

ORDINANCE NO. O-2022-54

**AN ORDINANCE AUTHORIZING THE SEASONAL CLOSING OF A PORTION OF
HALE STREET FOR A SEASONAL TENT FOOD AND BEVERAGE SERVICES PROGRAM, SEASONAL
SUSPENSION OF THE ENFORCEMENT OF CITY ORDINANCES PROHIBITING OUTDOOR SALES
AND PATRON POSSESSION OF ALCOHOLIC LIQUOR ON HALE STREET DURING A SEASONAL
TENT PROGRAM AND AUTHORIZING EXECUTION OF HOLD HARMLESS AND INDEMNIFICATION
AGREEMENTS**

WHEREAS, the City of Wheaton, an Illinois Home Rule Municipality, is in possession and owns improved public right-of-way known as Hale Street; and

WHEREAS, recently the City has adopted Ordinances authorizing restaurants on Hale Street, between Front Street and Wesley Street, to provide food and beverage service to the public under tents and associated accoutrements ("Seasonal Tent Program"); and

WHEREAS, the City has elected to extend the program pursuant to this Ordinance and agreements with the Downtown Wheaton Association ("DWA") and the owners/operators of restaurants adjacent to Hale Street; and

WHEREAS, the City has elected to formalize its relationship with the restaurant owners for the use of the Seasonal Tent Program through a Hold Harmless, Indemnification and Temporary License Agreement, a copy of which is attached hereto and incorporated herein as Exhibit 1.

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 foregoing recitals are incorporated herein as if fully set forth.

Section 2. That portion of Hale Street between Front Street and Wesley Street depicted on Exhibit 2 ("Use Area") shall be temporarily closed to accommodate the Seasonal Tent Program as described in the Hold Harmless, Indemnification and Temporary License Agreement (Exhibit 1).

Section 3. 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 sale, delivery and possession of alcoholic liquor or the deployment and use of tents, including accoutrements, in the Use Area by Hold Harmless, Indemnification and Temporary License holders, or patrons of the Hold Harmless, Indemnification and Temporary License holders, are hereby suspended during the term of the Seasonal Tent Program, so long as the Hold Harmless, Indemnification and Temporary License holder and their patrons are in full compliance with any other portion of Chapter 6, "Alcoholic Beverages," Section 6-1 through Section 6-132 of the Code of Ordinances of the City.

Section 4. This Ordinance, including all related exhibits, shall remain effective unless amended or repealed.

Section 5. The City Manager is hereby authorized to execute, and the City Clerk is hereby directed to attest to those Hold Harmless, Indemnification and Temporary License Agreements, for food and beverage service in the Use Area, submitted through the DWA, executed by owners/operators of restaurants adjacent to the Use Area.

Section 6. The City staff is hereby authorized and directed to undertake those acts necessary to effectuate the Seasonal Tent Program and to administer the Hold Harmless, Indemnification and Temporary License Agreement (Exhibit 1).


Philip Suess, Mayor

ATTEST:


City Clerk

	<u>Roll Call Vote:</u>
Ayes:	Councilman Brown
	Mayor Suess
	Councilwoman Fitch
	Councilwoman Robbins
	Councilman Weller
	Councilman Barbier
	Councilwoman Bray-Parker
Nays:	None
Absent:	None
	<u>Motion Carried Unanimously</u>

Passed: December 5, 2022

Published: December 6, 2022

**HOLD HARMLESS, INDEMNIFICATION AND TEMPORARY LICENSE AGREEMENT FOR FOOD AND
BEVERAGE SERVICE ON A PORTION OF HALE STREET**

This Hold Harmless, Indemnification and Temporary License Agreement ("**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 and owns improved public right-of-way known as Hale Street; and

WHEREAS, since 2020, the City has adopted Ordinances authorizing businesses located on a portion of Hale Street north of Front Street and south of Wesley Street that provide food and beverage service to the public, to occupy dining tents and associated accoutrements, allowing for retail sale of food and beverages in the Hale Street right of way, (hereinafter the "**Program**") subject certain terms and conditions, including the execution of a Hold Harmless, Indemnification and Temporary License Agreement and the provision of commercial liability and umbrella insurance; and

WHEREAS, the City has elected to extend the Program pursuant to the terms of this Agreement; and

WHEREAS, Indemnitor desires to participate in the Program by using a portion of Hale Street north of Front Street and south of Wesley Street in the vicinity of Indemnitor's property located at _____, Wheaton, Illinois for the exclusive purpose of occupying dining tents and installing associated restaurant 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 hereby indemnifies, holds harmless, and shall 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, 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 additional insureds on the insurance procured, and not merely a certificate holder.

