

ORDINANCE NO. 7,777-N.S.

AMENDING CHAPTER 14.48 MISCELLANEOUS USE OF STREETS AND SIDEWALKS OF THE BERKELEY MUNICIPAL CODE SECTION 14.48.190 PARKLETS AND AMENDING CHAPTER 16.18 RIGHT-OF-WAY ENCROACHMENTS AND ENCROACHMENT PERMITS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 14.48.190 is amended to read as follows:

14.48.190 Parklets

A. Notwithstanding anything to the contrary in this Chapter, the City of Berkeley Engineering Division of the Department of Public Works, or its successor, may approve Parklets, Benches and/or Planters in the public right of way (excluding Sidewalks alone, which are subject to and governed by Section 14.48.200) as set forth in, and in compliance with, this Section.

1. No permit may be issued under this Section for any right-of-way area in front of a single parcel if there are any current violations of this Chapter in that right-of-way area.
2. A permit for a Parklet may not be issued unless the parklet Host is in full compliance with all applicable requirements of Title 23 and any Permit issued thereunder.
3. A permit for a Parklet may only be issued adjacent to parcels in the following zoning districts: all Commercial (C-prefixed districts), Mixed-Use Light Industrial (MU-LI), Mixed-Use Residential (MU-R), and Mixed Manufacturing (MM).

B. For purposes of this Chapter, the following terms shall be defined as follows:

1. "Bench" means a seat designed for two or more persons.
2. "Bike Parking" means a location with bike racks intended for the secure parking of bicycles.
3. "Furniture" means amenities such as but not limited to tables, chairs, benches, and other equipment that facilitates the stationary use of public space.
4. "Parklet" means a platform or similar level surface extending into the public right of way with amenities such as but not limited to tables and/or chairs (including Benches), Bike Parking, and umbrellas, designated as public space, located in or on the public right-of-way or resting on, or projecting into, the sidewalk and parking area, which are not physically or structurally attached to a building, retaining wall or fence. Platforms that meet this definition but have received a Sidewalk Seating

Permit pursuant to BMC Section 14.48.150 shall not be considered Parklets.

5. "Planter" means a container that is designed or used for growing plants.
6. "Sidewalk" has the same meaning as set forth in Section 1.04.010(18).
7. "Sponsoring Business", "Host", "Permit Holder" or "Permittee" means, and is limited to, any establishment engaged in insuring and caring for the Parklet as set forth in the Parklet maintenance agreement.
8. "Transit Stop" means an AC Transit bus stop, UC Berkeley bus stop, a paratransit bus stop, Bay Area Rapid Transit station entrance, or another public transit provider.

C. Parklets, Benches and Planters shall fully conform to the following requirements of this subdivision:

1. Any object permitted under this Section shall leave a minimum of clear space as the Engineering Division finds necessary to protect and enhance pedestrian or vehicle traffic for public use in and around the Parklet area, as that space is determined by the City of Berkeley Engineering Division of the Department of Public Works, or its successor.
2. Parklets shall comply with applicable Americans with Disabilities Act (ADA) accessibility standards.
3. Objects permitted under this Section shall not:
 - a. Unduly interfere with access by public employees and utility workers to meters, fire hydrants or other objects (street hardware) in the right-of-way;
 - b. Block or obstruct the view of necessary authorized traffic devices;
 - c. Unduly interfere with pedestrian traffic in the right-of-way, including the Sidewalk, pedestrian safety, traffic circulation, and/or vehicular safety;
 - d. Be closer than 25 feet to any curb return or fire hydrant; except in such cases where the geometry of the roadway has been designed to accommodate, or will accommodate, a parklet, as determined by City staff. City staff will be defined as the Traffic Engineer, City Engineer, or Fire Marshall as appropriate;
 - e. Be affixed to any City or utility company-owned poles or appurtenances;
 - f. The width of the Parklet must not extend beyond six feet from the curb line, except in such cases where the geometry of the roadway has been designed to accommodate, or will accommodate, a Parklet, as determined by City staff. City staff will be defined as the Traffic Engineer, City Engineer, or Fire Marshall as appropriate.

