AGENDA BACKUP MATERIALS
FOR ISSUE OF DINING IN "PARKLETS"

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MEMORANDUM

TO: City Commission

FROM: Robert M. Fournier, City Attorney

RE: Use of on-street public parking spaces for dining

DATE: February 1, 2023

On November 29, 2022, at the request of the City Manager, I provided a memorandum in which I explained why I believed there were legal impediments under Florida law to the private use of public on street parking spaces for outdoor dining. Essentially, I cited two reasons to be apprehensive about allowing private businesses to expand into the public right of way *on a permanent basis*. First, because the City has a "public use" easement in the street right of way as opposed to fee simple ownership, in the event of a legal challenge to the private use of public right of way, there would have to be a showing that the private use served a valid public purpose. Incidental private benefit is not unlawful, but a benefit to the public at large is also essential. Second, I expressed concern that the City's "public use" easement could continue only for as long as the street was used primarily for the purpose for which it was dedicated to the public. Accordingly, I expressed the concern that the City's continued right to continued control of the public street would depend on its continued use for the primary purpose of vehicular travel and parking.

The November 29, 2022 memo was brought up at the regular City Commission meeting of December 5, 2022 in the context of a broader discussion about continuing the practice of allowing outdoor dining in on-street parking spaces. Both Vice-Mayor Alpert and Commissioner Arroyo spoke in favor of continuing the practice. I acknowledged that I was aware of several municipalities across the state that were allowing private businesses to use on street parking spaces for dining and I agreed to take a closer look at both the regulations in effect in these municipalities and at the Florida case law supporting the assertions made in my memorandum.

To explain why the City had to consider whether a proposed private use of public right of way also would have a public purpose before allowing it, my November 29 memo started out by noting that the City does not have unfettered discretion as to how it will allow public streets (including on street parking spaces) to be used. The basis for this caveat is that pursuant to Florida law, the City of Sarasota does not "own" the streets in the City which have been dedicated for public

use in the same way that a private landowner owns their property. Smith v. Horn, 70 Fla. 484; 70 So. 435 (Fla. 1915). Under the general rule in Florida, the interest acquired by a municipality when a street is acquired through dedication on a plat is more in the nature of an easement. Robbins v. White, 52 Fla. 613; 42 So. 641 (Fla. 1907). That is, the City controls the street via an easement held in trust for the benefit of the general public. United States of America v. 16.33 Acres of Land in County of Dade, 342 So. 2d 476 (Fla. 1977); Sun Oil Company v. Gerstein, 206 So. 2d 439 (Fla. 3rd DCA 1968). This is the reason that any use of the street authorized by the City must benefit the general public.

During the December 5, 2022 Commission meeting discussion it was generally agreed that the establishment of the so called "parklet" dining program was justified by a valid public purpose when it commenced during the pandemic in 2020. The purpose of the program was to keep our restaurants in business during the pandemic when their interior occupancy was limited or restricted. Everyone seemed to agree that there was a general economic benefit to the community in keeping the restaurants solvent and viable and in keeping the individuals who worked in those establishments employed. While the pandemic can be still be used as justification for the program to some extent as there are no doubt people who prefer to dine outside for their personal health related reasons, it was also generally acknowledged that as time goes on, the City must identify a new valid public purpose if the program is going to be continued.

Based on additional research and review of ordinances from other jurisdictions I have done since November, it seems that cities that have been adopting these ordinances are generally cognizant of the two general requirements described above that (1) the private use must also serve a public purpose; and (2) that the primary purpose of the street should still be for travel and incidental parking. The ordinances from these cities suggest that the attorneys who prepared them were less pessimistic than I was in my November 29 memorandum that these criteria can be satisfied. However, most of these ordinances do contain various provisions to enable the municipalities to argue, if challenged, that the private use is not permanent because it is subject to periodic renewal and because no property rights are being conferred to private users. These ordinances also contain provisions to limit the amount of space devoted to parklets so as to preserve the argument that the primary use of the right of way still serves the purpose it was dedicated to serve.

