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**Gale A. Brewer, Borough President**

October 13, 2021

**Recommendation on the ULURP Application No. N210434ZRY  
Open Restaurants / Sidewalk Cafés  
by the New York City Department of Transportation and the New York City of  
Department of City Planning**

**PROPOSED ACTIONS**

The New York City Department of Transportation (“DOT”) and the New York Department of City Planning (“DCP”) (together the “Applicants”) are seeking a city-wide zoning text amendment (the “Proposed Action”) to remove text related to sidewalk café regulations from the Zoning Resolution, including Article 1, Chapter 4.

If the Proposed Action is adopted, the zoning regulations that govern existing sidewalk cafés would be removed with the intention of introducing legislation to create a permanent Open Restaurants program that transfers oversight and administration from the New York City Department of Consumer and Worker Protection (“DCWP”) to DOT. Applicants to the DOT program would no longer be required to conform with zoning regulations when they apply.

**BACKGROUND**

*Existing Sidewalk Café and Street Seats Program*

A 1976 amendment to the City Charter required sidewalk café applications, which included a revocable consent, to go through the Uniform Land Use Review Procedure (“ULURP”), which included community board review. In 1980, the process was streamlined with the addition of Article 1, Chapter 4 to the Zoning resolution. At the same time, changes to the City Charter and the City Administrative Code were approved by the City Council removing the requirement for these applications to go through ULURP. In its place, § 2-44 of the Administrative Code was added in 1980. This section outlines the process, now administered by DCWP, which applicants must follow to obtain a revocable consent.

The current permanent outdoor dining program (the “Existing Program”) is administered through two different City agencies. The permanent sidewalk café program is administered by the New York City DCWP and the Street Seats program is administered by DOT. Out of approximately 27,000 restaurants in the City of New York, 1,224 have active permits for sidewalk cafés under the DCWP administered program and 25 have active permits for the Street Seats program.

The DCWP sidewalk café license is governed by provisions set forth in the Zoning Resolution. Without the currently active emergency Open Restaurants program, unenclosed sidewalk cafés

would be permitted in all R10H districts, all commercial districts other than C3 districts, and in manufacturing districts where eating and drinking establishments are permitted. A number of restrictions on the geographic applicability of unenclosed sidewalk cafés are included in the Zoning Resolution, and several special permits also restrict their use. Enclosed cafés are generally permitted except in certain special districts. Areas that predominantly allow only unenclosed cafés are located in East Harlem, West Midtown, and the Financial District. Small sidewalk cafés are also permitted on specified streets included in the Zoning Resolution, particularly concentrated in Midtown and Chelsea.

The follow special zoning districts in Manhattan permit unenclosed and enclosed sidewalk cafés:

|                                     | <b>Enclosed Sidewalk Cafés</b> | <b>Unenclosed Sidewalk Cafés</b> |
|-------------------------------------|--------------------------------|----------------------------------|
| 125 <sup>th</sup> Street District   | No                             | No                               |
| Battery Park City District          | Yes                            | Yes                              |
| Clinton District                    | No                             | Yes                              |
| East Harlem Corridor District       | No                             | Yes                              |
| Enhanced Commercial District 2      | Yes                            | Yes                              |
| Enhanced Commercial District 3      | Yes                            | Yes                              |
| Hudson Square District              | Yes                            | Yes                              |
| Inwood District                     | No                             | Yes                              |
| Limited Commercial District         | No                             | No                               |
| Lincoln Square District             | No                             | Yes                              |
| Little Italy District               | No                             | Yes                              |
| Lower Manhattan District            | No                             | Yes                              |
| Manhattanville Mixed Use District   | No                             | Yes                              |
| Transit Land Use District           | Yes                            | Yes                              |
| Tribeca Mixed Use District          | Yes                            | Yes                              |
| United Nations Development District | No                             | Yes                              |
| West Chelsea District               | No                             | Yes                              |

Additionally, the Zoning Resolution identifies specific streets that do not allow any sidewalk café, streets that do not allow enclosed sidewalk cafés, and streets that only allow small sidewalk cafés.

