



## *Office of the City Attorney*

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July 10, 2020

### **Memorandum**

To: Ordinance and License Committee, Common Council  
From: Brian Running  
Re: Revisions to Sidewalk Café Ordinance and Licensed Premises Ordinance

Recently, changes to the Sidewalk Café ordinance and the creation of a Licensed Premises ordinance were proposed to the O&L Committee. The Licensed Premises ordinance passed O&L, and is currently awaiting a third reading at Council. The proposed revision to the Sidewalk Café ordinance was pulled from the O&L agenda after all support for the proposal was withdrawn.

Now, Council Members Rodriguez and Miller have revived the Sidewalk Café ordinance revisions, and are presenting a less-extensive makeover. Because the Sidewalk Café ordinance and the Licensed Premises ordinance work together, the third reading of the Licensed Premises ordinance was postponed, and it's now back to the O&L Committee with some changes to coordinate it with the Rodriguez-Miller proposal.

#### **Sidewalk Café Revisions**

The Sidewalk Café proposal includes the following changes to existing Municipal Code §8.116:

- Allows bars to have sidewalk cafés, not just restaurants.
- Allows sidewalk cafés to extend temporarily onto streets, if the streets are closed under a street-closure permit and the permit holder consents in writing.
- Allows sidewalk cafés to extend laterally beyond the licensee's property line, if the adjacent property owners consent in writing.
- Allows restaurants to keep their sidewalk cafés open until 11 Sunday through Thursday and midnight Friday and Saturday, as long as they are serving food. All other sidewalk cafes must close at 9 Sunday through Thursday and midnight Friday and Saturday.
- Allows sidewalk café operators to prohibit smoking and to exclude non-patrons.

## **Licensed Premises Revisions**

Municipal Code §9.115, which has not had its third reading yet, is proposed to be revised as follows:

- Temporary extensions of licensed premises for sidewalk cafés are not limited to 90 days per year.
- Temporary extensions of licensed premises for sidewalk cafés may extend onto streets, if the streets are closed under a street-closure permit and the permit holder consents in writing.

Redlined drafts of 8.116 and 9.115 are attached for your reference.

## 8.116 Outdoor Dining on Public Property (Sidewalk Café)

- (1) Purpose. To further encourage the revitalization of the downtown and other areas of the city, including the development of social and economic activity, the city council finds and determines:
  - (a) That there exists the need for outdoor eating and drinking facilities in certain areas of the city to provide a unique environment for relaxation, social interaction, and food and drink consumption.
  - (b) That sidewalk cafés will permit enhanced use of the available public rights-of-way, will complement restaurants operating from fixed premises, and will promote economic activity in the area.
  - (c) That the existence of sidewalk cafés encourages additional pedestrian traffic but may impede the free and safe flow of pedestrians such that a need exists for regulations and standards to ensure safety.
  - (d) That the establishment of permit conditions and safety standards for sidewalk cafés is necessary to protect and promote public health, safety and welfare.

~~(2) Definitions. As used in this section, the following definitions shall apply:~~

~~(3)(2)~~ (2) “Sidewalk Café” shall mean an expansion of ~~a full-service restaurant creating an establishment serving beverages, alcohol beverages, or food to create~~ an outdoor ~~dining~~ facility on part of the public property that immediately adjoins the licensed premises for the purpose of consuming food or beverages ~~to~~by the patrons of the ~~restaurant establishment~~.

~~(a) “Full service restaurant” shall mean an establishment requiring a State of Wisconsin restaurant license and whose food sales are greater than thirty percent (30%) of its gross receipts.~~

~~(4)~~(3) Permit Required.

- (a) ~~A full-service restaurant~~An establishment serving beverages, alcohol beverages, or food may apply to the City Clerk’s Office for a permit to allow ~~a restaurant~~it to operate a Sidewalk Café. The City Clerk or his/her designee may approve, approve with conditions or restrictions, or deny a permit where necessary to maintain the public health, safety or welfare, to prevent a nuisance from developing or continuing, or due to violation of this section, the city code of ordinances, or applicable state or federal law.
- (b) Before a permit may be issued, the application and site plan shall be reviewed by the Community Development Department and reviewed and recommended by the Ordinance and License Committee and approved by Common Council.
- (c) Each permit shall be effective for one year from March 1st to February 28/29.

