

ORDINANCE NO. O-2022-12

**AN ORDINANCE AUTHORIZING THE CLOSING OF HALE STREET TO VEHICULAR
TRAFFIC BETWEEN FRONT STREET AND WESLEY STREET, FROM MAY 7, 2022, TO OCTOBER 31, 2022
IN CONJUNCTION WITH OUTDOOR DINING TENTS**

WHEREAS, over the past two years the City of Wheaton, pursuant to the executive orders of the Mayor ratified by the City Council, authorized the closing of a portion of Hale Street in Wheaton, Illinois, to vehicular traffic, in order to allow outdoor dining protected by tents along the portion of Hale Street, north of Front Street and south of Wesley Street ("Affected Area"); and

WHEREAS, despite the fact that such outdoor dining was originally adopted in consequence of attempting to further social distancing as a result of the COVID pandemic, the City noted that such outdoor dining has provided benefits to the community including: increased awareness of the City's downtown business district and its commercial offerings; creation of a festival-type atmosphere and promotion of a sense of community; and

WHEREAS, the Corporate Authorities of the City of Wheaton in their home rule capacity have the legal authority to close portions of Hale Street in furtherance of the foregoing public benefits.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and City Council of the City of Wheaton, DuPage County, Illinois, pursuant to its home rule authority, that:

SECTION 1: The Affected Area shall be closed to vehicular traffic from May 7, 2022, to October 31, 2022, to allow the erection of outdoor dining tents.

SECTION 2: The use of the Affected Area for said period shall be strictly subject to the terms and conditions of Section 5 of this Ordinance.

SECTION 3: For purposes of this Ordinance, a "Designated Business" shall mean any business located in the Affected Area which provides food and beverage service to the public.

SECTION 4: Enforcement of any section of the Zoning Ordinance of the City of Wheaton and Chapter 6, "Alcoholic Beverages," Sections 6-1 through Section 6-132 of the Code of Ordinances of the City of Wheaton, which would prohibit or have the effect of prohibiting the deployment and use of dining tents in the street of the Affected Area by Designated Businesses, including accoutrements, are hereby suspended in conformance with the terms of this Ordinance, so long as the Designated Business is operated in full compliance with the any other portion of Chapter 6 "Alcoholic Beverages," Section 6-1 through Section 6-132, except the requirements that would prohibit the sale of alcoholic beverages by a Designated Business, with a valid City of Wheaton Liquor License.

SECTION 5: In order for the Designated Businesses to be authorized to occupy the dining tents and install the associated accoutrements for retail sale of food and beverages on the street in the Affected Area, the Designated Business shall:

- A. Possess and maintain during the period of street occupancy all licenses and permits required to operate in the City of Wheaton; and
- B. Control and manage the street occupancy and installment of associated accoutrements in the Affected Area in conformance with this Ordinance during the period of street occupancy; and
- C. Comply with all applicable sections of the Wheaton City Code pertaining to alcoholic beverages; and
- D. Follow any orders or administrative conditions imposed on an emergent basis by the City Manager or designee, which are intended to protect the public health, safety and welfare; and
- E. Sign the Hold Harmless and Indemnification Agreement attached hereto and incorporated herein as if fully set forth as EXHIBIT 1; and
- F. Provide commercial liability coverage and umbrella coverage in the aggregate amounts of \$1,000,000 and \$2,000,000 naming the City, its officers, elected officials, employees, agents and volunteers as an additional insured; and
- G. Comply with all Illinois State statutes pertaining to the licensing and sale of alcoholic liquor, if the Designated Business sells alcoholic beverages; and
- H. Provide and maintain the access required under the Americans with Disabilities Act; and
- I. Not obstruct fire hydrants.

SECTION 6: The temporary street occupancy and installment of associated accoutrements in the Affected Area by Designated Business shall commence May 7, 2022 through October 31, 2022 and terminate on the first to occur the following:

- A. An Ordinance adopted by Wheaton City Council repealing this Ordinance; or
- B. End of business on October 31, 2022; or
- C. Suspension or revocation of the street occupancy by the Corporate Authorities of the City based on a violation of this Ordinance.

