



CITY OF SOUTH PORTLAND

KATHERINE W. LEWIS
Mayor

SCOTT T. MORELLI
City Manager

EMILY F. SCULLY
City Clerk

SALLY J. DAGGETT
Jensen Baird Gardner & Henry

IN CITY COUNCIL

**ORDINANCE #21-19/20
(as amended at first reading on 6/2/20)**

District One
CLAUDE V.Z. MORGAN

District Two
KATHERINE W. LEWIS

District Three
MISHA C. PRIDE

District Four
APRIL L. CARICCHIO

District Five
DEQA DHALAC

At Large
KATELYN S. BRUZGO

At Large
SUSAN J. HENDERSON

THE COUNCIL of the City of South Portland hereby ordains as follows:

Section 1. Findings.

WHEREAS, it is recognized that SARS-CoV-2, the virus that causes the disease known as COVID-19, presents a public health crisis requiring unprecedented protective measures and vigilance;

WHEREAS, the City and the State of Maine have responded to this public health crisis with protective measures in an effort to prevent the spread of the disease;

WHEREAS, many of those protective measures have forced the closure, suspension, or limitation of businesses and have also delayed construction project timelines;

WHEREAS, in an effort to protect customers and employees, owners and operators of retail businesses who are open to the public may only operate in accordance with federal and Maine Center for Disease Control and Prevention (CDC) guidance that involves increased physical distancing between and among customers and employees, maximum occupancy rates, and compliance with certain sanitation measures;

WHEREAS, during the public health crisis known as COVID-19, certain business activities are better suited to the outdoors, in an open-air setting, to protect the health, safety and welfare the public;

WHEREAS, to stimulate the recovery of restaurant and retail business in the City and to support local businesses, the City Council has determined that certain provisions of the City's ordinances prohibiting and/or limiting serving food and drink outdoors or engaging in retail activity on private property and on City streets and sidewalks should be temporarily suspended, as set forth further herein; and

WHEREAS, to assist construction projects that may have been stalled or delayed due to the public health crisis, the City Council has determined that certain provisions of the City's ordinances regarding project deadlines should be temporarily suspended, as set forth further herein.

Section 2. The text of Chapter 33, "Response to COVID-19 Public Health Crisis Ordinance" of the "Code of Ordinances of the City of South Portland, Maine" be and hereby is enacted as shown below (additions are underlined):

Chapter 33

RESPONSE TO COVID-19 PUBLIC HEALTH CRISIS ORDINANCE

Sec. 33-1. Title.

This ordinance shall be known as the "Response to COVID-19 Public Health Crisis Ordinance."

Sec. 33-2. Purpose.

Based on the findings herein, the purpose of this ordinance is to allow businesses to temporarily establish or expand their ability to provide certain sales and services outdoors and to extend certain construction project timelines.

Sec. 33-3. Definitions.

As used in this ordinance, the following words and phrases shall have the meanings ascribed to them in this section.

City Property means a public sidewalk or public street (or portion thereof, such as a parking space within a public street) owned or controlled by the City.

Food establishment means any place where food or drink is prepared and served or served to the public for consumption on the premises, or where food or drink is prepared and served or served ready to eat to the public for consumption off the premises, but it does not include an establishment listed in 22 M.R.S. § 2491(7)(A)-(C).

Outdoor dining means sales, service, and consumption of food and beverages occurring within a designated area outside a City-licensed food establishment.

Outdoor retail and personal services means product display, sales, service and other related activities considered “personal services” or “retail trade”, as those terms are defined in Sec. 27-201 of the Code of Ordinances.

Outdoor services means outdoor dining and/or outdoor retail and personal services.

Outdoor services area means any land area permitted to be used for outdoor services under this ordinance.

Outdoor service elements means any and all tables, chairs, tents, umbrellas, planters, heaters, and other objects associated with outdoor services.

Person means a natural person, partnership, association, company, corporation, limited liability company or organization or a member, manager, agent, owner, director, servant, officer or employee thereof.

Sec. 33-4. Temporary Suspension of Regulations Governing Outdoor Services and Certain Construction Project Timelines.

The provisions herein shall temporarily supersede and replace any conflicting provisions of the City’s Code of Ordinances governing outdoor services and certain construction project timelines.

Sec. 33-5. Temporary Delegation of Authority to City Clerk to Review and Approve Extension of Licensed Premises Applications Filed by Existing Liquor Licensees.

The authority to review and approve requests, pursuant to 28-A M.R.S. § 653, from persons already licensed by the State of Maine and the City to sell alcoholic beverages on premises but who wish to extend their licensed premises to include an outdoor services area is hereby temporarily delegated to the City Clerk.