Under the Administrative Code, sidewalks with cafés are subject to clear pedestrian path requirements. The minimum clear path for all locations is 8 feet or 50% of the sidewalk width, whichever is greater. Further, DWCP regulations govern sign display, railing and decorative accessories, table and chair count, railings, fences, planters, valences, canopies, awnings, and heaters.

Approval from the New York Landmarks Preservation Commission (“LPC”) is required for a sidewalk café in a historic district, or a sidewalk café located in or next to a landmarked building or district. LPC currently approves moveable sidewalk cafes and furniture at the staff level, meaning a public hearing and community board notification are not required. Moveable, non-

permanent sidewalk cafe furniture does not require an LPC permit. Under the DWCP program, all businesses must have a sidewalk café license and revocable consent to operate a sidewalk café.

The Administrative Code includes the ability for community boards to suggest revisions or raise objections within the required revocable consent petition approval process for sidewalk cafés. DCWP is responsible for holding a public hearing before granting the consent.

The existing DOT administered Street Seats is a seasonal program that allows businesses, Business Improvement Districts (“BIDs”), and other nonprofits to apply for a permit to place seating in the roadbed along the curb line or on wide sidewalks from March through December. The seating must be approved by both the property owner and the local community board. Design guidelines require that the arrangement not obstruct the sidewalk, be a pleasant place to sit, be appropriate for existing street conditions, and be outside of a parking zone that is a moving traffic lane at any time of day.

#### *Emergency Open Restaurants Program*

In response to the COVID-19 pandemic, the permanent regulations regarding outdoor dining and sidewalk cafés were suspended pursuant to an amendment to Local Law 77 of 2020 and emergency executive orders 126 and 128, which were issued by Mayor Bill de Blasio on June 18, 2020 and June 27, 2020, respectively. In its place, a temporary Open Restaurants Program (the “Temporary Program”) was established as an emergency measure to allow for safe social distancing for diners and to help restaurants recover financially from the loss of business that resulted from the pandemic. Under the Temporary Program, DOT established an application process for food service establishments to use adjacent sidewalk and curb parking for outdoor seating. As of September 2021, there are 11,866 self-certified active Open Restaurant permits reported citywide. Of these permits, 1,200 are for structures that only occupy roadways; 4,281 are for structures that only occupy sidewalks; and 6,025 are for structures that occupy both. DCP estimates that about 2,500 restaurants currently taking advantage of sidewalk or roadway seating under the Temporary Program would not have been able to open under prior zoning regulations.

Since the Temporary Program has been enacted, outdoor seating approved under Street Seats has been allowed to operate under the Open Restaurants program if the participating business goes through the required self-certification process.

For restaurants that face closure, DOT has indicated that it sends a 30-day removal notice to the business when they identify an abandoned structure. After 30 days, the City is responsible for its removal--a process that involves both DOT and the Department of Sanitation (“DSNY”). If there are restaurants currently operating outdoor seating that decline to participate in the proposed Open Restaurants program or are ineligible for that program, those restaurants are responsible for the removal of any erected temporary structures.

The Temporary Program will stay in effect until 2022.

*Proposed Permanent Open Restaurants Program*

In order to allow for a permanent Open Restaurants program managed by DOT, the laws which regulate non-emergency outdoor dining must be changed and the Proposed Action needs to be approved. DCP and DOT have announced a six-month citywide design engagement process that will culminate in the release of the design guidelines for the program in spring 2022. After the expiration of the Temporary Program in 2022, the permanent Open Restaurants program is planned to commence in 2023.

While DOT has provided a general indication of what the permanent Open Restaurants program will look like in public meetings, the text of the program and design guidelines are not yet available. General commitments for sidewalk seating include ADA compliance, variable clear path and siting criteria/distance from obstructions based on pedestrian volume and sidewalk width, removable chairs, tables and barriers, seating against building wall, and a requirement that structures only be allowed along a restaurant's frontage. General commitments for roadway café seating include ADA compliance, citywide applicability of the program in parking lanes except in prohibited zones, public safety requirements, such as visibility of traffic signs and access to hydrants, guidance and enforcement of sound, a ban on fully enclosed structures, and a fee structure. Additionally, DOT has indicated that sidewalk seating applications would still be referred to community boards, and sidewalk seating siting rules, as governed by the Administrative Code, would not be changed.

