

**LIMITED TERM PARKING RELIEF AGREEMENT
BY AND BETWEEN THE CITY OF SAN CLEMENTE
AND _____**

PARTIES AND DATE

This Agreement (“Agreement”) is entered into as of _____, 2022 (“Effective Date”) by and between the City of San Clemente, a California municipal corporation (the “City”) and _____ [Business Name], a _____ [Type of Business or Entity], (the “Business”). The City and Business are sometimes hereinafter individually referred to as “Party” and hereinafter collectively referred to as the “Parties.”

RECITALS

- A. The San Clemente Municipal Code (SCMC), Section 17.64.050 requires that private businesses provide dedicated parking for their use as indicated therein. Restaurants typically are required to provide a dedicated parking stall for every 4-5 customer seats on premise.
- B. The Governor of the State of California signed into law after the 2021 legislative session various bills supporting small businesses, including AB-61 and SB-314, which provide regulatory flexibility in the service areas for alcohol and relief from parking standards while encouraging local agencies to adopt ordinances and regulations as are herein proposed that streamline the approval for outdoor dining.
- C. On March 15, 2022, the City Council held a duly noticed public hearing and approved Zoning Amendment ZA 22-027 amending Section 17.28.206 of the San Clemente Municipal Code, regulating Temporary Parklet Dining, which establishes standards for outdoor dining areas and sunsets on December 31, 2023.
- D. SCMC Section 17.28.206 allows and regulates business use of parking areas for outdoor dining purposes.
- E. Businesses may opt to either: 1) meet their code-required off-street parking requirements; or 2) contribute a fixed monthly payment for dining areas that occupy parking stalls that are no longer available for parking.
- F. If businesses opt to participate, they will be required to contribute: 1) Four dollars (\$4) per square foot of dining area on **public** property per month; or 2) One dollar (\$1) per square foot of dining area on **private** property per month. Funds will go to the City’s general fund which may be used to offset parking and mobility impacts within the City.
- G. _____ [Business name], with a place of business located at _____ [address], in the City of San Clemente, County of Orange, State of California (the “Property”), wishes to contribute the fixed monthly payment commencing on June 1, 2022 and ending on December 31, 2023. The full period shall be considered 19 full months for the purposes of billing.

- H. The City desires to accommodate the Business’s request, subject to the terms and conditions set forth in this Agreement.

TERMS

Now therefore, in consideration of the mutual covenants and obligations of the parties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Relief.

1.1. Grant. The City hereby grants relief to the Business, and the Business’s representatives and agents, from SCMC 17.64.050 for the limited purpose of conducting the Permitted Activities described in Section 3 (Permitted Activities). The Parties hereby acknowledge and agree that use of the Property by Business, as set forth in this Agreement, is with the consent of the City and shall be considered permissive.

1.2. No Transfer of Interest. Nothing in this Agreement shall be interpreted as, or otherwise deemed to be, a transfer or conveyance of any interest in the Property whatsoever between the City and the Business. The Parties hereby acknowledge and agree that nothing in the Agreement shall be interpreted as an agreement for the lease or other use of the Property by Business.

1.3. Agreed Parking Relief Compensation. The Business agrees to pay four dollars per month per square foot of dining area on public property or one dollar per month square foot of private property, as applicable. “Dining area” shall mean the space enclosed within the required perimeter barrier/guardrail. The City will invoice the Business as described in Exhibit A.

1.4. Agreed Planter Cost Sharing. The approved design for planters on public streets calls for the installation of concrete planters every five feet along the outer edge (nearest traffic). The City and Business agree to share this cost at two hundred and fifty dollars (\$250) each, per planter. The City will select the planter type and arrange delivery. The business will have use of the planter for the parklet until December 31, 2023. The City will assume ownership control and responsibility of the planters after December 31, 2023.

2. Term. The term of this License shall commence on the Effective Date and shall, unless otherwise modified, continue until December 31, 2023 per Section 11 (Termination, Default, and Restoration).

3. Permitted Activities and Other Uses.

3.1. Permitted Activities. Business is authorized to conduct the following activities on the Property (“Permitted Activities”):

3.1.1. Maintain or establish an outdoor dining area with a footprint approved by the City through a Parklet Dining Permit.