Sec. 33-6. Temporary Outdoor Services Permit.

Any person desiring to offer outdoor services in the City must first seek and obtain a temporary outdoor services permit from the Planning Director pursuant to the procedures contained herein. Outdoor services shall not be engaged in until the person obtains all necessary licenses, permits and approvals from appropriate State and local agencies and authorities, as applicable, to perform such outdoor services.

Sec. 33-7. Standards/Terms and Conditions for all Outdoor Services.

(a) General Standards. Any person desiring a temporary outdoor services permit shall comply with the following general standards:

1. Outdoor services shall be properly licensed/permitted by appropriate State and local authorities to perform any such activities, sales, and services.
2. Any sales and/or consumption of food and/or alcoholic beverages shall be in compliance with the provisions of any federal, State, and/or local laws and regulations governing same.
3. Outdoor services shall comply with all applicable laws and ordinances relating to litter and noise. In addition to the foregoing, no amplified sound, whether live or recorded, shall be permitted within outdoor services areas without first obtaining the required license pursuant to Sec. 14-27 of the Code of Ordinances. The Planning Director may impose additional conditions or limitations relating to noise on the temporary outdoor services permit when the Planning Director finds that such additional conditions or limitations are necessary or appropriate based on the location of the new or additional outdoor services area and the proximity of such area to residential areas, including, without limitation, existing residences, existing residential neighborhoods, and residentially-zoned properties.
4. Outdoor services may only be provided in the designated area approved by the City. Once approved, the designated area permitted for outdoor services shall be not be expanded without first obtaining an amended permit in writing from the Planning Director. Once approved, the layout of the designated area permitted for outdoor services shall not be changed in a manner that impedes ingress or egress to the outdoor services area or the safe movement and circulation of customers, employees and wheelchairs within the outdoor services area without first obtaining an amended permit in writing from the Planning Director.
5. Outdoor services are prohibited between 9 p.m. and 7:00 a.m., unless the permitted hours are more restrictive under the existing land use or other approval applicable to the property, use, or activity, in which case the more restrictive hours shall control.
6. Unless authorized as part of a temporary outdoor services permit, outdoor dining and outdoor retail and personal services shall not encroach within any public rights-of-way.
7. Outdoor services shall not encroach into or interfere with required handicapped parking spaces unless parking spaces of equivalent accessibility are provided.

8. Outdoor services shall not interfere with safe pedestrian and vehicular access or access required to be maintained under the Americans with Disabilities Act and its implementing regulations.
 9. Outdoor services shall not interfere with fire and other emergency access as determined by the Fire Chief or his/her designee.
 10. Outdoor services shall comply with all applicable occupancy requirements, including, without limitation, maximum occupancy limits, and all other applicable provisions of fire and life safety codes. The Planning Director may impose other conditions or limitations to protect against adverse impacts from noise, traffic, parking, fire, and vehicular and pedestrian travel.
 11. The outdoor services area shall be cleaned as reasonably necessary, but no less than daily, using a broom, hose and/or other equipment as appropriate.
 12. Any signage placed within the designated outdoor services area or otherwise on the property must be in compliance with State of Maine and City sign regulations except as follows:
 - a. Building- or ground-mounted signs that direct patrons to the outdoor services area are allowed so long as the signs do not exceed two (2) square feet in area.
 - b. Signs advising patrons of any health and safety measures are allowed so long as the signs do not exceed two (2) square feet in area.
 - c. Any sign placed within the designated outdoor services area or otherwise on the property pursuant to subsection 12(a) or 12(b) herein shall not interfere with or distract motorists on adjacent streets or otherwise be so situated as to prevent the safe use or maintenance of adjacent streets.
- (b) Design and Layout. Any person desiring a temporary outdoor services permit shall comply with the following design and layout standards:
1. Permit holders shall maintain a clear pedestrian path of at least thirty-six inches (36") at all times; provided, however, in areas of higher pedestrian traffic or activity, or in conditions that suggest the need for additional clearance, the Planning Director may require a clear pedestrian path greater than thirty-six inches (36"). Any such clearance area must be free of all obstructions such as trees, parking meters, utility poles, fire hydrants, and similar encroachments in order to allow for adequate pedestrian movement. All services and patron activity provided within the designated outdoor services area shall occur within the designated area and shall not

encroach within the minimum clearances for pedestrian passage at any time.