4. All Parklets shall be subject to the following additional standards and requirements:

- a. Parklets must remain publicly accessible and must include signage posted on site to this effect;
- b. Parklet construction materials must be of high quality, durable, and suitable for public use;
- c. A visible edge to the Parklet is required, which may consist of Planters, railing, or cabling. The edges should be visually permeable;
- d. The Permittee shall regularly inspect and clean the Parklet and that portion of the public sidewalk adjacent to the Parklet;
- e. Access panels must be included in order to maintain the gutter and area underneath the Parklet and the design must allow for drainage along the gutter to pass underneath the Parklet;
- f. Safe hit posts and wheel stops, or approved equivalents, may be required. If Bike Parking is provided, the bike racks can be at street grade;

5. All Benches, Furniture, and Planters within the Parklet shall be subject to the following additional standards and requirements:

- a. All proposals shall comply with any design requirements adopted by the City for Benches, Planters and/or plant material;
- b. All non-secured Parklet components shall be stored in a secure location on private property when not in use;
- c. Any unsecured Furniture must be clearly different from the Furniture used by a Parklet Host in order to emphasize that the Parklet is public space, as determined by City staff;

D. All permits issued under this Section shall be subject to the following conditions:

1. The Permittee shall be responsible for, and exercise reasonable care in the inspection, maintenance, and cleanliness of the area affected by any object(s) permitted by this Section, including any design requirements hereafter enacted, from the building frontage to the right-of-way, including the Parklet area.

2. The Permittee shall restrict any objects permitted under this Section to the approved location(s) and configuration, ensure compliance with all applicable laws, and the number and configuration of Benches, Furniture and Planters and overall square footage of the Parklet shall not be modified without prior approval of the Public Works Department.

3. When any objects permitted under this Section are found to be in conflict with existing or proposed facilities or improvements owned, maintained, or operated by the City, or any existing or proposed City design plans, those objects shall, upon written demand of the City Manager or his or her designee, be removed or relocated in such a way as to eliminate the conflict, at the sole expense of the Permittee. Should the Permittee fail to comply with said written demand within a reasonable period of time, the City may cause such relocation of the placement at the expense of the Permittee. Any such non-compliance shall also be a violation of this Section.

4. Permits issued under the Section, when under review prior to issuance shall be posted in plain view within the sponsoring establishment(s) for which the permit has been issued. Public notice, permitting, and appeal for Parklets are set forth in BMC Section 16.18.060 (Permit procedure for minor encroachment) of the Berkeley Municipal Code. Section D (4) is not applicable in cases of declared local emergency due to disease outbreak. Upon termination of a declared local emergency due to disease outbreak within 365 days, a permittee must:

a. pay the permit fee for a minor encroachment and comply with all the requirements of this Section and Section 16.18.060, except that public notice requirements shall not be required; or

b. apply for a Sidewalk Seating Permit pursuant to BMC Section 14.48.150, and pay initial annual outdoor commerce use fee (the application permit fee for transitioning permits will be waived); or

c. remove the Parklet from the public right-of-way.

5. By accepting a permit under this Section, the Permittee explicitly agrees to hold the City, its officers and employees harmless from any liability, claims, suits or actions for any and all damages alleged to have been suffered by any person or property by reason of the Permittee's installation, operation, maintenance or removal of the Parklet, Benches and/or Planters.

6. Prior to permit approval, the Permittee shall demonstrate possession of liability insurance, in the amount not less than \$1,000,000, for the Parklet including any associated Benches, Planters and Furniture. Said insurance shall name the City of Berkeley as an additional insured and shall be in a form acceptable to the City Attorney.

7. The City Manager or their designee may require a performance bond to ensure Parklet removal in the event of a permit cancellation.

8. The Permittee shall monitor and control the use of the Parklet to prevent disturbance of the surrounding neighborhood.

9. A Sponsoring Business or other business is not permitted to perform table service at a Parklet or otherwise incorporate a Parklet into its business operations. Section D (9) is not applicable in cases of declared local emergency due to disease

outbreak.

10. Commercial signage, smoking, and advertising are prohibited at Parklets.

E. Parklets, Benches and/or Planters that are not permitted under this Section are prohibited encroachments under Chapter 16.18, and shall constitute public nuisances subject to the remedies in Chapter 1.26.

F. The City Council may by resolution establish or waive fees and guidelines for the implementation and administration of this Section.

Section 2. That Berkeley Municipal Code Section 16.18.010 is amended to read as follows:

16.18.010 Definitions.

A. "Encroach" means constructing or placing permanent structures or improvements over, upon, under, or using any public right-of-way or watercourse in any manner other than its intended use.