(d) Once issued, permit must be conspicuously displayed in public view.

(e) The permit issued hereunder is not transferable by Owner to any other ~~restaurant~~establishment or any subsequent owner of the premises.

~~(5)~~(4) Permit Application. Application for a permit to operate a Sidewalk Café or temporarily to expand a Sidewalk Café onto a street pursuant to subsection (6)(g), shall be submitted to the City Clerk's Office and shall include at least the following information:

(a) Completed city application form.

~~(b)~~ ~~Copy of valid restaurant license issued by the State of Wisconsin.~~

~~(e)~~(b) Copy of a current certificate of commercial liability insurance in the amount of at least \$1,000,000 per occurrence and naming the City of Waukesha as additional insured and documented that the coverage extends to the area used for the Sidewalk Café.

~~(d)~~(c) The permittee shall execute an indemnification agreement approved by the City Attorney prior to operation of the Sidewalk Café.

~~(e)~~(d) A layout which accurately depicts the dimensions of the existing sidewalk area or other public property and adjacent private property, the proposed location of the Sidewalk Café or the temporary expansion of the Sidewalk Café, the size and number of tables, chairs, steps, planters, location of doorways, trees, sign posts, hydrants, sidewalk benches, trash receptacles, heaters, traffic signal poles, light poles and any other obstructions, either existing or proposed.

~~(f)~~(e) Photographs, drawings or manufacturer's brochures fully describing the appearance and dimensions of all proposed tables, chairs, umbrellas, barriers, or other objects related to the Sidewalk Café.

~~(g)~~(f) A non-refundable application fee.

~~(6)~~(5) Permit Fees. A non-refundable payment of \$100.00 must be made with initial application (\$50.00 for renewal or temporary expansion pursuant to subsection (6)(g)) for a Sidewalk Café permit with an additional non-refundable payment of \$100.00 for applicants requesting to sell alcohol.

~~(7)~~(6) Sidewalk Café Standards.

(a) No portion of any Sidewalk Café may ~~encroach on the sidewalk adjacent to any other property other than~~extend beyond the boundaries of the property that is licensed in this chapter, unless expressly approved in writing by the adjacent property owner or owners.

(b) The Licensee shall maintain a four foot wide unencumbered, open and accessible portion of the sidewalk for pedestrian traffic safety at all times.

(c) Sidewalk Cafés operated by establishments holding a Wisconsin restaurant license and deriving more than 30% of gross revenues from the sale of food may operate, and serve food ~~or~~and beverages, until 11:00 PM Sunday through Thursday and until midnight Friday and Saturday; provided, however, they may serve alcohol beverages only while food is being served by the establishment., meaning; All patrons must vacate the Sidewalk Café by those times.

~~(e)~~(d) and all other Sidewalk Cafés operated by establishments not holding a Wisconsin restaurant license and not deriving more than 30% of gross revenues from the sale of food may operate until 9:00 PM Sunday through Thursday and until midnight Friday and Saturday. All patrons must vacate the Sidewalk Café by those times.

~~(f)~~(e) Licensee shall provide for the removal of garbage and is responsible for the cleanliness of the Sidewalk Café area.

(f) The use of a portion of the public property as a Sidewalk Café shall be subject to the rights of the City at all times~~not be an exclusive use~~. All public improvements, including but not limited to, trees, light poles, traffic signals, manholes or any public initiated maintenance procedures shall take precedence over said use at all times. The City Administrator, Chief of Police, Community Development Director, Public Works Director or his/her designees may temporarily order the termination of Sidewalk ~~cafes~~Cafés for the following reasons, but not limited to, special events, including but not limited to, construction, parades, sponsored runs or walks, or for any reason to maintain the health, safety, and welfare of the public.

(g) Sidewalk Cafés for which a permit has already been issued may temporarily be expanded onto the adjacent street, provided the street is closed pursuant to a permit issued under Municipal Code §6.17, and written permission for the expansion has been obtained from the holder of the street-closure permit.

~~(e)~~(h) The Licensee may prohibit smoking within the Sidewalk Café, and may exclude non-patrons from the Sidewalk Café. Non-patrons may be removed by the Licensee from the Sidewalk Café only if doing so would not result in a breach of the peace, otherwise, the Licensee shall have police remove the non-patrons.