- 3.1.1.1. Parklets may have up to 24 seats for dining and a bench for waiting customers or public seating. The Business must provide one (1) wheelchair-accessible dining seat per twenty seats, including fractions thereof.
 - 3.1.2. Serve food and beverages within the outdoor dining area. Alcoholic beverages may be served in these areas with ABC approval of a Temporary Catering Authorization¹. Alcoholic beverages may not be consumed outside of the permitted outdoor dining area.
 - 3.1.3 Nothing in this section shall be construed to supersede any State or Federal regulations.
 - 3.2. Time. All Permitted outdoor activities are limited to the time of 7 a.m. to 9 p.m. daily and may continue until 10 p.m. Friday through Saturday and the day prior to a City Holiday.
4. Required Approvals and Compliance.
 - 4.1. Required Approvals. The use of the property by the Business for Permitted Activities pursuant to this Agreement is subject to Business obtaining, at its sole cost and expense, and maintaining throughout the term of this License, all approvals and permits required by any federal, state, or local government agency, including the City Approvals listed in Section 4.2 (City Approvals) (“Required Approvals”).
 - 4.2. City Approvals. The Business must submit a Parklet Dining Permit Application prior to completing this Limited Term Parking Relief Agreement. Parklets may not be constructed until after this agreement is executed by all parties. Parklets may not be operated until after the Parklet Self-Certification Checklist has been completed. All referenced forms may be found on the City’s website.
 - 4.3. City Review. The City does not make any representation that it will issue or otherwise assist in the issuance of any Required Approval. The City shall have no obligation or liability to verify whether Business has obtained all Required Approvals.
 - 4.4. Compliance. The Business’ rights under this Agreement shall be conditioned upon, and Business shall, at their sole cost and expense, comply with each and every federal, state and local law, regulation, standard, court decision, ordinance, rule, code, order, decree, directive, guideline, permit and permit condition, together with any declaration of covenants, conditions and restrictions that are recorded in any official or public records with respect to the Property or any portion thereof, each as currently existing and as amended, enacted, issued or adopted from time to time, that are applicable to the Permitted Activities and the Property. The Parklet operator is responsible for complying with the Parklet Design and Operation Guidelines,

¹ <https://www.abc.ca.gov/abc-218-cv19-instructions/>

which may be updated by the City from time to time and can be found on the City's website.

5. Standard of Performance. All Permitted Activities shall be performed in accordance with the highest standards and practices in the industry.
6. Hazardous Materials. The Business shall not under any circumstances store or bring onto the Property any Hazardous Materials. As used in this Agreement, the term "Hazardous Material" means any substance, material or waste which is (1) defined as a "hazardous waste," "hazardous material," hazardous substance," "extremely hazardous waste," or "restricted hazardous waste" under any provision of California law; (2) petroleum or petroleum products; (3) asbestos; (4) polychlorinated biphenyls; (5) radioactive materials; (6) designated as a "hazardous substance" pursuant to Section 311 of the Clean Water Act, 33 U.S.C. section 1251 et seq. (33 U.S.C. §1321) or listed pursuant to Section 307 of the Clean Water Act (33 U.S.C. §1317); (7) defined as a "hazardous substance: pursuant to the Resource Conservation and Recover Act, 42 U.S.C. section 6901 et seq. (42 U.S.C. §6903) or its implementing regulations; (8) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. section 9601 et seq. (42 U.S.C. §9601); or (9) determined by California, federal or local governmental authority to be capable of posing a risk of injury to health, safety or property.
7. No Duty to Warn. The City has no duty to inspect the Property and no duty to warn the Business or any person of any other latent or patent defect, condition or risk that might be incurred in entering the Property. The Business has inspected or will inspect the Property and hereby accept the condition of the Property "AS IS." The Business acknowledges that neither the City, nor any employee, agent or representative of the City, has made representations or warranties concerning the condition of the Property. All persons entering the Property under this Agreement do so at their own risk.
8. Liability for Damage. With respect to Business' rights under this Agreement, the Business shall be responsible for any damage done to any person, or to the Property or any other property, caused by the Business, their officers, directors, employees, agents, independent contractors, insurers, lenders, representatives, successors or permitted assigns of the Business, and the other users.
9. Insurance. Each Business shall maintain in effect during the entire term of this Agreement each of the following:
 - 9.1. Insurance Coverage.
 - 9.1.1. Commercial General Liability. The City requires Commercial General Liability, personal injury and property damage liability, with minimum combined liability limits of One Million Dollars (\$1,000,000) per occurrence. Any deductible or self-insured retention in excess of Five Thousand Dollars (\$5,000) shall be declared to the City and requires the prior approval. An additional insured endorsement to the general liability policy is required and shall name and list the City of San Clemente, its officials, officers, employees, agents and volunteers as additional insured.