B. "Encroachment" shall include any of the following acts:

1. Erecting or maintaining any flag, banner, decoration, post, sign, pole, fence, guard-rail, wall, loading platform, mailbox, pipe, conduit, wire, or other structure on, over, or under a public right-of-way;

2. Constructing, placing, or maintaining, on, over, under, or within the public right-of-way any subsurface drainage structure or facility, any pipe, conduit, wire or cable;

C. "Major encroachment" means any permanent improvement attached to a structure or constructed in place so that it projects into the public right-of-way such as basement vaults, earth retaining structures over three feet above grade, structure connected planter boxes, ramps, or fences over six feet above grade Improvements identified in chapters 16.04, 16.24 and 17.16, and. any items conforming to the Berkeley Building Code, shall not be considered Major encroachments. Projections over any part of the public right-of-way that are not permitted by or which are in excess of the limitations specified in the Berkeley Building Code shall also be classified as major encroachments, including theatre marquees, signs suspended above the sidewalk, oriel windows, balconies, cornices and other architectural projections.

D. "Minor encroachment" means encroachment into the public right-of-way resting on or projecting into the sidewalk area such as: subsurface tiebacks and soil nails; concrete stairs; disabled Access Ramps where more than six feet of sidewalk area is preserved; subsurface foundations extending less than 2 feet from the property line; level landings for garages; landscape features less than two feet in height; conduit for privately owned phone and data lines connecting buildings owned by the permittee; flower pots; permanent planter boxes; clocks; bus shelters; phone booths; bike racks; fences less

than six feet above grade; earth retaining structures less than three feet above grade; benches; Parklets, as defined in Section 14.48.190; and curbs around planter areas. Any encroachment which is not a minor encroachment is a major encroachment. During a declared City emergency in response to a disease outbreak, a Parklet shall be considered a temporary structure not subject to the encroachment permit requirement and shall be permitted with an engineering permit.

E. "Assistant City Manager for Public Works" includes the Deputy City Manager, Public Works Director and/or his/her authorized delegate.

F. "Permittee" means any person(s) firm, company, corporation, association, public agency, public utility, or organization and the permittee's successors-in-interest which has been issued a permit for said encroachment by the Assistant City Manager for Public Works. All obligations, responsibilities, and other requirements of the permittee as herein described, shall be binding on successors in interest of the original permittee and subsequent owners of the property benefitted by the encroachment unless otherwise specified in the permit.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way within fifteen calendar days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on June 15, 2021, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Droste, Hahn, Kesarwani, Robinson, Taplin and Arreguin.

Noes: None.

Abstain: Harrison and Wengraf.

Absent: None.

ORDINANCE NO. 7,778-N.S.

AMENDING CHAPTER 14.48 MISCELLANEOUS USE OF STREETS AND SIDEWALKS
OF THE BERKELEY MUNICIPAL CODE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Findings.

The Council of the City of Berkeley hereby finds and determines as follows:

A. During the declared local emergency due to the COVID-19 pandemic, the City permitted Sidewalk Seating in all parts of the public right-of-way in order to allow businesses to survive while also maintaining appropriate social distancing measures.

B. Following the termination of the local emergency, the City desires to continue allowing Sidewalk Seating in all parts of the public right-of-way, subject to conditions set forth in BMC 14.48.150.

C. The City expects that such outdoor commerce will result in a decrease in parking meter revenues, as parking spaces will be used for business operations rather than parking.

D. The City is obligated to maintain revenue from operation of its off-street parking enterprise and its parking meter enterprise sufficient to meet rate covenants in the Installment Sale Agreement, dated as of August 1, 2016 related to the \$33,970,000 Berkeley Joint Powers Financing Authority Parking Revenue Bonds, Series 2016.

E. In order to maintain sufficient parking meter revenue, the amended Berkeley Municipal Code Section 14.48.150 implements a new Outdoor Commerce Use Fee which shall be equivalent to the expected block face parking revenue from the parking spaces used by the Sidewalk Seating permittee, and shall be treated as Parking Meter Fund revenue.

F. By charging the Sidewalk Seating permittee the equivalent of the parking meter rate for the use of parking spaces, the Outdoor Commerce Use Fee is no more than necessary to cover the costs to the City of providing parking spaces for outdoor commerce, and bears a fair and reasonable relationship to the benefit received by the Sidewalk Seating permittee.

Section 2. That Berkeley Municipal Code Section 14.48.150 is amended to read as follows:

14.48.150 Sidewalk seating, benches and planters.

A. Notwithstanding anything to the contrary in this Chapter, the City of Berkeley Engineering Division of the Department of Public Works, or its successor, may approve

Sidewalk Seating, Benches and/or Planters on sidewalks, parking lanes, street areas, and other public right of way locations as set forth in, and in compliance with, this Section.