2. Outdoor service elements shall not interfere with any utilities or other facilities such as utility poles, fire hydrants, signs, mailboxes, and/or benches within the designated area.
3. Outdoor service elements shall not interfere with or obstruct any required clearance for maneuvering around entrances or exits.
4. Outdoor service elements shall not interfere with or obstruct any areas required for accessibility for disabled persons, whether patrons or employees.
5. Outdoor service elements shall not interfere with or obstruct required ingress and/or egress for adjacent buildings set forth in the building code or otherwise.
6. If alcoholic beverages are served within the outdoor services area, there must be a stanchion or fence completely enclosing the area. Signs must be posted at exit points, stating "NO ALCOHOL BEYOND THIS POINT." There must be sufficient employees at the outdoor services area who are able to control and monitor the area.

(c) Terms and Conditions for All Outdoor Services. To be issued a temporary outdoor services permit, the applicant must agree to the following terms and conditions, which terms and conditions are a part of any permit issued hereunder:

1. In the event that any public health law, order or regulation related to the COVID-19 public health crisis issued by the State of Maine pursuant to its emergency powers or by the City Manager pursuant to his emergency powers during the time period that the Governor of Maine or the Mayor/City Council has declared a state of emergency is determined by the City Manager, in consultation with the Corporation Counsel, to be in conflict with or inconsistent with the conduct of outdoor services, the Planning Director shall suspend temporary outdoor services permits with or without prior notice to permit holders. Any appeal of this suspension shall be directly to Superior Court pursuant to Rule 80B of the Maine Rules of Civil Procedure.
2. Any action taken in reliance upon a temporary outdoor services permit until such time as the time period to file a petition to overrule City Council action on this ordinance has expired is at the permit holder's own risk, as facts, circumstances and the law may change prior to that date.

Sec. 33-8. Additional Standards/Terms and Conditions for Outdoor Services on City Property.

(a) Additional Standards for Outdoor Services on City Property. Any person desiring a temporary outdoor services permit on City Property shall comply with the following additional standards:

1. Any and all outdoor service elements shall be removed from City Property except during the outdoor services' daily operations. The storage of outdoor service elements within City Property at any time is prohibited.

2. Nothing shall be permanently attached to any City Property.

(b) Terms and Conditions for Outdoor Services on City Property. To be issued a temporary outdoor services permit, the applicant must agree to the following terms and conditions, which terms and conditions are a part of any permit issued hereunder:

1. The temporary outdoor services permit is for a permissive use only and the issuance of the permit shall not operate to create or vest any property rights in the permit holder.

2. No permit shall be issued by the Planning Director until the applicant has filed with the Planning Director a certificate, in a form satisfactory to the Corporation Counsel, evidencing general liability coverage in an amount not less than \$400,000 combined single limit for personal injury and property damage, or such other amount as may be required to meet the maximum coverage provisions of the Maine Tort Claims Act (14 M.R.S. § 8001 *et seq.*) as it may be amended, whichever amount shall be greater, and naming the City as an additional insured. The permit holder shall maintain such insurance at all times while engaged in use of City Property, and the permit holder shall provide the Planning Director with not less than ten (10) days' advance written notice of the cancellation, expiration or non-renewal of said insurance.

3. If alcoholic beverages will be served within the outdoor services area, the permit holder shall provide a certificate, in a form satisfactory to the Corporation Counsel, evidencing liquor liability insurance under the same terms and conditions as those applying to general liability insurance. The permit holder shall maintain such insurance at all times while engaged in use of City Property, and the permit holder shall provide the Planning Director with not less than ten (10) days' advance written notice of the cancellation, expiration or non-renewal of said insurance.

4. The permit holder releases and agrees to defend, indemnify and hold harmless the City, its agents, officers and employees, from any and all

liability, actions, damages and claims of any kind and nature whatsoever for any injury, harm or damage to persons or damage to property that may arise or occur during or in connection with the permit holder's use of City Property.

