Subject:

ORDER #144-12/13 – Authorize the City Manager to sign a License Agreement with William F. Dunnigan, III, d/b/a Cia´ (coffee, ice cream, art gallery) to offer outdoor seating for its patrons on a portion of Ocean Street sidewalk. Passage requires majority vote.

Position:

Cia´, a new coffee/ice cream/art establishment on Ocean Street in Knightville, has requested the opportunity to place tables and chairs on the sidewalk in front of its establishment. The plan is for the installation of three tables, two chairs apiece and a 48” wide umbrella shading each table. Currently Chapter 23 does not allow this type of activity to occur on city sidewalks. The typical sidewalk width in South Portland is between 4 to 5 feet wide; however, since the reconstruction of the Knightville streetscape last summer, the city now has sidewalks up to 8-feet in width. This type of width could allow for activity to occur, while leaving ample enough room for pedestrians.

Ordinance Section 23-4 and 23-11, though may not necessary “prohibit” the specific activity from happening, it doesn’t say it can happen either.

Sec. 23-4. Altering sidewalks.

No person shall make any alteration in any sidewalk in the city without first obtaining the consent of the council or the consent of some person authorized by the council. (Code 1966, § 6-6-1.10)

Sec. 23-11. Obstructing streets, sidewalks with material, appliances, etc.: Permit required; space permitted to be obstructed; occupant’s duty.

(a) No person shall place or cause to be placed upon a public street, gutter, public sidewalk, or parts thereof, any materials, appliances or other devices used in connection with the construction, repair or alteration of any building without first obtaining a permit from the director of public works.

(b) Such obstructions shall not occupy more than one-third (1/3) the width of any street, nor more than one-half (1/2) the width of any sidewalk.
(c) The temporary occupant shall give acceptable assurance sufficient to the director that the obstructions shall be confined to the area for which the permit was issued.

SOUTH PORTLAND CODE (Code 1966, § 7-3-4)

As this is a new proposal for the City to consider, I proposed in workshop for the Council to take a one-year review on how the process works before completely committing to changing any Ordinance. A license agreement (as attached) would provide the City a one-year review of this type of activity. The Agreement would allow for the use, but put conditions and criteria on the use. Staff will be able to monitor the activity and complaints, if any, over the next five months and make recommendations to the City Council in late fall or winter on whether to change the Ordinance for this type of activity. If a change in Ordinance was to occur, Corporation Counsel has recommended that the change take place in Chapter 14.

Using the sidewalk for seating or display of items would be limited to only a few locations within the City. Sidewalk width criteria would govern where this type of activity could take place. A quick review of sidewalk widths showed the use could happen in a portion of Knightville and possibly some areas of Willard Square. It should be noted that while working through Cia’s application request, staff noticed that Smaha’s (table of plants) and the Lamp Repair Shop (antique stools) both seem to be displaying items out on the sidewalk along their building frontage.

At last Monday’s workshop the Council accepted the License Agreement proposal and is willing to give the proposal a try for the summer of 2013. Corporation Counsel has amended the License Agreement in the following ways:

1. First “Whereas” clause – defined sidewalk as 8 ft wide
2. Sec. 1 – defined width of Licensed Property as 5 ft wide
3. Sec. 2(b) – fixed hours and added need to remove furniture during off-hours for seating area
4. Sec. 2(h) – added limit of 3 tables, 6 chairs
5. Global - fixed a few stray references to “Licensed Premises” that should be to “Licensed Property”

This item is in order for Council review and action on Monday.

Requested Action:

Council passage of ORDER #144-12/13

_________________________
City Manager
IN CITY COUNCIL
ORDER #144-12/13

ORDERED, that the City Manager be and hereby is authorized to sign a License Agreement with William F. Dunnigan, III d/b/a Cià (coffee, ice cream, art gallery) to offer outdoor seating for its patrons on a portion of Ocean Street sidewalk.

