

ORDINANCE NO. 2022-69

AN ORDINANCE OF THE CITY COUNCIL OF THE OF THE CITY OF SAN MARCOS, TEXAS AMENDING CHAPTER 74, ARTICLE 6 OF THE SAN MARCOS CITY CODE RELATED TO SIDEWALK CAFES, PARKLETS, AND SIMILAR SPECIAL USES OF PUBLIC RIGHTS-OF-WAY, BY, AMONG OTHER THINGS, ADDING A DEFINITION AND CRITERIA FOR SIDEWALK SEATING AREAS, AND DELETING PROVISIONS FOR THE 2020 TEMPORARY PARKLETS PROGRAM RELATED TO THE COVID-19 PANDEMIC; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR THE REPEAL OF ANY CONFLICTING PROVISIONS; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

SECTION 1. Chapter 74, Streets and Sidewalks, Article 6, Sidewalk Cafes, Parklets, and Similar Special Uses of Public Rights-of-Way, of the San Marcos City Code is hereby amended to read as follows (Added text is indicated by underlining. Deleted text is indicated by strikethroughs.):

ARTICLE 6. SIDEWALK CAFÉS, PARKLETS AND SIMILAR SPECIAL USES OF PUBLIC RIGHTS-OF-WAY

Sec. 74.199. Definitions.

In this article:

Neighborhood gateway feature means an entrance to a neighborhood or development that provides a unique sense of identity, transition, and anticipation. These features should relate to the region's natural resources, scenic views, and local cultural heritage. Gateways identify entrance points to neighborhoods. The scale includes neighborhoods that may have entries for both pedestrian and vehicular traffic. Architecture, materials, and views may be highlighted to give residents not only a sense of identity and belonging, but pride in their community.

Parklet means a small area of land within a public right-of-way temporarily dedicated for use by the public for rest, relaxation, recreation, beautification, entertainment, cultural, educational and other non-commercial activities and purposes, together with improvements, such as lighting, signage, paving, benches, sculpture, landscaping, barricades and fencing, in furtherance of such purposes. Use of a parklet may not be reserved for the exclusive benefit of any private person or entity, including a licensee under this article for any for profit or commercial purposes.

Public right-of-way means a strip of land over which the city has authority, used or intended to be used, wholly or in part by the city, as a public street or sidewalk, or for utility purposes.

Sidewalk means that portion of a public right-of-way, not including the street, that is paved for pedestrian traffic.

Sidewalk cafe means an outdoor dining area that ~~is~~:

- (1) Is ~~A~~ associated with a restaurant with kitchen facilities for the preparation of the food to be sold, the primary business of which is the on-premises sale of prepared food;
- (2) Is located on a sidewalk abutting and within the span of the facade of the restaurant;
- (3) Is ~~O~~ open to the air; ~~and~~
- (4) Contains removable or fixed tables, chairs, planters or other appurtenances; and
- (5) Is provided for the sole use of patrons of the associated restaurant.

Sidewalk seating area means an outdoor area consisting of tables and / or chairs that:

- (1) Is associated with any business including a restaurant with kitchen facilities;
- (2) Is located on a sidewalk abutting and within the span of the facade of the business;
- (3) Open to the air;
- (4) No barrier device, screen, or fence shall be installed to serve a sidewalk seating area;
- (5) Contains removable tables, chairs, planters or other appurtenances; and
- (6) May be used by, but is not provided for, the sole use of patrons of the associated business.

Street means that portion of a public right-of-way that provides primary vehicular access to adjacent land, whether designated as a street, highway, thoroughfare, parkway, throughway, avenue, lane, boulevard, road, place, drive or other similar designation, including areas designated for on-street parking.

Streetscape improvements manual means a manual approved by the city manager or the city manager's designee that establishes technical standards or specifications for authorized improvements and uses under this article that may be supplemented by other technical standards approved by the city manager or the city manager's designee.

Sec. 74.200. Authorized special use licenses.

(a) The city manager or the city manager's designee may grant a special use license for use of public right-of-way in accordance with the requirements of this article for the following uses:

- (1) Neighborhood gateway features and landscaping;
- (2) Parklets under section 74.204(b);
- (3) Sidewalk cafes;
- (4) Supportive or decorative columns, arches or other structural or decorative features; or
- (5) Overhead, surface or subsurface encroachments, other than signs, not specified herein.