9.1.1.1. Provide that the insurance is primary and non-contributing with any other valid and collectible insurance or self-insurance available to City.

9.2. Evidence of Insurance. The Business shall provide to City a Certificate(s) of Insurance evidencing such coverage together with copies of the required policy endorsements at least fifteen (15) business days prior to the expiration of any policy. Coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits, non-renewed, or materially changed for any reason, without thirty (30) days prior written notice thereof given by the insurer to City by U.S. mail, or by personal delivery, except for nonpayment of premiums, in which case ten (10) days prior notice shall be provided.

9.3. Endorsements.

9.3.1. Valid Endorsements. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement. Insurance policies shall not be in compliance if they include any limiting provision or endorsement that has not been submitted to the City for approval.

9.3.2. Additional Insured Endorsements Additional Insured Endorsements shall not:

9.3.2.1. Be limited to "Ongoing Operations."

9.3.2.2. Exclude "Contractual Liability."

9.3.2.3. Restrict coverage to the "Sole" liability of Business.

9.3.2.4. Contain any other exclusion contrary to the Agreement.

9.4. Acceptability of Insurers. Each policy shall be from a company with current A.M. Best's rating of A- VII or higher and authorized to do business in the State of California or approved in writing by the City.

10. Liens.

10.1. No Liens Due to Business's Activities. Business shall not permit to be placed against the Property, or any part thereof, any design professionals', mechanics', materialmen's, contractors' or subcontractors' liens due to Business's construction activities thereon or use thereof. Business shall indemnify, defend and hold the City harmless from all liability for any and all liens, claims and demands, together with the costs of defense and reasonable attorneys' fees, related to same.

10.2. Failure to Defend. In addition to, and not in limitation of, the City's other rights and remedies under this Agreement, should Business fail either to discharge any lien or claim related to Business' construction activities on or use of the Property or to bond for any lien or claim to the reasonable satisfaction of the City, or to indemnify, hold harmless and defend the City from and against any loss, damage,

injury, liability or claim arising out of Business use of the Property, then the City, at its option, may elect to pay any lien, claim, loss, demand, injury, liability or damages, or settle or discharge any action or satisfy any judgment and all costs, expenses and attorneys' fees incurred in doing so shall be paid to the City by Business upon written demand, together with interest thereon at the rate of ten percent (10%) per annum from the date incurred or paid through and including the date of payment by Business.

11. Termination, Default, and Restoration.

11.1. Termination Without Cause. This Agreement may be terminated by either Party earlier than the December 31, 2023 expected termination date by giving Thirty (30) days' written notice to the other Party.

11.2. Termination for Cause. In addition to the rights described in Section 11.1 (Termination Without Cause), the City shall have the right to terminate this Agreement upon the Business's Default.

11.2.1. Default. "Default" means the failure of the Business to perform, or violation of any term, condition, covenant or agreement of this Agreement, and the continuation of such failure or violation for a period of ten (10) days after the City provided the Business with written notice specifying the same.

11.2.2. Termination. In the event of any Default by Business, including expiration of any applicable cure period, the City may terminate the Agreement. The City shall mail a "Notice of Intent to Terminate Agreement" letter to the Business (at the address specified in 13.8 – Notices), which describes the violation, default, and right to appeal.

11.2.3. Right to Appeal. The Business may appeal the Notice of Intent to Terminate the Agreement in writing to the City Manager at the address indicated in the Notices Section herein (13.8) within 10 business days of the date of delivery of said notice. The City Manager shall schedule a hearing with the appealing Business no sooner than 5 business days from receipt of the appeal and no later than 15 business days from receipt of the appeal.

11.2.4. Decision is Final. If the Business fails to submit an appeal within 10 business days as described in 11.2.3, then the Termination is final. If the City Manager hears an appeal as described in 11.2.3, his/her determination is final.

11.2.5. Remedies. The City may issue citations or seek other financial or legal remedies if the Business continues to operate after Termination of the agreement. The City reserves the right to remove any material on its public property after Termination of an agreement.

11.3. Restoration of Land to Original Condition. Upon termination of the Agreement, the Business shall be responsible for removing all improvements the Business placed upon the land. The Business shall promptly initiate and exercise due

diligence in removing said improvements until all improvements have been removed, which shall be completed by January 11, 2024 or not more than thirty (30) days following termination of this Agreement if terminated earlier than December 12, 2023.

- 11.4. Effect of Termination. Termination of this Agreement shall in no way prejudice any of the rights and remedies available to the City at law or in equity, and the Business acknowledge and agree that all of the obligations and responsibilities of Business under this Agreement shall continue and survive such termination.