Fiscal Note:  Less than $1000

Dated: May 20, 2013
LICENSE AGREEMENT

This License Agreement is made this ____ day of May, 2013 by and between the CITY OF SOUTH PORTLAND, a municipal corporation existing under the laws of the State of Maine and located in the County of Cumberland, State of Maine (the “City”), and WILLIAM F. DUNNIGAN III, a resident of South Portland, County of Cumberland and State of Maine with a mailing address of 72 Ocean Street, Unit 303, South Portland, ME 04106 (“Licensee”).

WHEREAS, Ocean Street is a City-accepted street located in South Portland that is improved with an approximately eight (8) foot wide sidewalk running along the easterly side of Ocean Street, adjacent to the Mill Cove Landing Condominium project;

WHEREAS, Licensee owns certain real property in the City of South Portland, County of Cumberland, State of Maine, which real property is described as Unit 103 in the Mill Cove Landing Condominium in a deed dated September 27, 2012 and recorded in the Cumberland County Registry of Deeds in Book 29971, Page 251 (the “Retail Property”);

WHEREAS, a copy of the Condominium Plat and Plans for the Mill Cove Landing Condominium is recorded in said Registry in Plan Book 208, Pages 199-208;

WHEREAS, Licensee has recently started to operate the Retail Property as a coffee, ice cream and art gallery shop under the name of “Cia”;

WHEREAS, Licensee would like to offer outdoor seating to his Retail Property patrons on a portion of the Ocean Street sidewalk adjacent to the Retail Property; and

WHEREAS, to determine the feasibility of the proposed use of certain public sidewalks for outdoor seating during warmer weather, the City Council is willing to enter this license agreement on a “trial only basis,” which agreement shall be effective from May 21, 2013 through October 15, 2013, at which time the use of certain public sidewalks, including the one covered by this License Agreement, for outdoor seating during warmer weather shall be re-examined by the City Council to determine if the use of certain public sidewalks for outdoor seating during warmer weather by retail businesses is feasible on a long-term basis, and, if so, whether any additional changes are needed to the proposed terms and conditions of such use and/or the Code of Ordinances generally.

NOW, THEREFORE, in consideration of One Dollar and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the City hereby extends to Licensee the right to use and occupy the Licensed Property, as defined
herein, for said purposes, and Licensee hereby accepts the same, both pursuant to the terms and conditions of this License Agreement (the “Agreement”).

1. The Licensed Property: The specific Licensed Property is defined as that easterly five (5) foot wide portion of the Ocean Street sidewalk from the westerly edge of the Retail Property to the sidewalk (the “Licensed Property”). A sketch of the Licensed Property is attached hereto as Exhibit A and incorporated herein.

2. Use of the Licensed Property: Licensee will use the Licensed Property for the purposes of outdoor seating for a coffee, ice cream and art gallery shop. Such use is subject to the following terms and conditions:

   (a) Licensee’s use of the Licensed Property will comply with all applicable laws, ordinances, and regulations, including, without limitation, any and all requirements regarding licensing and land use approvals.

   (b) Hours of operation at the Licensed Property are limited to 9:00 a.m. through 7:00 p.m., seven (7) days/week. All outdoor seating furniture (tables, chairs, umbrellas) and other personal property shall be removed from the Licensed Property during non-operational hours of the outdoor seating area.

   (c) The Licensee, his employees, guests, patrons and invitees shall not engage in or allow any illegal activity to occur at the Licensed Property. Illegal drugs and/or tobacco products shall not be brought onto or consumed within the Licensed Property. The sale or consumption of alcohol on the Licensed Property is prohibited.

   (d) Notwithstanding any other provision of this Agreement to the contrary, thirty-six (36) inches of the Ocean Street sidewalk must be left clear of any obstructions to safe pedestrian and wheelchair passage on the portion of the sidewalk that is not a part of the Licensed Property.

   (e) Nothing shall be permanently attached to the Licensed Property or any other City property. Heat lamps and tents are prohibited on the Licensed Property.

   (f) No sign, billboard, panel, placard, poster, notice or other advertising device in, upon or above the Licensed Property or so situated with respect to the Licensed Property shall interfere with or distract motorists on adjacent streets or otherwise be so situated as to prevent the safe use or maintenance of Ocean Street and D Street.