(b) The city council may grant a special use license for a parklet under section 74.204(a).

(c) ~~All other improvements in or uses of a public right-of-way not specified in this article may only be approved as specifically provided by other ordinances or by the city council subject to applicable laws.~~ The city manager or the city manager's designee may grant a certificate for use of public right-of-way in accordance with the requirements of the article for Sidewalk Seating Areas.

(d) ~~A special use license granted under this article is a revocable grant of a privilege and is not a property right, nor conveyance of an interest in real property.~~ All other improvements in or uses of a public right-of-way not specified in this article may only be approved as specifically provided by other ordinances or by the city council subject to applicable laws.

(e) A special use license granted under this article is a revocable grant of a privilege and is not a property right, nor conveyance of an interest in real property.

Sec. 74.201. Exceptions.

The following improvements, facilities or uses in a public right-of-way shall not require a special use license:

- (1) Trees and decorative landscaping, including landscaping, lighting, watering systems, and other appurtenances for the maintenance thereof, the plans for which are part of an approved site preparation permit for a subdivision;
- (2) Utility facilities for which the city has granted a franchise permitting such use of the public right-of-way; or
- (3) Improvements, facilities or uses specifically allowed by or for which an alternate approval process is established by zoning or other ordinances of the city, e.g. projecting signs, awnings, canopies, marquees or architectural elements of a building ~~within the downtown SmartCode~~ as permitted by the San Marcos Development Code or successor zoning district.

Sec. 74.202. Requirements for special use licenses.

(a) *Uses and improvements not allowed.* No license may be granted under this article for:

- (1) Any building or structure requiring a building permit, other than a neighborhood gateway feature, supportive or decorative column, arch or other structural or decorative feature of a building;
- (2) Any improvement, facility or use, the installation or allowance of which would:
 - a. Result in a violation of the Americans with Disabilities Act or any other applicable local, state or federal health or safety law or regulation;
 - b. Unduly interfere with the free passage of vehicles on the street or of pedestrians on the sidewalk;
 - c. Create a traffic hazard; unduly interfere with the safe and efficient operation of a utility facility;
 - d. Create undue adverse impacts on adjacent property owners and businesses; or
 - e. Block the sight visibility triangle at an intersection.

(b) *General requirements for all licenses.* A license applicable to permitted uses and improvements allowed under this article, shall include, as applicable:

- (1) All requirements set forth in the streetscape improvements manual or other applicable technical standards and specifications with which the licensee must comply;
- (2) Terms and restrictions necessary to protect public use of the public right-of-way or the facilities and access needs of a public or private utility provider;
- (3) Specifications for required clearances between the improvements and utility facilities, whether above ground, underground or overhead, as prescribed by applicable building and health and safety codes, franchise agreements or state or federal laws;
- (4) A requirement that the licensee pay the cost to relocate a utility facility or improvement in a public right-of-way in connection with the installation of the improvements, if consent is granted for such relocation;
- (5) Authorization for the city or a utility provider to remove, without liability, all or part of the improvements if necessary to obtain access to an affected utility facility;

- (6) Provisions approved by the city attorney that require the licensee to indemnify, defend, hold harmless and release the city, its officers, agents, and employees from any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation for injury or death of any person, or for damage to any property, arising out of or in connection with licensee's use of public right-of-way;
 - (7) A provision specifying the term or expiration date of the license that is no greater than one year;
 - (8) A provision for termination of the license for violation of its terms, subject to notice of the violation and an opportunity to cure the violation within ten days after receipt of the notice;
 - (9) A provision for termination of the license by the city without recourse before the end of the license term when necessary to implement a capital improvements or utility project, to address threats to public health or safety, or to mitigate adverse impacts to adjacent property owners and businesses caused by the improvement or use for which the license is granted; and
 - (10) A provision providing for the prompt removal of all improvements or cessation of uses upon termination of the license at the licensee's expense, including the right of the city to remove improvements upon failure of the Licensee to do so and to recover the city's cost for such removal.
- (c) *Other minimum design and installation standards.*
- (1) The city manager or the city manager's designee shall approve a streetscape improvements manual and any other technical standards or specifications for authorized improvements and uses under this article, which shall include:
 - a. Provisions to ensure a minimum width of unobstructed paved areas on a sidewalk available for passage by pedestrians and other users of the sidewalk of at least six feet;
 - b. Measures deemed necessary by the city manager or the city manager's designee to address public health, safety, sanitation and aesthetic concerns;
 - c. Requirements for maintenance, repair, litter and debris;
 - d. Requirements for the protection of persons and property from injury or damage;
 - e. Requirements for installation and anchoring to prevent or minimize damage to the surface of streets and sidewalks;