4. **Authorization Revocable.** The City hereby grants a temporary license to the Indemnitor to participate in the Program. It is not a lease, easement, or any interest in the Hale Street public right of way. 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 is authorized only as a temporary license which may be revoked, amended, or otherwise changed in the City's sole and absolute discretion. Revocations, amendments, or changes shall be provided by the City in writing and shall be effective of the date of hand delivery to the Indemnitor's Hale Street address. If the authorization is revoked Indemnitor shall have 7 (seven) calendar days to remove its restaurant accoutrements from the program premises at its sole cost and expense. No sales of food or beverages shall be allowed during the 7 (seven) days. Failure to remove the accoutrements within the 7 (seven) days shall authorize the City to remove and dispose of the same without liability to the Indemnitor, its successors or assigns. In this circumstance the Indemnitor shall reimburse the City for the actual out of pocket costs in removing the restaurant accoutrements.
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. There are no third person beneficiaries of this Agreement or the Program.
6. **Code Compliance.** As a condition of this temporary license, Indemnitor shall comply with all applicable codes and Ordinances of the City. The City Manager may revoke a temporary license after a hearing before him or his appointee if the Indemnitor violates this section in a manner determined by the City Manager to be inconsistent with the public health, safety and welfare, including but not limited to: Underage Alcoholic Beverage sales or deliveries, overserving alcoholic beverages, failure to maintain its food and beverage service area in a sanitary manner, etc. The hearing shall provide the Indemnitor an opportunity to contest any such allegation before the City Manager or appointee.
7. **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 by the City.

8. **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.
9. **Agreement Not an Easement or Leasehold.** The use of Hale Street authorized by this Agreement is a temporary 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 a leasehold, easement or other interest in land it shall only be a temporary easement which shall terminate 3 (three) calendar days after the Indemnitor asserts in writing that it constitutes an easement, leasehold or other interest in real estate. Any Indemnitor asserting that this Agreement constitutes a leasehold, easement or other interest in land shall reimburse the City's attorney's fees and costs asserting or defending its status as a temporary license.

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

CITY OF WHEATON, an Illinois municipal corporation
Existing under the laws of the State of Illinois

By: _____ Date: _____

ATTEST:

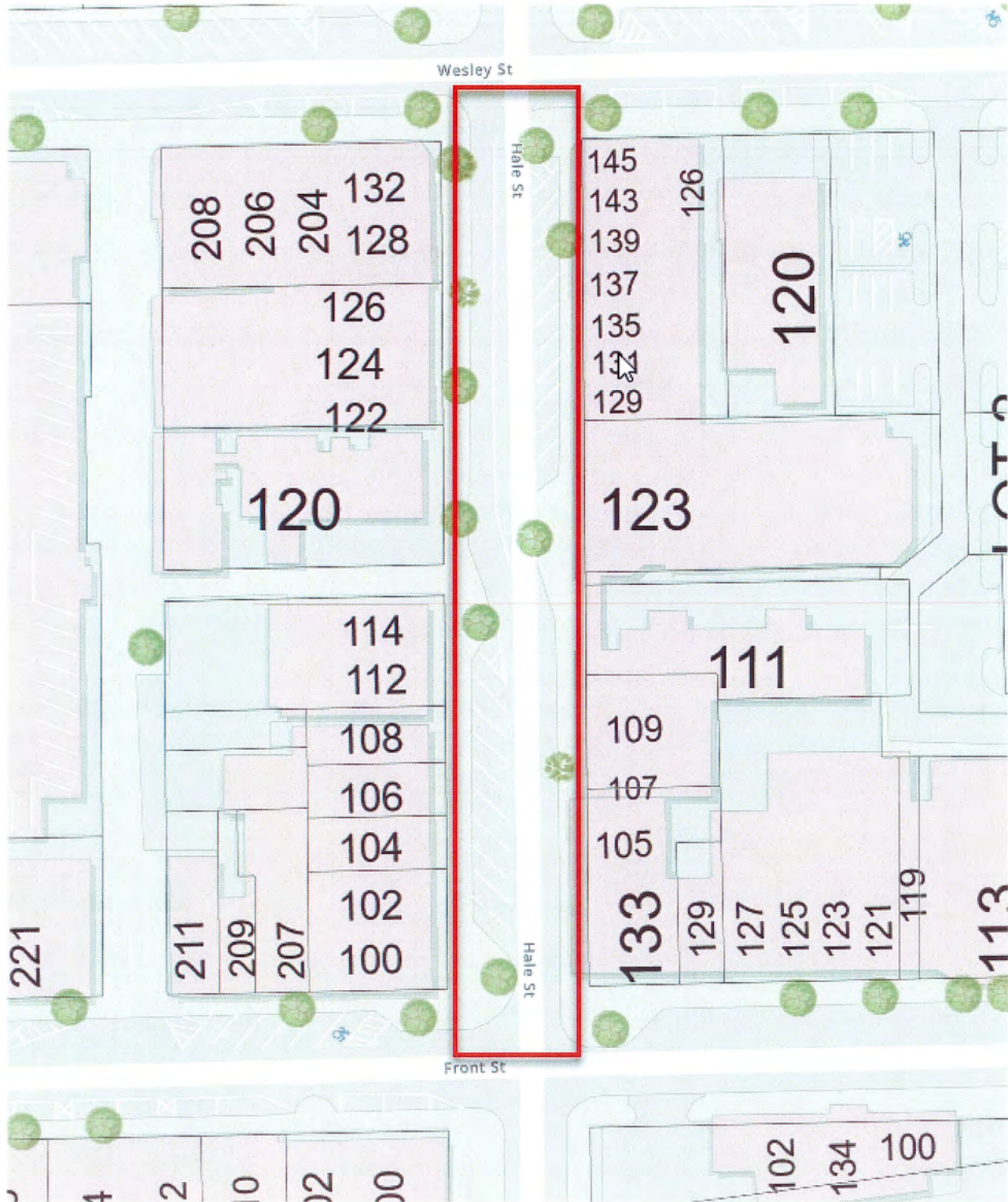
BY: _____

Title: _____

INDEMNITOR:

By: _____

Its: _____



Use area