   (g) No umbrella shall be no larger than forty-eight (48) inches at its longest dimension when open, and no umbrella shall obstruct safe pedestrian and wheelchair passage on the portion of the sidewalk that is not a part of the Licensed Property.
(h) No tables, chairs, umbrellas, trash receptacles or other items of personal property shall block any means of ingress or egress to Licensee’s Retail Property. The Fire Chief or his designee must approve the number and arrangement of tables, chairs, umbrellas, trash receptacles and other items of personal property located within the Licensed Property, and once so approved, the License shall not increase the number of, or substantially change, the arrangement of tables, chairs, umbrellas, trash receptacles and other items of personal property located within the Licensed Property without first securing an amended approval from the Fire Chief or his designee; provided further that the Fire Chief or his designee shall not approve more than three (3) tables and six (6) chairs within the Licensed Property.

(i) The Licensee shall provide at least one trash receptacle located within the Licensed Property.

(j) The Licensed Property shall be cleaned as reasonably necessary, but no less than daily, using a broom, hose and/or other equipment as appropriate.

(k) The Licensee is responsible for any damage to the Licensed Property or any part thereof caused directly or indirectly by the Licensee or his/her agents, employees, guests, or invitees. The City shall not be liable for any damage or loss to any property of the Licensee from any cause whatsoever while said Licensee’s property is located within the Licensed Property for storage purposes or otherwise.

(l) The Licensee is responsible for leaving the Licensed 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 the Licensed Property. The Licensee shall be charged for any required repair or cleanup costs incurred as a result of the Licensee’s use of the Licensed Property.

3. No Warranties: The City extends no warranties or guaranties of any kind with this Agreement. Rights to the Licensed Property are granted solely on an “AS IS, WHERE IS” basis.

4. Inspection: The City, its agents, officers, and employees shall have the right to enter the Licensed Property at all times to confirm that the Licensee is in compliance with this Agreement.

5. Insurance: Prior to commencement of use of the Licensed Property, Licensee shall provide the City Manager with proof of general liability insurance provided by an insurance company or companies licensed or approved to do business in the State of Maine by the Maine Bureau of Insurance to cover 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 arising out of this Agreement in an amount not
less than $400,000, or such larger amount as needed to reflect changes in municipal liability exposure under the Maine Tort Claims Act, as amended from time to time, and naming the City as an additional insured on the Licensee's insurance policy.

6. **Indemnification:** The Licensee 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 Licensee’s use of the Licensed Property.

7. **Term:** The term of this Agreement shall run from May 21, 2013 through October 15, 2013.

8. **Termination:**

   (a) If the City determines, in its sole judgment, that the Licensee has breached a term of this Agreement, the City shall have the right to immediately terminate this Agreement prior to the expiration of the term of the Agreement by written notice from the City Manager to the Licensee.

   (b) The Licensee may terminate this Agreement for convenience by giving the City no less than seven (7) days advance notice in writing.

   (c) In the event of termination or expiration of the Agreement, Licensee shall have forty-eight (48) hours to clean the Licensed Property and to complete the removal of all furniture, equipment and other personal property from the Licensed Property; Licensee shall repair all damages resulting from such removal. Licensee agrees to defend and indemnify the City from any loss, liability, claims, damages, and injury to person or property arising out of Licensee’s exercise of such right. Any personal property not removed at the end of the term hereof shall be deemed abandoned by the Licensee and shall become the property of the City, and Licensee 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.

   (d) Under all circumstances, the indemnification obligations shall survive any termination of this Agreement.

9. **Non-Assignment:** This Agreement is not assignable to any other person or entity.

IN WITNESS WHEREOF, the City of South Portland, through its City Manager, thereunto duly authorized, and William F. Dunnigan III have caused this instrument to be signed as of the date first set forth above.
CITY OF SOUTH PORTLAND

By: ____________________________

James H. Gailey
Its City Manager, duly authorized

WILLIAM F. DUNNIGAN III

By: ____________________________

Witness

Witness