~~(f)~~(i) Semi-permanent markings will delineate the corners of the Sidewalk Café area, as illustrated in the approved site plan required for permit.

~~(g)~~(j) Molded plastic tables and chairs will not be permitted.

~~(h)~~(k) Applicant shall secure tables and chairs nightly, within one hour after closure of the Sidewalk Café.

~~(8)~~(7) Alcohol Licensing and Serving of Alcohol Beverages.

(a) Alcohol may be served at a Sidewalk Café under the following conditions:

- (i) The permittee has a valid and appropriate retail alcohol beverage license for the principal premises.
- (ii) No alcoholic beverages may be served at any time if the restaurant has not received Council approval for the ~~enlargement~~temporary extension of the premises under its liquor license that includes the area of the public ~~sidewalk-property~~ where the Sidewalk Café is located. Further, the liquor license shall be automatically conditioned at the time of the ~~enlargement~~temporary extension of premises to allow for the consumption of alcoholic beverages within the Sidewalk Café area only. Approval of the enlargement of premise area (Sidewalk Café) shall not grant any licensee or licensed premise any vested rights and such approval may be suspended or revoked or non-renewed without cause being shown.
- (iii) The entire outdoor area utilized for service and consumption of food and beverage shall be visible from the restaurant establishment.
- (iv) Alcoholic beverages must be sold and served by the licensee or licensee's employees who have operator's licenses ~~and sold, served or are under the immediate supervision of an employee holding an operator's license in compliance with Wis. Stat. §125.32(2) and §125.68(2); and purchased and consumed by patrons seated at tables in the Sidewalk Café. (Reference Wisconsin Statutes sections 125.32(2) and 125.68(2).~~
- ~~(v) Alcoholic beverages may only be served at the sidewalk café when food service is available through the licensed establishment.~~
- ~~(vi)~~(v) The permittee shall be responsible for complying with the approved Sidewalk Café plan.
- ~~(vii)~~(vi) The permittee shall not allow patrons of the Sidewalk Café to bring alcohol beverages into the Sidewalk Café, nor to carry open containers of alcohol beverages about in the Sidewalk Café area, nor to carry open containers of alcohol beverages served in the Sidewalk Café outside the Sidewalk Café area.
- ~~(viii)~~(vii) The permittee shall display signage indicating alcohol may only be consumed by patrons seated at tables in the Sidewalk Café.
- ~~(ix)~~(viii) The bar from which the alcohol beverages are dispensed shall be located indoors and shall not be located in the Sidewalk Café area.

~~(9)~~(8) Liability and insurance. By obtaining a Sidewalk Café permit, the permittee agrees to indemnify, defend, save and hold harmless the City, its officers and employees, from any and all claims, liability, lawsuits, damages, and causes of action, which may arise out of the permit or the permittee's activity at the sidewalk café. Permittee shall provide commercial liability insurance in the amount of at least \$1,000,000 per occurrence and name the City of Waukesha as additional insured and show how the coverage extends to the area used for the Sidewalk ~~cafe~~Café.

- (a) The permittee shall execute an indemnification agreement approved by the City Attorney prior to operation of the Sidewalk Café.
- (b) The permittee shall provide the City with an original certificate of insurance as evidence that the requirements set forth in this section are met prior to commencing or renewing operations. If insurance coverage changes while this agreement is in effect, Owner shall notify the City of Waukesha and provide proof of insurance.

~~(10)~~(9) Revocation or Suspension.

- (a) The approval of a Sidewalk Café permit is conditional at all times. The City Administrator, Chief of Police, Community Development Director, Public Works Director or his/her designees may temporarily order the termination of Sidewalk ~~eafes'~~Cafés at any time.
- (b) A Sidewalk Café permit may be formally revoked or suspended by the Ordinance and License Committee at any time without cause. Issuance of this permit under this ordinance is a privilege, not a right, to use the public right of way.

~~(11)~~(10) Appeal. A revocation, suspension, or denial of a permit may be appealed by the permittee to the Common Council or designated Committee of the Council, which shall hold a hearing and either grant, grant with conditions, or deny the permit. The permit holder or applicant shall be notified and shall have the right to be heard prior to a decision.