12. City's Right Of Substituted Performance.

- 12.1. City Removal of Parklets on Public Property due to Termination. If at any time during the Term, the Business refuses or neglects to make repairs or maintain the Premises or any part thereof in a manner consistent with the terms of this Agreement or otherwise reasonably satisfactory to City, City shall have the right, upon giving the Business reasonable written notice of its election to do so, to make such repairs or perform such maintenance on behalf of and for the account of Tenant. In such event City's cost for such work shall be reimbursed by the Business to City within ten (10) business days after Tenant's receipt of a bill therefor.

- 12.2. City Removal of Parklets due to Emergency Repairs or Work on Public Property. If at any time during the Term, the City has need of access to the area under the established Parklet, the Business shall be responsible for removing the parklet in whole or in part as directed by the City's Public Works Director or designee in order to facilitate emergency work. If the Business is unable to remove the Parklet within the time indicated by Public Works, then the City shall have the right to remove the parklet to the extent necessary to perform the work. In such event City's cost for such work shall be reimbursed by the Business to City within ten (10) business days after Tenant's receipt of a bill therefor unless waived by the City Manager.

13. Miscellaneous.

13.1. Indemnification.

- 13.1.1. Indemnification of the City by the Business. The Business shall defend (with counsel of the City's choosing), indemnify, and hold the City, its officials, officers, employees, volunteers, and agents (the "Indemnified Parties") free and harmless from any and all liability from loss, damage, or injury to property or persons, including wrongful death, in any manner arising out of or incident to acts, omissions, and/or operations by the Business, its officials, officers, personnel, employees, contractors, and/or subcontractors as well as its contractors' and/or subcontractors' officials, officers, employees, and agents. Further, the Business shall defend at its own expense, including attorneys' fees, the Indemnified Parties in any legal action based upon such acts, omissions and/or operations.

- 13.1.2. The Business's Obligations. The Business's obligations under this Section 12.1 (Indemnification) shall apply to all damages and claims for damages of every kind suffered, or alleged to have been suffered, regardless of whether or not the City has prepared, supplied, or approved any plans or for the uses allowed by this Agreement, and regardless of whether or not such insurance policies shall have been determined to be applicable to any of such damages or claims for damages.
- 13.1.3. The City's Rights. The City does not and shall not waive any rights against the Business that the City may have under the indemnification provision in this Section 12.1 (Indemnification) because of the City's acceptance of any security deposits or insurance policies.
- 13.1.4. Survival. The indemnification provision in this Section 12.1 (Indemnification) shall survive the termination or expiration of this Agreement.
- 13.2. Attorneys' Fees. If any legal action or proceeding arising out of or relating to this Agreement is brought by either party to this Agreement, the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action or proceeding by the prevailing party.
- 13.3. Governing Law and Venue. This Agreement shall be governed by the laws of the State of California. Venue shall be in Orange County.
- 13.4. Waiver. The City's failure to insist upon strict compliance with any provision of this Agreement or to exercise any right or privilege provided herein, or the City's waiver of any breach hereunder, shall not relieve the Business of any of its obligations hereunder, whether of the same or similar type. The foregoing shall be true whether the City's actions are intentional or unintentional. Further, the Business agrees to waive as a defense, counterclaim, or setoff any and all defects, irregularities, or deficiencies in the authorization, execution, or performance of this Agreement as well as any laws, rules, regulations, ordinances, or resolutions of the City with regard to this Agreement.
- 13.5. Supplement, Modification, and Amendment. No supplement, modification, and/or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.
- 13.6. Assignment or Transfer.
- 13.6.1. No Assignment without the City's Consent. The Business shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without prior written consent of the City. Any attempt to do so shall be null and void, and any assignee, hypothecate, or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation, or transfer. Unless specifically stated to the contrary in the City's written consent, any assignment, hypothecation, or

transfer shall not release or discharge the Business from any duty or responsibility under this Agreement.

13.6.2. Merger. The transfer of a majority of the ownership interests in the Business, however accomplished, and whether in a single transaction or in a series of related or unrelated transactions, or the merger of the Business into any other entity in which the Business is not the surviving entity, or the sale of all or substantially all of the Business’s assets, shall be deemed an assignment of the Business’s rights hereunder subject to the requirements of Section 12.6.1 (No Assignment without the City’s Consent).

13.7. Construction, References, and Captions.

13.7.1. Simple Construction. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party.

13.7.2. Section Headings. Section headings contained in this Agreement are for convenience only and shall not have an effect in the construction or interpretation of any provision.