5. The permit holder is responsible for any damage to City Property or any part thereof caused directly or indirectly by the permit holder or his/her/its agents, employees, guests, or invitees. The City shall not be liable for any damage or loss to any property of the permit holder from any cause whatsoever while said permit holder's personal property is located at City Property for storage purposes or otherwise.
6. The permit holder is responsible for leaving City Property in the same condition in which it was received, reasonable wear and tear excepted, and shall be responsible for any loss or damage to City Property. The permit holder shall be charged for any required repair or cleanup costs incurred as a result of the permit holder's use of City Property.
7. In the event that the City's Police, Fire or Public Works Department determines that the location of an encroachment, including, but not limited to, outdoor service elements, constitutes an immediate physical danger to life, safety or health, the encroachment may be removed immediately without prior notice to the permit holder. If the City removes an encroachment, a notice of removal shall be sent to the permit holder as soon as practicable under the circumstances. Any abandoned encroachment shall be subject to removal. For purposes hereof, "abandoned" shall mean the vacating of City Property by the permit holder for a period of seven (7) consecutive days or more. Any costs incurred by the City in restoring City Property to the condition that existed prior to the use of it shall be the responsibility of the permit holder.
8. In the event of suspension, revocation or expiration of the permit, the permit holder shall have forty-eight (48) hours to clean City Property and to complete the removal of all furniture, equipment and other personal property from City Property; the permit holder shall repair all damages resulting from such removal. Any personal property not removed at the end of the term hereof shall be deemed abandoned by the permit holder and shall become the property of the City, and the permit holder hereby waives any claim to such personal property and agrees to indemnify the City against all costs and expenses incurred by the City in storing, removing and disposing of any such personal property.
9. The permit holder shall not assign the temporary outdoor services permit.

Sec. 33-9. Outdoor Services Permit Application Review, Approval and Expiration.

- (a) Beginning June 1, 2020, a person may apply to the Planning Director for a temporary permit to establish or expand outdoor services consistent with this ordinance. Application forms and any applicable checklists shall be available on the City's website or may be requested in hardcopy at City Hall or the Planning Department. Applications must, at a minimum, include the following information:
1. A narrative and site plan describing the nature of the use, including responses or illustrations demonstrating how the proposal meets the requirements stated above.
 2. A plan, survey, or aerial of the area where the proposed outdoor services will be located that includes the following information:
 - a. Clearly mark limits and capacity of the proposed outdoor services area.
 - b. Include a general plan showing seating, circulation, placement of tables, chairs, other furniture, planters, heaters, and other objects associated with the outdoor services.
 - c. Identify proposed awnings, umbrellas, tents or other temporary structures proposed to protect the outdoor services area from the elements.
 - d. Delineate on the plan areas that are private property, public property, and within the public right-of-way. Identify any area of City Property proposed to be used as an outdoor services area.
 - e. Provide measurements between tables, aisles, ingress and egress to demonstrate how activities will comply with safety regulations, i.e., physical distancing guidelines as promulgated by the Maine CDC.
 - f. Identify the spaces that will facilitate the safe movement of customers, pedestrians and wheelchair passage to the main entrance and, if along the sidewalk, the area that is not a part of the designated outdoor services area. These spaces must have a minimum of thirty-six inches (36") in width clear of any obstructions, except that umbrella canopies may encroach into this space if they are at least seven feet in height.
 3. If the designated area for outdoor services includes parking spaces or areas typically accessible to automobiles, whether on private property or within City Property, provide a detailed description of the plan for placement of physical barriers and other safety measures to ensure that the designated area is appropriately protected, including design specifications of the physical barriers to be placed.

4. Demonstrate that any temporary structure(s) complies with all applicable fire and life safety codes.
 5. List the days of the week and hours of operation that outdoor services will be provided.
 6. If using City Property, provide evidence of general liability insurance as required by Sec. 33-8(b)(2) above and, if alcoholic beverages will be served within the outdoor services area, provide evidence of liquor liability insurance as required by Sec. 33-8(b)(3) above.
 7. Any additional materials as deemed necessary by the Planning Director to ensure compliance with the standards.
- (b) Prior to issuance of a temporary outdoor services permit by the Planning Director, the application must be reviewed and approved by the following City officials, or their designee: Code Enforcement Officer; City Clerk; Fire Chief; Police Chief; Public Works Director; and Health Inspector (if the application involves outdoor dining). The Planning Director shall not issue a temporary outdoor services permit if one of the designated application reviewers does not provide a positive recommendation on the application; instead the Planning Director shall either (i) allow the applicant to amend the application in such a way that all designated application reviewers provide a positive recommendation on the application; or (ii) deny the application and allow the applicant to appeal such denial as set forth herein.
- (c) City officials responsible for review of an application may require modifications to a proposed site layout and require conditions of approval that they deem necessary in their sole judgement to ensure compliance with this ordinance and to protect the public health, safety, and welfare. The Planning Director shall incorporate these requirements into the permit unless the requirements conflict with another reviewers' requirements, in which case the Planning Director shall deny the application and allow the applicant to appeal such denial as set forth herein.
- (d) There shall be no permit fee assessed for processing or approving outdoor services permit applications. No further City regulatory review and approval is required for outdoor services activity so long as (i) the applicant is in compliance with all existing City regulatory permits, licenses and approvals held by the applicant, and (ii) the property that is the subject of the application is in compliance with all existing City regulatory permits, licenses and approvals that relate to the property.
- (e) The Planning Director may cause a City site inspection to be performed of the area to be utilized for outdoor services to verify compliance with the requirements set forth herein prior to issuing a temporary outdoor services permit. The Code

Enforcement Officer, City Clerk, Fire Chief, Police Chief, Public Works Director, and Health Inspector are authorized to inspect the outdoor services area and determine whether applicants and permit holders comply with, and continue to comply with, this ordinance.