- f. Requirements for the type of construction utilized to facilitate the expeditious removal of improvements; and
- g. Requirements for the mitigation of adverse impacts on the public or adjacent property owners and businesses.

Sec. 74.203. Security for sidewalk cafe improvements.

Security for restoration. Where a barrier device, screen or fence is installed to serve a sidewalk cafe, the applicant shall provide sufficient security to the city to pay for the costs of the safe and orderly removal of such barrier device, screen or fence and the restoration of the public sidewalk or other public improvements to a condition similar to that existing before the installation of the barrier device, screen or fence.

- (1) *Amount of security.* The security shall be in the amount of 125 percent of the cost estimate approved by the engineering director for the removal of the barrier device, screen or fence and restoration of the public sidewalk and any other public improvements.
- (2) *Form of security.* The security provided to the city shall be either a cash escrow (payment of funds directly with the finance department of the city to be held in escrow by the city) or letter of credit in a form acceptable to the city attorney.

Sec. 74.204. Requirements for parklets.

(a) *Approval of parklets by city council.* An application for approval of a parklet in a parking area of a street shall be considered by the city council after a public hearing on the application. Following the conclusion of the public hearing, the city council may approve a license agreement that identifies the parklet area and any applicable restrictions, or deny the application.

(b) *Approval of parklets by city manager.* The city manager or the city manager's designee shall designate appropriate locations eligible for the installation of parklets and may approve applications for a parklet in areas of right-of-way that are not designated or used for parking.

Sec. 74.205. Smoking and alcohol restrictions applicable to parklets and sidewalk cafes.

(a) Parklets and sidewalk cafes approved under this article shall be subject to the same restrictions and prohibitions against smoking as are applicable to parks pursuant to chapter 34, article 5 of the San Marcos City Code, together with applicable enforcement remedies and penalties thereunder.

(b) It is unlawful for any person to publicly consume or display alcoholic beverages within a parklet. No person shall be issued a citation or arrested for an offense under this subsection unless the person has first been issued a verbal warning and given an opportunity to comply with this section.

(c) In addition to any other remedies and penalties that may be pursued for a violation of this section, the city manager or the city manager's designee may revoke a license issued under this article to a licensee that commits a violation under this section.

Sec. 74.206. Requirements for Certificates for Sidewalk Seating Areas

(a) Uses and improvements not allowed. Any use of the public right of way which does not comply with this section 74.206 and any additional conditions included with the Certificate of Use is not allowed.

(b) General requirements for all certificate holders. Any business seeking a certificate for a sidewalk seating area must comply with the following:

- (1) Maintain a minimum width of unobstructed paved areas on a sidewalk of six feet;
- (2) Have a sidewalk layout which clearly shows the location of all proposed tables, chairs, planters or other private appurtenances, and all existing signage, planters, or other public appurtenances approved by the city and available in the business for public inspection;
- (3) The business shall have posted hours of operation near the main entrance;
- (4) All approved appurtenances are permitted to be placed in the public right of way no earlier than one hour prior to the posted opening time of the business and shall be removed no later than one hour following the posted closing time of the business; and
- (5) Insurance shall not be required; however, the business owner must indemnify, defend, hold harmless and release the city, its officers, agents, and employees from any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation for injury or death of any person, or for damage to any property, arising out of or in connection with the use of public right-of-way.
- (6) The certificate of use shall be posted in the same area and manner as the certificate of occupancy.
- (c) Expiration, enforcement, and termination of certificates.
 - (1) Certificates for the use of public right of way shall be issued to the associated business owner and shall only expire when a business receives a new owner or is closed for a period of more than six months.
 - (2) If a certificate holder is found in violation of any requirements of this ordinance the city may issue a notice of the violation and offer an opportunity to cure the violation within ten days after receipt of

the notice. If the violation is not cured, the city may revoke the certificate by providing notice of revocation in writing.; or