~~(12)~~(11) Penalty. The penalty for violation of this section shall be a forfeiture of not less than \$50.00 or more than \$200.00 per day for each violation, together with the costs of prosecution. Any enforcement action taken under this ordinance shall be deemed a violation under 12.10 Chronic Nuisance Premises of the Municipal Code.

**City of Waukesha, Wisconsin**

**Ordinance No. 2020 - \_\_\_\_\_**

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**An Ordinance Creating Section 9.115 of the Waukesha Municipal Code,  
Regarding Licensed Premises, Amendments of Licensed Premises,  
and Temporary Extensions of Licensed Premises**

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The Common Council of the City of Waukesha do ordain that:

**Section 1.** Section 9.115 of the Waukesha Municipal Code is created to read in its entirety as follows:

**9.115 Licensed Premises, Amendment of Licensed Premises, and Temporary Extension of Licensed Premises.**

**(a) Definitions.**

- (1) Committee means the Ordinance and License Committee.
- (2) Licensed Premises means the area described in a license issued by the City for the sale of alcohol beverages, within which alcohol beverages are sold, served, or kept for sale. Licensed Premises may be inside or outside of a building, or a combination of both. The Licensed Premises shall be the area into which unaccompanied underaged persons may not enter, except as allowed by Wis. Stats. §125.07(3)(a); and from which persons may not carry open intoxicants.

**(b) Regulations.**

- (1) A Licensed Premises must be a single, continuous area, except that Licensed Premises within a Sidewalk Café may be separated from the rest of the Licensed Premises by a public sidewalk.
- (2) A Licensed Premises must be entirely within a single tax parcel, except as provided in subsection (f)(7), below.
- (3) A Licensed Premises that is inside a building must be bounded by walls.
- (4) Any portion of a Licensed Premises that is outside of a building must be surrounded by a substantial enclosure, not less than 36 inches in height, sufficient to delineate the boundary of the Licensed Premises and to prevent easy entry to or exit from the Licensed Premises except at designated entry and exit points. The number and

location of entry and exit points shall be as required by the zoning code or building code, or as determined by the Chief Building Inspector or Fire Inspector. Enclosures surrounding Licensed Premises within Sidewalk Cafés shall meet the requirements of Municipal Code §8.116 rather than the enclosure requirements of this subsection. Enclosures surrounding temporary Licensed Premises in connection with a temporary Class B license issued under Wis. Stats. §125.26(6) or §125.51(10) or a temporarily-extended Licensed Premises under subsection (f) shall meet the requirements of subsection (f)(5) rather than the requirements of this subsection. All enclosures surrounding Licensed Premises must comply with all applicable zoning and building codes.

- (5) Licensed Premises may not be on public property, except for temporary Licensed Premises in City parks in connection with licenses issued pursuant to Municipal Code §9.09(6)(b), temporary extensions onto Municipal Lot 3 pursuant to subsection (f)(4), or if the portion on public property is within a Sidewalk Café licensed under Municipal Code §8.116.
- (c) **Sidewalk Café Licensed Premises.** Any portion of a Licensed Premises that is, or is proposed to be, on public property in conjunction with a Sidewalk Café license issued under Municipal Code §8.116 is a temporary extension subject to subsection (f) and is conditional upon the issuance and existence of, and is subject to any conditions placed on, the Sidewalk Café license. If the Sidewalk Café license is not issued, is not renewed, or is revoked, then the portion of the Licensed Premises that is on public property shall automatically no longer be part of the Licensed Premises.
- (d) **Applications Must Clearly Indicate Licensed Premises.** Applications to the City for licenses to sell alcohol beverages must contain a definite verbal or graphic description of the boundaries of the proposed Licensed Premises, sufficient for the City Clerk to determine a clear description to be placed in the license.
- (e) **Amendment of Licensed Premises.** After a license is issued, the licensee may request an amendment of the Licensed Premises by filing an application with the City Clerk that contains a description of the amended Licensed Premises meeting the requirements of subsection (b), above. The application shall be accompanied by the appropriate fee, which shall not be refunded if the application is denied. The amended Licensed Premises must comply with all of the requirements of this section 9.115. The application shall be forwarded to the Committee for review and action. The Committee shall grant the amendment if the proposed amended Licensed Premises complies in all respects with the requirements of this section 9.115 and Municipal Code Chapter 9, unless the Committee determines in its sole discretion, on the basis of substantial, objective evidence, that granting the amendment would not be in the best interest of the public safety or welfare. When granted, the amendment shall permanently amend the description of the Licensed Premises.
- (f) **Temporary Extension of Licensed Premises.** A licensee may request a temporary extension of the Licensed Premises by filing an application with the City Clerk with the appropriate fee, which shall not be refunded if the application is denied. The application