- (f) A temporary outdoor services permit approved hereunder shall automatically expire on November 1, 2020, unless sooner revoked as set forth herein.

Sec. 33-10. Outdoor Services Permit Denial, Suspension or Revocation.

- (a) The Planning Director may deny an outdoor services permit application upon failure of the applicant to meet all of the requirements of this ordinance and/or the failure of the application to obtain the positive recommendation of all of the following City officials: Code Enforcement Officer, City Clerk, Fire Chief, Police Chief, Public Works Director, and Health Inspector (if outdoor dining is involved).
- (b) The Planning Director may, following an investigation and recommendation of a City inspector, suspend, modify or revoke a permit at any time with or without notice based on a determination that additional conditions or limitations shall be required to protect against adverse impacts associated with the outdoor services area or a determination that there has been a violation of this ordinance or the terms and/or conditions of the permit.
- (c) Except as otherwise provided by Sec. 33-7(c) above, any appeal of a decision of the Planning Director to grant, deny, suspend, modify or revoke a permit for outdoor services under the provisions of this ordinance shall be made to the City Council. The City Council shall conduct a *de novo* hearing in which it will hear evidence on the permit and make its own findings of fact and conclusions of law on the issue of whether the activities meet all the requirements of this ordinance. Any appeal of a decision of the City Council shall be to Superior Court pursuant to Rule 80B of the Maine Rules of Civil Procedure.

Sec. 33-11. Extension of Certain Construction Project Timelines.

For any building permit issued from January 1, 2020 to June 1, 2020, there shall be no fee to apply to the Building Inspector to renew a lapsed building permit. For any Planning Board approval granted in the time period January 1, 2020 to June 1, 2020, if the approval holder needs additional time to record a subdivision plan at the Registry of Deeds, to commence construction pursuant to an approved subdivision plan or to start construction pursuant to an approved site plan, the Planning Director may in writing extend the applicable time period for an additional six (6) months beyond the current deadline upon a showing that the need for additional time is related to delays caused by COVID-19; provided, however, that the Planning Director shall also notify the Planning Board by publicly reporting the extension at the next meeting of the Planning Board.

Sec. 33-12. Enforcement; Violations.

This ordinance shall be enforced by the Planning Director, for whom the Code Enforcement Officer, City Clerk, Fire Chief, Police Chief, Public Works Director, and Health Inspector shall provide investigative and enforcement assistance. In addition to any action that may be taken by the Planning Director or the City Council with respect to the suspension or revocation of a license, violation of this ordinance shall be a civil violation subject to a fine. Each day of a violation shall constitute a separate violation. For any violation of this ordinance, the violator shall be penalized with a fine of \$500 per day for each such violation, to be recovered upon complaint to Maine District or Superior Court in Portland, for use of the City. In addition to the fines provided herein, the City may enjoin or abate any violation of this ordinance by appropriate action. The City shall be entitled to recover its costs of enforcement, including its reasonable attorney's fees. Nothing in this ordinance shall prevent the enforcement official from obtaining voluntary compliance by way of warning, notice or education.

Sec. 33-13. Reports and Review.

Commencing July 1, 2020, the Planning Director shall provide the City Council with monthly reports summarizing the number of temporary outdoor services permits issued in the prior month; the names of permit holders; the location of the properties for which the permits were issued in the prior month by street address, map/lot number, and zoning district; and identifying any City property approved as an outdoor services area.

Sec. 33-14. Severability.

Should any section or provision of this ordinance be declared by the courts to be invalid, such decision shall not invalidate any other section or provision of this ordinance.

Sec. 33-15. Conflicts with Other Ordinances.

Whenever a provision of this ordinance conflicts with or is inconsistent with another provision of the Code of Ordinances, this ordinance shall control.

Sec. 33-16. Effective date; Applicability date.

This ordinance shall become effective pursuant to Section 225 of the City Charter and shall expire on November 1, 2020, unless otherwise modified, amended or

extended by subsequent City Council action. Notwithstanding the provisions of 1 M.R.S. § 302 or any other law to the contrary, this ordinance, when enacted, shall apply commencing on June 1, 2020.

Fiscal Note: Less than \$1,000

Date: June 2, 2020