SECTION 7: That this Ordinance does not provide any user with an "interest in land" for occupancy of the closed section of Hale Street. Consequently, the City Council maintains its legal authority without notice or hearing to repeal this Ordinance and return the Affected Area to its prior full use

including vehicular traffic if deemed appropriate in the Wheaton City Council's sole legislative discretion. Should any provision of this Ordinance be declared invalid by a Court of competent jurisdiction the entire Ordinance shall become void and the Affected Area shall be restored to its prior status as a public right of way.

SECTION 8: This Ordinance shall become effective upon its passage, execution and publication as provided by law.



Philip J. Suess
Philip J. Suess, Mayor

ATTEST:



Andrea Rosedale
City Clerk

Roll Call Vote:

Ayes: Councilman Weller
Councilman Barbier
Councilwoman Bray-Parker
Mayor Suess
Councilwoman Fitch
Councilwoman Robbins

Nays: None

Absent: Councilman Brown

Motion Carried Unanimously

Passed: March 21, 2022

Published: March 22, 2022



EXHIBIT 1

HOLD HARMLESS and INDEMNIFICATION AGREEMENT
For Temporary Food and Beverage Service on Hale Street

This Hold Harmless and Indemnification Agreement is dated this _____ day of _____, 2022, and is between _____ ("Indemnitor"), a corporation or other business entity created under the laws of the State of _____, authorized to conduct business in the State of Illinois and the City of Wheaton, Illinois, an Illinois municipal corporation, DuPage County, Illinois ("City").

WHEREAS, the City is in possession of improved public right-of-way which includes Hale Street; and

WHEREAS, on March 21, 2022, the Corporate Authorities of the City of Wheaton adopted Ordinance No. O-2022-12 authorizing businesses located on Hale Street between Front Street and Wesley Street that provide food and beverage service to the public to occupy dining tents and install the associated accoutrements for retail sale of food and beverages in Hale Street pursuant to certain terms and conditions, which include the execution of a Hold Harmless and Indemnification Agreement and the provision of commercial liability and umbrella insurance; and

WHEREAS, Indemnitor desires to use a portion of Hale Street between Front Street and Wesley Street in the vicinity of Indemnitor's property located at _____, Wheaton, Illinois for the purpose of occupying dining tents and installing associated accoutrements for retail sale of food and beverages for _____ (Business Name) in

accordance with City ordinance(s) authorizing the temporary occupation of a portion of Hale Street for dining and retail sale of food and beverages.

NOW THEREFORE, in consideration of receipt of a non-exclusive temporary license from the City to occupy a portion of Hale Street including dining tents and associated accoutrements for retail sale of food and beverages in Hale Street, the parties agree as follows:

1. **Recitals.** The foregoing recitals are incorporated herein as representing the intent of the undersigned and as substantive representations and covenants.
2. **Indemnification.** Indemnitor agrees to indemnify, hold harmless, and defend to the maximum extent allowed by law, the City, its corporate authorities, officers, employees, agents, representatives, and volunteers from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, all costs and cleanup actions of any kind, and all costs

and expenses incurred in connection therewith, including but not limited to reasonable attorney's fees, expert witness fees and costs of defense (collectively, the "Claims") which in whole or in part result from, or arise out of, or are claimed to result from or to rise out of any acts, negligence, errors, or omissions (including, without limitation, professional negligence) of Indemnitor, its employees, representatives, contractors, subcontractors, or agents by reason of or arising out of, or in any matter connected with, any and all acts, operations, privileges authorized, allowed or undertaken pursuant to Indemnitor's use of Hale Street for dining purposes and Indemnitor's installation and use of dining accoutrements for retail food and beverage service. Any personal property, including but not limited to tables, chairs, serving equipment, fencing, tenting, barriers or other non-permanent fixtures, erected, used or installed on Hale Street or private property are the sole and exclusive responsibility of the Indemnitor. The City makes no representations, warranties or promises related to the use of Hale Street for outdoor seating and dining.