must state the dates and times of the proposed temporary extension, and contain a definite verbal or graphic description of the boundaries of the proposed temporary extension. The application shall be forwarded to the Committee for review and action. If the Committee approves the application, then the City Clerk shall issue a written approval to the licensee. The Committee shall grant the temporary extension if the proposed extended Licensed Premises complies in all respects with the requirements of this section 9.115 and Municipal Code Chapter 9, subject to the following additional provisions:

- (1) Temporary extensions of Licensed Premises shall only be for the period of duration and frequency determined by the Ordinance and License Committee, but for not more than 90 total days in any calendar year. This limitation shall not apply to temporary extensions of Licensed Premises encompassing a Sidewalk Café, which shall run concurrently with the Sidewalk Café permit.
- (2) Upon the expiration of the temporary extension, the Licensed Premises shall revert automatically back to the Licensed Premises described in the license issued by the City.
- (3) Temporary extensions of Licensed Premises shall not be granted to any applicant that has been convicted of violations of Municipal Code Chapter 9 or Wisconsin Statutes Chapter 125 in the five years preceding the date of the application.
- (4) Licensed Premises may not be temporarily extended onto public property, except ~~that~~ as follows:
  - (A) Licensed Premises may be extended onto Municipal Lot 3 if a closure permit under Municipal Code §6.17 and special event permit under Municipal Code §6.18 have been issued for Municipal Lot 3;
  - (B) ~~and~~ Licensed Premises may be extended temporarily to include Sidewalk Cafés licensed under Municipal Code §8.116-; and
  - (C) Licensed Premises encompassing Sidewalk Cafés may be further extended beyond the terrace and onto public streets or parking lots if the streets and parking lots are closed pursuant to permits issued under Municipal Code §6.17 and the written permission of the street-closure permit holder has been obtained, in the discretion of the Committee.
  - (B)(D) Temporary extensions of Licensed Premises onto ~~Municipal Lot 3~~ public property under this subsection (f)(4) are exempt from the provisions of Municipal Code §11.27.
- (4)(5) The enclosure around temporarily-extended Licensed Premises and Licensed Premises described in a temporary Class B license issued under Wis. Stats. §125.26(6) or §125.51(10) may be of a temporary nature and need not comply with zoning or building codes; however, the enclosures must be at least 36 inches high, must be substantial enough to prevent easy entry and exit except at designated entry and exit points, must not be able to be moved easily, and must delineate the boundaries of the

temporarily-extended Licensed Premises clearly enough that patrons have fair notice of the line beyond which they may not carry open alcohol beverages. Ropes or chains are sufficient for enclosures around temporary Licensed Premises. Regardless of the foregoing, enclosures surrounding Licensed Premises within Sidewalk Cafés shall meet the requirements of Municipal Code §8.116 rather than the enclosure requirements of this subsection.

~~(5)~~(6) All laws, rules, and regulations that apply to Licensed Premises apply to temporarily-extended Licensed Premises, except enclosure requirements.

~~(6)~~(7) Licensed Premises may be temporarily extended onto adjoining tax parcels with the written permission of the owner of the adjoining parcels.

~~(7)~~(8) Applications for temporary extensions of Licensed Premises may be denied by the Committee if the Committee determines in its sole discretion, on the basis of substantial, objective evidence, that granting the temporary extension would not be in the best interest of the public safety or welfare.

**(g) Monitoring Entry and Exit.** All entry and exit points in a Licensed Premises, including a temporarily-extended Licensed Premises, must be monitored by a licensed operator or staff under the supervision of a licensed operator, sufficient to prevent the entry of unaccompanied underaged persons or to prevent persons from leaving the Licensed Premises with open alcohol beverages.

**Section 2.** All ordinances, or portions of ordinances, inconsistent with this ordinance are hereby repealed.

**Section 3.** This Ordinance shall be effective the day after its publication.

Passed the \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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Shawn N. Reilly, Mayor

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Attest: Gina L. Kozlik, City Clerk