- (3) The City may terminate the approved certificate without recourse when necessary to implement a capital improvements or utility project, to address threats to public health or safety, or to mitigate adverse impacts to adjacent property owners and businesses caused by the improvement or use for which the license is granted; and

Sec. 74.2076. Insurance

- (a) *Insurance for parklets and sidewalk cafes.*

- (1) No special use license shall be granted for a parklet or sidewalk cafe unless the licensee files with the city manager or city manager's designee a certificate of liability insurance or other proof of insurance in a form acceptable to the city's risk manager confirming that the applicant has procured the insurance required by this section. If the policy is not kept in full force and effect throughout the term of the license, the special use license shall automatically become void and the improvements must be removed at that time.

- (2) The insurance policy shall be issued by an insurance company authorized to do business in the state. The policy shall provide in substance that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the city, its officers, agents or employees. The insurance shall provide coverage in an amount of not less than \$1,000,000.00 for each single occurrence. The minimum amounts of insurance coverage may be increased by the city when it is in the best interest of the public. The policy of insurance shall name both the licensee and the city as insured parties to the full amount of the policy limits.

- (b) *Insurance for other uses.* For uses other than parklets or sidewalk cafes, the city manager or the city manager's designee shall establish applicable insurance requirements if insurance is determined to be necessary.

Sec. 74.2087. Application.

(a) An application for a special use license or certificate of use under this article must be filed with the department designated by the city manager on a form approved by the city manager or the city manager's designee.

(b) An application under this article must include:

- (1) An application fee, if any, as established by separate ordinance or resolution of the city council;
- (2) A map, survey, drawing, aerial photograph or similar information, provided at the applicant's expense, identifying the area of public right-of-way proposed to be used under a special use license;
- (3) A survey and/or title commitment if the city manager or the city manager's designee determines that the information provided by the applicant is inadequate to identify the area subject to the proposed license, to clarify conflicts in boundary lines between the city's right-of-way and adjacent properties, to verify ownership the subject land area or the existence of easements and other encumbrances; and
- (4) A detailed description, together with plans, specifications, photographs or illustrations of the proposed improvements or installation.

(c) For special use licenses, due to their more permanent nature, ~~the~~ application shall be delivered for comment to:

- (1) Affected city departments;
- (2) The owners of property or businesses abutting the proposed licensed area; and
- (3) Affected utility providers.

(d) Applications for certificates of use shall not require the additional review described in subsection (c) above due to their temporary nature.

~~Sec. 74.208. Provisions for parklets subject to review after one year.~~

~~In the month of August, 2016, the city council shall review and consider the provisions of this ordinance that allow for and relate to parklets to determine their effectiveness and impact on the community, and whether to continue, amend or repeal such provisions. The city council may also review this ordinance at any other time it deems appropriate. During this review period, no more than five licenses for parklets may be approved.~~

SECTION 2. The Addendum to Chapter 74, Article 6 of the San Marcos City Code related to the temporary parklets program adopted by Ordinance No. 2020-30 is hereby repealed to the extent not, otherwise, expired by operation of law and also hereby deleted.

SECTION 3. In codifying the changes authorized by this ordinance, paragraphs, sections

and subsections may be renumbered and reformatted as appropriate consistent with the numbering and formatting of the San Marcos City Code.

SECTION 4. If any word, phrase, clause, sentence, or paragraph of this ordinance is held to be unconstitutional or invalid by a court of competent jurisdiction, the other provisions of this ordinance will continue in force if they can be given effect without the invalid portion.

SECTION 5. All ordinances and resolutions or parts of ordinances or resolutions in conflict with this ordinance are repealed.

SECTION 6. This ordinance will take effect after its passage, approval and adoption on second reading.

PASSED AND APPROVED on first reading on August 16, 2022.

PASSED, APPROVED AND ADOPTED on second reading on September 6, 2022.

Jane Hughson
Mayor

Attest:

Approved:

Elizabeth Trevino
Interim City Clerk

Michael J. Cosentino
City Attorney