The proposed permanent Open Restaurants program would allow for City operations such as snow removal from sidewalks and streets to continue in the winter, maintain a standard for seasonal safety such as guidelines for outdoor heaters, and waivers are being considered for winter months.

A unified DOT office would administer both sidewalk and roadway seating programs, with the first formal procedure for approving roadway seating for outdoor dining. The agency's administration would rely in part on a detailed design guideline package that includes a streamlined online application process, a shortened review period that still allows public review, and a 4-year license window with periodic compliance checks and the ability to fine or remove bad actors. Additionally, the new program would give DOT greater flexibility in site-specific conditions that would make outdoor seating a helpful activation of the street.

The Applicants have not yet provided specific details on what standards restaurants would have to follow to renew a permit, how community boards would have opportunity to comment on the DOT plan and/or specific sidewalk and roadway seating as they are proposed, and specific plans for enforcement.

## **COMMUNITY BOARD RECOMMENDATIONS**

The Open Restaurants / Sidewalk Cafés application was certified by DCP on June 21, 2021 and referred to all Manhattan community boards for comment. Boards were given a 60-day period to review the application and submit a resolution recommending support or opposition.

As of the time of submission, all Manhattan Community Boards voted on and submitted resolutions regarding the application.

Manhattan Community Boards 1, 2, 3, 4, 7, 11, and 12 submitted unfavorable recommendations including the following conditions and comments<sup>1</sup>:

- DOT should commence public outreach and consultations for proposed legislation as soon as possible;
- Permits should be granted for a sidewalk café or roadway seating, not both for a single business;
- Licenses should include an at-will revocation and/or a suspension clause, with a short notice period as to not impede utility or street work, or street design improvements;
- A curbside plan for each block should consider the space needed for key functions such as fire and EMS access, oil tank refilling, business and residential deliveries, and garbage storage and pick-up, even if located in legal parking;
- DOT should provide stricter guidance on seasonality, requiring enclosures to be removed in winter except in the case of locations that are suitable for year-round use;
- Enclosed cafés should not be allowed on sidewalks and structures in parking lanes should be as open and transparent as possible;
- Review by community boards should replace self-certification of applications;
- A single agency should be tasked with enforcement, including noise, design, placement, storage, and sidewalk encroachments, as well as rules regarding electrical and gas installations;
- License revocation should be an enforcement option;
- The Applicants should not remove current zoning regulations governing the applicability and placement of sidewalk cafés without adequate protections in place;
- The Applicants should present the legislation to enact the permanent Open Restaurants program in tandem with this proposed zoning text amendment;
- Community boards should be allowed to review DOT guidelines for permanent Open Restaurants program;
- Sidewalk widenings intended for additional pedestrian flow should not be used to accommodate new sidewalk cafés;
- Outdoor eating and drinking facilities should continue to be prohibited on residential streets;
- Patrons in Open Restaurants must remain seated and there should be no amplified sound allowed outdoors;
- Eating and drinking facilities should be prohibited when the operator uses amplified sound; and
- Service aisles should be explicitly designated and required.

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<sup>1</sup> This list of conditions and comments is an aggregation. Not all community boards listed included these items in their resolutions.

Manhattan Community Boards 5, 9, and 10 submitted favorable recommendations including the following conditions<sup>2</sup>:

- DOT should improve enforcement of existing regulations for noncompliant Open Restaurants;
- Community boards should be given the opportunity to comment on license applications and any waivers from proposed regulations; and
- Community boards should have a role in the creation of the future permanent Open Restaurants program, including design, application, and process specifics.

Manhattan Community Board 8 submitted a favorable recommendation without conditions.

Manhattan Community Board 6 submitted a recommendation of no objection with the following condition:

- DOT should continue to include Manhattan Community Board 6 as active participants in designing the proposed permanent Open Restaurants program.

