

Practice Update

Some Fresh Air is Necessary to Jumpstart Restaurants Reopening

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Once upon a time, before the modern world could be bothered by the thought of a global pandemic, let alone the consequences of one, there were municipalities considering novel ideas to help local businesses thrive, such as allowing businesses to extend their operations out into the open air spaces typically reserved by zoning restrictions, such as parking spaces and sidewalks, as a way of providing more space and creating an inviting atmosphere for their patrons and their neighborhoods in general.

With the outbreak of COVID-19 and the Center for Disease Control issuing considerations for restaurants and bars that state the risk of spreading the virus is lower for outdoor seating than indoor seating, the idea of allowing businesses, such as restaurants and bars, to expand into outdoor areas has gained traction as a lower risk option for jump starting these and other non-essential businesses that are starting to reopen as stay-at-home orders are being lifted, notwithstanding the fact that the virus is still out there with no proven treatment or cure available yet.

With decreased traffic and high demand from consumers who have been under restrictive stay at home orders, it is the perfect time for local governments to get creative in assisting local

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businesses and revitalizing their communities. Allowing restaurants to utilize outdoor parking space is a way for municipalities to offer additional relief to local restaurants and help consumers feel safe and more comfortable when dining out.

For example, in Florida, under the State's full phase one reopening plan, restaurants are able to operate indoor dining rooms at 50-percent capacity and can fully utilize their outdoor space so long as they maintain social distancing. While this is better than the 25-percent indoor capacity allowed under the State's initial phase one plan, for many smaller restaurants, 50-percent capacity will not be enough to justify reopening. Bringing back their full staff would be overly burdensome and it is likely that many restaurants would not be able to generate positive operating cash-flow as it would limit them to a maximum potential of 50 percent of possible revenues while still having to cover 100 percent of fixed operating costs. Therefore, maximizing the ability to utilize outdoor space to increase seating capacity will be critical for restaurants during this period.

Health experts believe that the virus is less likely to be transmitted outdoors, partially because the virus droplets disburse more rapidly in the moving air. Without recirculated air indoors, transmission is generally less likely, however, it is still important to maintain social distancing. That said, it can be expected that consumers will likely feel more comfortable if the restaurant has socially distanced outdoor seating option available.

Some municipalities are already starting temporary pilot programs to allow restaurants to utilize additional outdoor space, including expanding seating areas onto public rights-of-way or on private property, but there are several concerns that both the restaurants and local governments need to take into consideration when looking into these programs. For instance, going back to the Florida

example, the State is now firmly into its summer storm season when scattered storms and the summer heat can make outdoor seating a bit more difficult, if not potentially unbearable without shade. As there will likely be periods of time when the weather will make outdoor spaces unusable, maximizing the use of these spaces during the times it is useable is crucial to the success of participating businesses.

For business owners, if a program were to be implemented in their area, there are a myriad of considerations, such as whether additional outdoor seating will require them to incur additional costs, whether they will be required to obtain corresponding state or county permits for any such expansions, and safety considerations for their employees and consumers. However, before anyone can reach that stage, local governments must parse through their own list of concerns regarding how to implement such a program, such as:

Timeline – When will the program be implemented and how long should it last? Will the program be temporary, or could it potentially be maintained permanently? These are important issues for restaurants as they decide whether the investment into additional equipment for expanded outdoor seating is worthwhile.

It should also be noted that if a temporary program is successful, there may be a backlash from restaurant owners and consumers when it is set to expire, so time limitations need to be made clear from the outset to prevent undue reliance on the program.

Additionally, time is of the essence as more and more restaurants are permanently closing their doors and those that survive will need some form of assurance of their ability to operate profitably in the coming months.

Location – What additional spaces will restaurants be able to utilize? It may be easy to offer adjacent public property spaces such as the sidewalk and adjacent on-street parking spaces, but what about potentially closing off lanes of traffic or entire roadways? What about spaces on private property that would otherwise be limited by zoning restrictions such as private parking lots and driveways? It should be made clear whether zoning restrictions will be suspended in certain areas for such programs.

Additionally, will additional space need to be contiguous to the business's current outdoor seating or storefront, or could it be somewhat removed, and if so, what limitations will be in place? This is a consideration for those businesses that may be across the street from an open public green space but have little to no outdoor area on their side of the street that is convertible into additional seating area.

Regulation – In addition to pandemic related sanitation and social distancing guidelines, should these outdoor seating areas be subject to the same general restrictions as pre-existing outdoor or sidewalk café regulations? Will businesses be allowed to set up equipment, such as umbrellas, fans, or lighting in these outdoor seating areas, and if so, will there be design guidelines?

For businesses to be able to comply with what can often be onerous code restrictions, it is vital to know all the applicable requirements well in advance. The more restrictions that are implemented, the longer it can take for compliance to be achieved to get a business open, and this can be the determining factor as to whether a program will be successful or not.

It is also important for local governments to keep track of orders from the state and county levels that may affect the programs they are looking to implement and be a resource for local businesses.

Permits – Is there an existing permitting structure in place that can be utilized, or will a new system need to be created? Most municipalities have existing permitting capabilities for temporary uses and special events that provide for an expedited process to obtain a permit and would not require reinventing the wheel.

However, even the most expedient processes can take several days or weeks to process, inspect, and approve an application, and that does not even include the time it takes the business to compile the materials needed to complete and submit the application.

Therefore, it is important that such programs are developed in a manner that (1) does not create an undue burden on applicants by requiring them to go out and spend time and money that they do not have on things like professional architects or engineers to prepare application materials that they would not be able to prepare themselves, and (2) provides the necessary infrastructure to expedite the review, approval, and issuance of permits after an application is received.

Safety – In order to protect employees, customers, and the general public, there are many safety measures that will need to be put into place around businesses that take part in these types of programs. Municipalities will need to allocate police and code enforcement officers to patrolling the outdoor areas being utilized and ensure compliance with operating permits and other locally enacted facial covering and/or social distancing requirements. Fire inspectors will need to conduct inspections to ensure life safety measures are in place. Public Works will likely need to install barricades to block roads and buffer outdoor seating areas from lanes of vehicular traffic.

These are just some of the concerns that need to be taken into account to ensure sufficient resources are available to manage a successful program, and more

importantly, to ensure the safety of all those involved. It is especially important that these considerations are addressed in advance of implementation, as it is likely that municipal employees and funds will need to be diverted to these programs at a time when revenue projections are dismal and the goodwill and taxes generated by the participating businesses may not be enough to support its operation.

Ideally, local governments should be able to quickly agree on whether they want to move forward with a temporary program to expand outdoor seating options for restaurants. To ensure that such programs can be developed and implemented expeditiously, and to keep up with the state government's current business reopening timelines, these programs should stand alone from existing outdoor café and seating requirements unrelated to public safety, such as design limitations that will do little more than delay the ability of a business to reopen quickly.

Without profitable businesses, local governments will not have the revenue needed to keep cities running. Implementing an outdoor business expansion program to help businesses jumpstart revenue generation upon reopening, while potentially mitigating the risks of spreading infection by utilizing outdoor spaces, is a great way to begin phasing in the “new normal” with a win for all parties involved.

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