13.7.3. Calendar Days. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days.

13.7.4. References to the City. All references to the City shall include, but shall not be limited to, City Council, City Manager, City Attorney, City Engineer, or any of their authorized representatives. The City shall have the sole and absolute discretion to determine which public body, public official or public employee may act on behalf of the City for any particular purpose.

13.7.5. References to the Business. All references to the Business shall include all officials, officers, personnel, employees, agents, contractors, and subcontractors of Business, except as otherwise specified in this Agreement

13.8. Notices. All notices to be given hereunder shall be in writing and may be made either by personal delivery or by registered or certified mail, postage prepaid, return receipt requested. Mailed notices shall be addressed to the parties at the addresses listed below. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices will be deemed communicated as of two (2) days after mailing.

To City:

City of San Clemente
910 Calle Negocio
San Clemente, CA 92672
Attn: Jonathan Lightfoot

To Business:

Attn: _____

13.9. Entire Agreement and Severability.

13.9.1. Entire Agreement. This Agreement contains the entire Agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements, either written or oral, express or implied.

13.9.2. Severability. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

13.10. Binding Effect.

13.10.1. The Parties. Each and all of the terms and conditions of this Agreement shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns.

13.10.2. Successors and Assigns. This Agreement shall be binding on the successors and assigns of the Parties.

13.10.3. Recordation. The Business acknowledges and agrees that the City may cause a copy of this Agreement to be recorded in the Orange County Recorder's Office.

13.10.4. Not Authorization to Assign. This Section 3.10 (Binding Effect) shall not be construed as an authorization for any Party to assign any right or obligation under this agreement other than as provided in Section 3.6 (Assignment or Transfer).

Signatures on next page.

**SIGNATURE PAGE TO LICENSE AGREEMENT
BY AND BETWEEN THE CITY OF SAN CLEMENTE
AND _____ [BUSINESS]**

In witness thereof, the Parties here to have executed this Agreement:

City of San Clemente

By: _____

Jonathan Lightfoot,
Economic Development Officer

ATTEST:

By: _____

Laura Campagnolo,
City Clerk

APPROVED AS TO FORM:

By: _____

City Attorney: Best, Best, & Krieger LLP

Business Owner and/or Operator

By: _____

NAME: _____

POSITION: _____

By: _____

NAME: _____

POSITION: _____

EXHIBIT A
PARKLET PAYMENT SCHEDULE FOR
_____ (BUSINESS)

Limited Term Parking Relief Agreement Fees.

The Business owner/operator is responsible for all costs associated with development of the parklet space, including construction of the deck and acquisition and maintenance of planters and plants. The monthly fee below reflects a cost of \$4/sf/month for parklets on public property and \$1/sf/month for parklets on private property. Additionally, the City has facilitated a discounted rate for concrete planters, which are specified as part of the standard installation design requirement for parklets on public property. To mitigate initial start-up costs, the City will pay for 50% of the planter cost (not including plants or soil) and assume ownership and responsibility of the planters after December 31, 2023.

- A standard 3-stall angle-in parklet on City property (\$1540/month or \$6160 for full 4-month period) + \$1,250 for 5 concrete planters
- A standard 2-stall parallel parklet on City property (\$625/month or \$2500 for full 4-month period) + \$1,250 for 5 concrete planters
- A non-standard [Public] or [Private] parklet, with dimensions: _____. The fee is \$_____ per month or \$_____ per 4-month period + _____(##) planters at \$250/ea [To be validated by City Staff.]

Fees will be invoiced in arrears in 4-month increments. The first and/or last period of operation may be pro-rated if the period is less than 4 full months. This expense shall be payable on the following dates:

- First payment: September 1, 2022. Includes Planter cost as appropriate.
- Second Payment: January 3, 2023
- Third Payment: May 1, 2023
- Fourth Payment: September 1, 2023
- Final Payment: January 3, 2024

EXHIBIT B

BUSINESS OWNER/OPERATOR CHECKLIST

- I have submitted a complete [Parklet Application](#).
- I have provided the required insurance Certificate and Endorsement (see instructions [here](#)).
- I have reviewed the [Parklet Design Guidelines](#), the standard layouts, and the [Parklet Dining Ordinance](#) and agree to the regulations therein.
- I understand that my parklet cannot be installed until May 9, 2022. Parklets on public property must follow any instructions and on dates and times that will be permitted for construction in coordination with City Public Works.
- I understand that I cannot begin operations until I have completed the [Parklet Operator Self-Certification Checklist](#).