## **BOROUGH BOARD RECOMMENDATION**

The Manhattan Borough Board received a presentation from DCP and DOT about the proposed text amendment at its September 23, 2021 meeting. During the meeting, members raised questions and concerns that were addressed by DCP and DOT. Concerns included the noise impacts of sidewalk and roadway dining under the Temporary Program, how the proposed permanent program would be enforced, increased vermin, and the rollout of the zoning text amendment before a completed draft plan for the permanent program is available.

Informed by these questions and the responses from the agencies, the Manhattan Borough Board voted to approve a resolution to recommend disapproval of the application with conditions. The conditions are as follows:

- Consult with all community boards and borough presidents regarding the proposed DOT permanent program, including its applicability in residential and mixed-use districts, particularly in Lower Manhattan and retain the existing sidewalk café regulations in special zoning districts;
- Provide a plan for enforcement of DOT Open Restaurant regulations as well as sanitation and allow for that plan to be previewed by community boards and borough presidents and ensure that the program is informed by data obtained in more typical, post-pandemic conditions;
- Complete a study on the impact that the proposed DOT program would have on dry goods retail spaces, and propose mitigations as necessary;
- Allow community boards to review and recommend approval or denial for applications of licenses for sidewalk dining and roadbed dining prior to final DOT approval;

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<sup>2</sup> This list of conditions and comments is an aggregation. Not all community boards listed included these items in their resolutions.

- Maintain the enclosure requirements for eating and drinking establishments in residential districts;
- Include compliance with program guidelines as key criteria for approving renewal applications and use license revocation as an enforcement option;
- Require restaurants to submit sanitation and rat abatement plans as part of their license application;
- Prohibit new sidewalk widenings from being used for outdoor dining unless the loss of pedestrian space is included in an analysis for the widening, and mitigation measures are ensured;
- Ensure all sidewalks and roadways remain fully accessible, including maintaining the three-foot service aisle (in addition to the four-foot clearance requirement) and that emergency vehicles have the ability to navigate city streets efficiently;
- Prohibit restaurants from playing amplified music and require patrons to be seated;
- Include measures to prevent loss of space or safety for users of bike lanes; and
- Present a plan to allow other public uses on sidewalks and roadways.

## **BOROUGH PRESIDENT’S COMMENTS**

Restaurants were among the hardest hit businesses during the COVID-19 pandemic. As indoor spaces were subject to closures due to emergency health measures, eating and drinking establishments across New York City faced a significant loss in revenue, and many were forced to close permanently.

The temporary Open Restaurants program has been a success in many ways. It helped to reopen businesses when health guidelines allowed, and provided outdoor, socially distanced space for residents and visitors to the city. Despite issues with the program, such as inconsistent enforcement, the speed with which DOT was able to adapt to the present conditions was admirable.

However, the rollout for the proposed permanent Open Restaurants program has not allowed for ample community and stakeholder input. By asking for approval of the proposed zoning text amendment without providing a detailed description of the permanent DOT program that would replace it, the Applicants are asking the public to take a leap of faith. Before being able to recommend approval to remove the zoning governing sidewalk cafés, there are several questions about its replacement that need to be addressed.

The Temporary Program has had enforcement issues as noted above. On blocks with Open Restaurant structures, some residents have been faced with unacceptable noise levels, unruliness, and litter. These same communities have lacked an opportunity to weigh in on new additions to the proposed Open Restaurants program. In presentations, DOT has indicated that they would handle enforcement of barriers, clear paths, and ADA compliance, while the New York Police Department (“NYPD”) would continue to enforce noise regulations, and DSNY would continue to be responsible for garbage removal. In addition to disagreeing that NYPD is the best City agency for dealing with quality-of-life issues, I worry that DOT does not currently have the capacity to ensure the compliance of over 10,000 restaurants.

In addition to noise, there have been complaints about trash on the street and a subsequent increase in the number of vermin. DOT has indicated in public meetings that DSNY is responsible for trash collection, but there should be additional support made for restaurants to proactively mitigate these impacts. DOT, in coordination with DSNY, should commit to developing a citywide trash collection plan for the Open Restaurants Program and create resources that restaurants can refer to for guidance on managing trash and vermin.