This indemnity agreement includes, but is not limited to, personal injury (including death and/or health pandemics at any time) and property or other damage sustained by any person or persons (including, but not limited to, companies, corporations, Indemnitor and its employees or agents, and members of the general public).

The indemnification provided by this Agreement shall apply to Claims occurring on or after the date on which Indemnitor begins occupying dining tents in Hale Street or begins installing dining accoutrements for retail food and beverage service in Hale Street, but shall not apply to any Claims occurring after Indemnitor ceases its operations in, and removes its installations from, Hale Street. Indemnitor shall cease its occupancy and use of Hale Street in accordance with the City's ordinance(s) authorizing the temporary occupation of Hale Street for dining and retail sale of food and beverages. Indemnitor shall provide the City written notification of such cessation in operations and removal of installations ("Termination"). Indemnitor shall have no obligation to indemnify the City for Claims occurring after Termination hereunder.

Upon Termination, the City may remove and dispose of any remaining Indemnitor installations or accoutrements placed upon Hale Street by Indemnitor or its employees, representatives, contractors, subcontractors, or agents without liability to the City.

3. **Insurance.** Indemnitor further agrees to purchase commercial general liability insurance and umbrella insurance, and maintain such insurance coverages for the duration of Indemnitor's use of Hale Street for dining and installing associated accoutrements for retail sale of food and beverages. Indemnitor agrees to purchase such insurance from an insurance company or companies with an A.M. Best rating of A- (VII) or better, and purchase commercial general liability insurance in the amount of \$1 million per occurrence and \$2 million in the aggregate. Indemnitor shall provide the City with an insurance certificate showing the coverages required

herein, prior to Indemnitor's use of Hale Street for occupying dining tents and installing associated accoutrements for retail sale of food and beverages. The City, its officers, elected officials, employees, agents and volunteers shall be named as an additional insured on the insurance procured, and not merely a certificate holder.

4. **Authorization Revocable.** Indemnitor understands that the authorization to occupy a portion of Hale Street including dining tents and associated accoutrements for retail sale of food and beverages in Hale Street may be revoked, amended or otherwise changed based upon Indemnitor's violation of Ordinance No. O-2022-12, or by an Ordinance adopted by the Wheaton City Council repealing Ordinance No. O-2022-12.
5. **City Immunities.** Nothing set forth in this Agreement shall be deemed a waiver by the City of any defenses or immunities relating to Indemnitor or its property, or to any other person or entity or their property, that are or would be otherwise available to the City or its corporate authorities, officers and employees under the provisions of the Illinois Local Government and Governmental Employees Tort Immunity Act, or that are otherwise available to local governments and their corporate authorities, officers and employees under the common law of the State of Illinois or the United States of America.
6. **Entire Agreement; Amendment.** The provisions set forth in this Agreement represent the entire Agreement between the parties and shall supersede all prior agreements, contracts, understandings, promises and representations, oral or written, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement. This Agreement may be modified only by a further written agreement between the parties, and no modification shall be effective unless properly approved and signed by each party.
7. **Agreement Not Binding on Assigns.** This Agreement shall be binding upon the parties hereto only. No heir, successor, lessee or assign of Indemnitor shall have the rights or privileges under this Agreement without the express written consent of the City.
8. **Agreement Not an Easement or Leasehold.** The use of Hale Street authorized by this Agreement is a license and not a property interest or an estate in land. This Agreement shall not be construed as an easement. If any court of competent jurisdiction construes this Agreement as an easement it shall only be a temporary easement which shall terminate 5 calendar days after the Indemnitor asserts in writing that it constitutes an easement. This Agreement shall also not be construed to create a leasehold. If any court of competent jurisdiction construes this Agreement as a leasehold it shall terminate 5 calendar days after the Indemnitor asserts in writing that it constitutes a leasehold.

IN WITNESS WHEREOF, the parties have entered into this Agreement this _____, day of _____, 2022.

CITY OF WHEATON, an Illinois municipal corp.

By: Philip J. Sauer

Date: _____

ATTEST:

BY: Andrea Rosedale

Title:

City Clerk

INDEMNITOR:

By: _____

Its: _____