1. No permit may be issued under this Section for any sidewalk area in front of a single parcel if there are any current violations of this Chapter in that sidewalk area.
2. A permit for Sidewalk Seating, Benches and/or Planters may not be issued unless the business for which the Sidewalk Seating, Benches and/or Planters is/are proposed is in full compliance with Title 23 and any Permit issued thereunder.
3. Sidewalk Seating and Outdoor Commerce shall require a Sidewalk Seating engineering permit, renewed annually.
4. Businesses conducting Outdoor Commerce in a parking lane shall additionally pay an annual Outdoor Commerce Use Fee in exchange for using public parking spaces for business operations.
5. Sidewalk Seating shall be permitted in any area of the public right-of-way if City Staff makes a finding that the use of the right-of-way for Sidewalk Seating purposes does not create a dangerous condition for customers, pedestrians, or bicycle or motor vehicle traffic. City staff will be defined as the Traffic Engineer, City Engineer, or Fire Marshall as appropriate.
6. Upon termination of any declared City emergency, any Sidewalk Seating present in the public right-of-way and not on the sidewalk shall within (365) days of date of termination either obtain a valid Sidewalk Seating Engineering Permit and pay the Outdoor Commerce Use Fee or be removed from the public right-of-way.

B. For purposes of this Chapter, the following terms shall be defined as follows:

1. "Bench" means a seat designed for two or more persons.
2. "Block Face" means one side of one block, e.g., the north side of Center Street between Milvia Street and Shattuck Avenue.
3. "Bus Bench" means a bench installed and maintained under an agreement between the City, A.C. Transit and Lamar Transit Advertising or another public or semi-public transit provider.
4. "Commercial Establishment" means, but is not limited to, a place where Business Activity is established. Business activity is defined as any activity subject to BMC Chapter 9.04 and any economic activity which generates receipts but is exempt from BMC Chapter 9.04 by state or federal law.
5. "District-wide Sidewalk Bench/Planter Area Plan" means a City-approved plan

for a specific commercial district as defined in said plan that establishes area-specific regulations for benches, planters and/or plant material, and establishes general regulations for the placement of benches and planters in the public right-of-way, for the designated district.

6. "District-wide Sidewalk Seating Area Plan" means a City-approved plan for a specific commercial district as defined in said plan that establishes area-specific regulations for sidewalk seating, and establishes general regulations for the placement of sidewalk seating in the public right-of-way, for the designated district.

7. "Food Service Establishment" has the same meaning as set forth in BMC Chapter 23F.04.

8. "Furniture" means amenities such as but not limited to tables, chairs, benches, and other equipment that facilitates the stationary use of sidewalk, parking lanes, street area, and other public right of way spaces.

9. "Outdoor Commerce" means Sidewalk Seating in the public right of way.

10. "Outdoor Commerce Use Fee" means an annual fee for the use of the parking lane for Sidewalk Seating.

11. "Planter" means a container that is designed or used for growing plants.

12. "Parking Lane" and "Street Area" are considered to be part of the Public right-of-way (PROW), known as, "any public street, public way, public place or rights-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof, and additions thereto, owned, operated and/or controlled by the City or subject to an easement owned by City and any privately-owned area within City's jurisdiction which is not yet, but is designated as a proposed public place on a tentative subdivision map approved by City." as defined in BMC 23F.04.010.

13. "Sidewalk" has the same meaning as set forth in BMC 1.04.010(18).

14. "Sidewalk Seating" means tables and/or chairs (including benches) and, umbrellas and other associated furniture with lawfully operating Food Service Establishments or other commercial establishments, in or on the sidewalk. "Sidewalk Seating" includes seating and associated furniture in the public right-of-way or resting on, or projecting into, the sidewalk, parking lane, or street area, or any combination thereof which are not physically or structurally attached to a building, retaining wall or fence.

15. "Transit Stop" means an AC Transit bus stop, UC Berkeley bus stop, a paratransit bus stop, Bay Area Rapid Transit station entrance, or another public transit provider.

16. "Window Box Planter" means a box, designed to hold soil for growing plants,

attached at or on a windowsill.

C. Sidewalk Seating, Benches and Planters shall fully conform to the following requirements of this subdivision:

1. Any object permitted under this Section shall leave a minimum horizontal clear space of six feet for ADA-compliant path of travel, (or reduce to 5 feet at a single point of contact) or such greater (or smaller) amount of clear space as the Engineering Division finds necessary to protect and enhance pedestrian and vehicle traffic for public use in the sidewalk area, as that space is determined by the City of Berkeley Engineering Division of the Department of Public Works, or its successor.