As part of this zoning change, DOT must have a plan in place. DOT should evaluate applications based on their noise impact and should closely evaluate and enact different standards for outdoor dining in residential neighborhoods. I was pleased to hear that DOT intends to consider compliance in evaluating the renewal of Open Restaurants applications, but details on the criteria which would lead to license revocation are missing. A detailed enforcement plan must be made available for public review. With the removal of the text in the Zoning Resolution, certain geographic restrictions on sidewalk cafés would be permanently lifted. Currently, there is a prohibition of or limit on sidewalk cafés in certain special districts such as the Special Hudson Yards, West Chelsea, and East Harlem Corridor Districts. During the Temporary Program, these zoning measures were overridden, and with the Proposed Action, they would be permanently removed.

Some of these geographic restrictions were meant to ensure that sidewalk widenings that were intended to improve pedestrian flow were not used for sidewalk cafés. This was the case in Hudson Yards. Additionally, in the West Chelsea Special District, sidewalk cafés are only allowed on “wide streets” as narrower streets were deemed inappropriate for outdoor dining. As indicated in the presentation at the City Planning Commission review session, the required pedestrian clear path would be larger for select CBD corridors. However, there needs to be greater attention paid to specific local conditions. Some sidewalks may remain inappropriate for sidewalk seating.

As eating and drinking establishments are given a right to use public sidewalk and street space with the proposed program, DOT and DCP should continue to explore other potential uses of that space. There should be additional study of how other small retail establishments, and community and cultural groups could make use of repurposed street space. Also, the impact of sidewalk and roadway dining on dry goods retail should be evaluated. While the use of this space for seating is good for the restaurant industry, which was particularly affected by the pandemic, it’s important to mitigate any negative effect it may have on adjacent businesses, in a permanent program. Additionally, outdoor seating should not take precedence over planned expansion to bike lanes or bus routes.

These concerns, along with issues raised by Community Boards and other stakeholders, could be addressed with further consideration if the proposed DOT program were available for review alongside the proposed zoning text amendment. While some general guidelines regarding future plans for the program have been shared in public presentations, it is difficult to make comments on what should or should not be included in the replacement to the current zoning regulations without more information. I support a permanent outdoor dining program, but for the stated reasons, I cannot support this application in its current form.

Parenthetically, I note that the proposed regulatory structure involves multiple agencies and will require a high degree of coordination to succeed. This type of arrangement illustrates why such oversight would be best coordinated by an office of the Public Realm Czar as I have recommended in the past.

### **BOROUGH PRESIDENT'S RECOMMENDATION**

Therefore, the Manhattan Borough President recommends **disapproval** of ULURP Application No. **N210380ZRY** unless the following conditions are met:

1. Require that all community boards and borough presidents be allowed to comment on the DOT proposed permanent Open Restaurant program in advance on the approval of the zoning text amendment;
2. Consult with all community boards and borough presidents regarding the applicability of proposed permanent Open Restaurant program in residential and mixed-use districts, particularly in Lower Manhattan, and further evaluate the existing sidewalk café regulations in special zoning districts;
3. Ensure that all sidewalks remain fully accessible and that emergency vehicles have the ability to navigate the street effectively and provide a more detailed plan for enforcement;
4. Complete a study on the impact that the proposed DOT program would have on dry goods retail spaces, and present mitigations as necessary;
5. Present a plan to allow other public uses on sidewalks and roadways;
6. Prioritize bike lane and bus lane expansion over roadway dining in accordance with the DOT 5-year transportation plan;
7. Require restaurants to comply with noise restrictions, have windows and doors closed while playing amplified music indoors, prohibit amplified music outside, and require patrons to be seated;
8. Present citywide sanitation plan and vermin control guidelines for restaurants;
9. Include compliance with program guidelines as key criteria for approving renewal applications and use license revocation as an enforcement option, thereby eliminating the need for NYPD involvement regarding enforcement issues;
10. Prohibit seating on the roadway or sidewalk in a location that would impede passage in a bike lane; and
11. Reduce hours of operation for outdoor dining in residential areas.



Gale A. Brewer  
Manhattan Borough President