
- (d) In the event that the application is not processed within thirty (30) days, the applicant shall be entitled to a refund of the permit fee.

¹⁹ PROPOSED MODEL ORDINANCE FOR HOME BASED BUSINESSES, Dominique Harrington and Mariah Turner, (accessible at <https://widenerenvironment.files.wordpress.com/2019/01/home-based-businesses-final.pdf>)

Section 10. Duration and Renewal of Permit.

- (a) Permit Duration. Permits shall be valid for a 12 month period, commencing on April 1st and ending on March 31st.
- (b) Permit Renewal. Permits may be renewed, on a form provided by the Administrative Agency, for the following season provided all requirements of this chapter are met, and no changes have been made from the previous application. The permit renewal fee to be set by the [Borough Council/Administrative Agency].

Section 11. Violations and Penalties.

- (a) Penalties for Violation. Any person who violates any provision of this article shall, upon conviction, be sentenced to pay a fine of not more than \$2,000 and not less than \$100. Each day during which a violation occurs shall constitute a separate offense.²⁰
- (b) Permit Termination. A sidewalk café permit terminates if any of the following occur:
 - (1) The business changes ownership.
 - (2) The business vacates the premises.
 - (3) The permit duration expires.
 - (4) The permit fees are not paid.
- (c) Revocation or Suspension of Permit. Failure to comply with the requirements of this article, conditions, and any other provisions of the Borough Code incorporated herein, may result in revocation or suspension of a permit by Borough Manager, Borough Council or other authorized individual.

- (1) Suspended Permit. The municipal board shall determine the appropriate length of suspension. A permit suspension will not be lifted until the violation in question is corrected
 - (2) Revoked permit. The Municipal Board shall determine the appropriate length of revocation before a permittee can reapply. Following
- (d) Notice of Violation. Upon finding by the health officer that a permittee has violated any provisions of this article, the health officer or authorized agent shall give written notice to the applicant to correct said operational violation.
- (e) Failure to correct violations. Upon failure to correct said operational violation within the time frame specified, the health officer may take appropriate action, as necessary, to maintain the pedestrian walkway.
- (1) The health officer may suspend the applicant's license issued pursuant to this article.
 - (2) The health officer shall, in his/her sole judgment, give a violator reasonable time to repair any structural damage or physical violation of any provision of this article.
 - (3) An appeal before the Board of Health shall be accorded if requested.

Section 12. Nontransferable.

Sidewalk café permits are not transferable. Changes in ownership or operation require reapplication for a permit.²¹

²⁰ Middletown, Pa., Ord. ch. 235 § 235-48. (1995)
<https://ecode360.com/33597807?highlight=dining,outdoor%20dining&searchId=27701327428717781>(adopted 1995).

²¹ *Id.*

Section 14. Liability.

The permittee shall also complete the following prior to issuance of permit:

- (3) Execute an indemnification and hold-harmless agreement in favor of the Borough against all claims and losses, including costs and expenses, resulting from injury to person or property as a direct or indirect result of the operation of the restaurant sidewalk dining area.
- (4) Provide proof of liability insurance in the amount of \$100,000 per individual and \$300,000 per occurrence.

Section 15 Noise.

The permittee of the sidewalk café area shall control the noise created by the operation of the restaurant sidewalk café dining area, including, but not limited to, the conduct of patrons, or any other disturbances prohibited by the [Municipal Code].

Section 16. Lawful Consumption of Alcoholic Beverages.

- (a) A restaurant sidewalk café permitted pursuant to this article and duly licensed for the sale and consumption of alcoholic beverages by the Pennsylvania Liquor Control Board shall act in accordance with regulations set forth by the Pennsylvania Liquor Control Board.
- (b) Alcoholic beverages served in the sidewalk café area shall not be transported outside the designated area.

Section 17. Funding.

The Zoning Hearing Board shall place all money acquired from fees into the Municipal Board's general fund. The use of the funds for this ordinance shall be limited to the following:

- (1) Operating costs associated with printing applications, reports, and permits in accordance with this article.
- (2) Inspection costs in accordance with Section 5(c) of this ordinance.
- (3) Other related expenses necessary for the implementation of this ordinance as determined by the governing body of the municipality.

Section 18. Severability.

The provisions of this article are severable. The invalidity of any section or part of any section of this article, or any regulation promulgated hereunder, shall not affect the other provisions or applications of this act, which can be given effect without the invalid provisions or application.

Section 16. Repeals.²³

All other ordinances and parts of ordinances are repealed to the extent they are inconsistent with this ordinance.

Section 17. Effective Date.

This ordinance shall take effect 60 days after adoption.

²³ 53 Pa. Stat. Ann. § 11202