The benefit to the general public most often cited as justification for the municipal ordinances regarding the use of parklets for dining that I have reviewed is to stimulate economic development. There seems to be a general perception in those

communities that have gone forward with on street dining programs that the use of the parking spaces for outdoor dining enhances the experience of visitors to the areas in which it is allowed, thereby drawing more visitors to the benefit of all the businesses in the area. Based on my review of some of these ordinances, I am revising my previous opinion to advise that if the City Commission held a public hearing on a proposed parklet dining ordinance, that based on the pubic input received, the City Commission could make a finding as to whether the use of parklets for outdoor dining in lieu of parking serves the public interest. If the Commission decides affirmatively that it does, in the event of a legal challenge the court should generally speaking be deferential to the Commission's legislative determination in this respect.

As for the second legal requirement to consider, there are some cases, (mainly older ones) that recite the proposition that a street can only be lawfully used by a local government for the purpose for which it was dedicated. But I was not able to find a case that specifically held that a particular non travel related use of public street was unlawful because it was inconsistent with the use for which the street was originally dedicated. So while there are many cases that recite this rule, there seem to be few, if any, cases that have applied it in practice. It seems to me that most local government attorneys who have prepared these parklet dining ordinances believe this requirement could be satisfied by a showing that the *primary* use of the street right of way is still vehicular travel and parking.

Also, as a practical matter, the second legal requirement described above seems to be merging into the first requirement. That is, the main concern is simply whether a proposed private use of the street also serves a valid public purpose and not so much whether or not the use is for the purpose that the street was dedicated. This may be because the modern concept of what is a valid public use of a right of way has been changing as well, with greater recent emphasis on the use of the street as public gathering space and less emphasis on the movement of vehicular traffic.

So, having read many other ordinances I now believe that if the ordinance is drafted in a way that would enable the City to credibly argue in the event of a challenge that the primary use of the right of way is still for traditional street purposes; that the private use also serves a public purpose and that the ordinance is not resulting in the permanent conversion of public space for private use, that a parklet dining ordinance could be adopted. Should the City Commission decide to proceed with developing a program to allow private restaurants to use on street parking spaces for outdoor dining, I would have the following recommendations.

First, the area and number of parking spaces that can be used by an establishment for outdoor dining should be limited in some way so that if necessary, it can still be credibly argued that the *primary use* of the public street is still for vehicular and pedestrian travel. For example, the City of Orlando requires the parking spaces utilized to be in front of the business using the space. Other cities limit the total number of parklets used for dining to a certain number of spaces per "block face" which is defined as one side of a four sided block. (e.g. Safety Harbor) The City of Miami Beach limits the use to two parklets per restaurant. Miami Springs provides that a so called "street café" cannot exceed two parallel or three angle spaces per establishment. West Palm Beach likewise limits each restaurant to no more than two parking spaces.

Second, care should be taken to avoid the perception that the parklet is *permanently* devoted to private use. Generally, the issuance of a permit by a local government will create a property right in the possession of the permit which means the permit cannot be revoked without due process. Some jurisdictions confer the right to use the street by utilizing a revocable license rather than issuing a permit so as not to create any private property rights in the use of the street. The City of Ft. Lauderdale has actually generated a 22 page standardized revocable license agreement between the City and the restaurants. While I am not suggesting that the City of Sarasota should utilize this agreement, it is important to document that the license or permission given by the City to use the space creates no private property interest and that the City Manager may terminate the use when termination is deemed to be in the best interest of the public health, safety and welfare. The City of Miami Beach ordinance does a good job with this and requires a written acknowledgment from the owner of the restaurant property to this effect.

Third, I recommend a signed acknowledgement from the owner of the adjacent restaurant property that in the event the allowance of the use of the parklet for outdoor dining (i.e. expanded restaurant space) results in additional ad valorem property taxes, that the payment of all applicable taxes is the responsibility of the owner of the adjacent property on which the restaurant is situated.

Fourth, compliance with the Americans With Disabilities Act can also be a serious issue that should be addressed.

Finally, rather than being spelled out in detail in the ordinance, a design criteria manual with specific design standards and requirements can be prepared by Engineering staff and adopted by reference within the ordinance.

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