2. Objects permitted under this Section shall not:

a. Unduly interfere with access by public employees and utility workers to meters, fire hydrants or other objects (street hardware) in the right-of-way;

b. Block or obstruct the view of necessary authorized traffic devices;

c. Unduly interfere with pedestrian traffic in the public ROW/sidewalk, pedestrian safety, access to public or private parking, traffic circulation, and/or vehicular safety;

d. Be closer than 25 feet to any curb return or fire hydrant; except in such cases where the geometry of the roadway has been designed to accommodate, or will accommodate, Sidewalk Seating, as determined by City staff. City staff will be defined as the Traffic Engineer, City Engineer, or Fire Marshal as appropriate;

e. Be affixed to any City or utility company-owned poles or appurtenances;

3. All sidewalk seating shall be subject to the following additional standards and requirements:

a. All Sidewalk Seating configurations shall comply with applicable Americans with Disabilities Act (ADA) accessibility standards.

b. All Sidewalk Seating components shall be stored in a secure location when not in use.

c. The permittee shall regularly inspect and clean the Sidewalk Seating and that portion of the public sidewalk adjacent to the establishment. A waste receptacle shall be provided.

4. All benches and planters shall be subject to the following additional standards and requirements:

a. All proposals shall comply to the greatest extent possible with any design requirements adopted by the City for benches, planters and/or plant material.

D. All permits issued under this Section shall be subject to the following conditions:

1. The permittee shall be responsible for, and exercise reasonable care in the inspection, maintenance, and cleanliness of the area affected by any object(s) permitted by this Section, including any design requirements hereafter enacted, from the building frontage to the curb, parking lane, or street area.

2. The permittee shall restrict any objects permitted under this Section to the approved location(s) and configuration, and ensure compliance with all applicable laws, and the number of tables and chairs shall not be increased without prior approval of the Public Works or Public Health Department.

3. When any objects permitted under this Section are found to be in conflict with existing or proposed facilities or improvements owned, maintained, or operated by the City, or any existing or proposed City design plans, those objects shall, upon written demand of the City Manager or their designee, be removed or relocated in such a way as to eliminate the conflict. Should the permittee fail to comply with said written demand within a reasonable period of time, the City may cause such relocation of the placement at the expense of the permittee. Any such non-compliance shall also be a violation of this Section.

4. Permits issued under the Section shall be posted in plain view within the commercial establishment for which the permit has been issued along with any other relevant permits that support health and safety of patrons and the general public.

5. By accepting a permit under this Section, the permittee explicitly agrees to hold the City, its officers and employees harmless from any liability, claims, suits or actions for any and all damages alleged to have been suffered by any person or property by reason of the permittee's installation, operation, maintenance or removal of Sidewalk Seating, Furniture, Benches and/or Planters.

6. Prior to permit approval, the permittee shall demonstrate possession of liability insurance in the amount of \$1,000,000 for Benches and Planters, and related Sidewalk Seating furniture. Said insurance shall name the City of Berkeley as additionally insured and shall be in a form acceptable to the City Attorney.

7. The permittee shall monitor and control the use of the Sidewalk Seating so as to prevent disturbance of the surrounding neighborhood.

8. A food service establishment that proposes to serve alcoholic beverages within an outdoor dining area shall comply with the standards established by the State of California Department of Alcoholic Beverage Control. The dining area shall be:

a. Physically defined and clearly part of the commercial establishment it serves; and

b. Supervised by a commercial establishment employee to ensure compliance with laws regarding the on-site consumption of alcoholic beverages.

E. Permits under this Section are not transferable, and must be renewed annually.

F. Sidewalk Seating, Benches, Furniture, and/or Planters that are not permitted under this Section are prohibited encroachments under Chapter 16.18, and shall constitute public nuisances subject to the remedies in Chapter 1.26.

G. The City Council may by resolution establish or waive fees for the implementation and administration of this Section. Outdoor Commerce Use Fees shall be equivalent to the expected block face parking revenue from the parking spaces used by the permittee, and shall be treated as Parking Meter Fund revenue.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way within fifteen calendar days of adoption, copies of this Ordinance shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on June 15, 2021, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Droste, Hahn, Kesarwani, Robinson, Taplin and Arreguin.

Noes: None.

Abstain: Harrison and Wengraf.

Absent: None.