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Township Law *E-Letter*

10 Things Your Township Should Consider About Outdoor Dining and Retail Regulations

Restaurant owners, entrepreneurs, and other businesses here and around the world have utilized outdoor dining or retail space to enhance the consumer experience for decades. With the emergence of COVID-19 however, there has been an increase in local municipalities questioning how to best support businesses while also adhering to social distancing and other preventative measures. Municipalities have responded by proposing various regulations relating to the expansion of outdoor dining or retail spaces onto public or private areas, including permitting the use of public streets or spaces, parking lots or alleyways. This expansion in the United States has been similar to a typical dining experience in European cities in the times before COVID-19, where open-air dining on public streets, sidewalks, parking lots or alleyways is normal and routine. This E-Letter highlights and discusses ten different issues that your municipality may consider in expanding outdoor business operations in light of, but as well as after, COVID-19.

WHAT HAS CAUSED INCREASED INTEREST IN OUTDOOR DINING AND RETAIL REGULATIONS?

Nationwide, the emergence of coronavirus (“COVID-19”) and related state-mandated social distancing measures limiting available restaurant and retail space have resulted in significant impacts to small businesses. Michigan businesses were not immune to the economic hardships imposed by COVID-19, particularly Michigan’s restaurants and local retail. As Michigan’s businesses start to re-open, townships may be considering how to both help those businesses recover, while at the same time ensure proper precautions are put in place to help limit the spread of COVID-19.

One way municipalities have responded across the United States is by implementing changes in their outdoor dining and retail regulations. Ordinances regulating outdoor businesses help balance a township’s interest in advocating for public participation in the local economy and offset business losses, while also imposing restrictions intended to reduce the spread of COVID-19.

WHAT IS AN OUTDOOR DINING OR RETAIL ORDINANCE?

Local ordinances relating to the expansion of outdoor business operations take multiple forms—a product of communities having varying needs and circumstances. It would not be uncommon for a township’s differing needs, wants, and circumstances to even cause variation between a township’s regulations and those of its neighboring communities. For example, these regulations may be limited to a specific business industry, such as restaurants or retail, or both, and may be

limited to certain locations, such as a specific portion of a township’s downtown area or main thoroughfare. An ordinance attempting to regulate outdoor business should therefore be drafted in recognition of the specific needs of a township. Outdoor business regulations provide a valuable tool in not only promoting local business, but also servicing the public by providing a unique consumer experience, as well as a safer experience.

The overarching purpose of these regulations is to permit certain establishments to occupy portions of public or private places where not otherwise usually permitted. The regulations imposed protect and preserve access to use of those places while imposing standards for their control, inspection, or maintenance.

WHAT ISSUES SHOULD BE CONSIDERED IN AN OUTDOOR DINING OR RETAIL ORDINANCE?

If your township is considering expanding outdoor business operations or is reviewing its current regulations, there are ten issues to consider that are unique to regulating outdoor dining or retail spaces:

1. **Permits to Occupy the Space.** The municipality can require that a business apply for and receive a valid permit authorizing the business to maintain an outdoor dining or retail space on public property, including but not limited to roadways, sidewalks, or alleyways, as well as allow outdoor operations in private or public parking lots. A permitting process can ensure that all work or use under the permit would be planned and executed in a manner that would least interfere with the safe and convenient use of the public property. Permits are generally issued after an application process, which allows the municipality to provide a detailed review of the business’ plan and how it will use such space (such as location of outdoor furniture, barricades, electric, and separation distances). This review process and issuance of a permit provides a reasonable mechanism to ensure that expanded outdoor dining or retail spaces are consistent with the character, public health and safety of the community.
2. **Outdoor Alcohol Service.** Many outdoor dining and retail regulations impose the requirement that businesses holding an outdoor dining or retail permit have and abide by the conditions of all licenses required for their business activity—a vital provision where a township intends to let restaurants serve alcohol in the expanded area. When a bar or restaurant serves alcohol in such expanded areas, they must apply for permission from the Michigan Liquor Control Commission (MLCC). With the MLCC imposing square footage and location requirements for bars and restaurants serving alcohol outdoors, savvy townships can have their ordinance requirements for outdoor seating at bars and restaurants mirror or meet the MLCC’s requirements to avoid conflicting regulation.

Another consideration for outdoor alcohol service in an outdoor dining and retail ordinance includes requiring patrons to not take their drinks outside of the outdoor service area. During the COVID-19 pandemic, some outdoor dining and retail ordinances require restaurants only serve alcohol to outdoor patrons who are seated at a table. This

prevents unnecessary contact where patrons enter the facility and order a beverage inside.

3. **Temporary Road Closure.** With pre-authorization of the appropriate agencies (which is much more difficult for townships), public roadways or sidewalks may be temporarily closed and used for outdoor dining or retail space. The township may limit the duration of the closures, as well as impose other regulations necessary to protect the public health, safety and welfare or to protect the environment. Not all townships will find road closures feasible or applicable to their plans. In areas where sidewalks are not sufficiently wide and expanded areas cannot otherwise be designated in parking areas, townships may need to look at other public areas for expanded areas.
4. **Use of Outdoor Fixtures.** To be allowed to open an outdoor dining or retail space, the township will either supply outdoor fixtures and furniture or the businesses will provide their own. More commonly, each business addresses their own outdoor fixtures and furniture to enhance the outdoor experience. Given the placement of these items outside the business and into other areas generally open to the public, the township may consider imposing requirements relating to or limiting obstructing walls, canopies, or other structures that block the free flow of outdoor air through the space. To meet this requirement, the seating area could require at least three sides open, with no more than four-foot-high walls that do not impede the free flow of air through the space. Townships will also want to consider imposing restrictions on how those items are fastened or located in the expanded area to prevent damage to the municipal public roadways, sidewalks, and common areas. If a Township allows seating in a closed public road for a temporary duration, it is advised to consider implementing hours restrictions that require permit holders to remove their fixtures from the closed public road by a specified time.
5. **Reducing Potential COVID-19 Exposure.** Consistent with and in addition to Governor Gretchen Whitmer's executive orders mandating restrictions on businesses to reduce the spread of COVID-19, including but not limited to EO-2020-153, EO-161, and EO-168, the township could impose certain standards to reduce COVID-19 exposure. These standards could require limited capacity of normal seating or encourage or require reservations or advise customers to call in advance to confirm seating/serving capacity to prevent crowding while customers wait for tables. To further encourage social distancing among customers waiting for tables, the Township may require customers to wait in their vehicles if it is not possible to maintain an at-least 6-foot social distance from other people from other households. To avoid the use of shared devices such as buzzers, customers may be alerted their table is ready by phone or text message. Once food or drinks leave the preparation area, the township may require it be taken directly to the table to discourage servers visiting multiple tables in a single trip. If the Township is utilizing a permit process, the Township could also require the business submit for Township review of its COVID-19 mitigation measures to maintain a safe environment for the community.

6. **Outdoor Dining and Retail Nuisances.** Business' increased use in public or private areas where otherwise not usually permitted may raise some nuisance concerns. Nuisances typically attributed to businesses may be exacerbated, such as noise concerns due to music or an unreasonable encroachment on a public right-of-way that interferes with pedestrian passage. To avoid nuisances created by increased outdoor use, townships may impose reasonable regulations that protect the public health, safety and welfare, such as, but not limited to, requiring the applicant or property owner be responsible for mitigating any nuisances that arise from the outdoor dining or retail spaces or to eliminate all negative impacts on surrounding properties. Townships may also put into place regulations requiring the outdoor dining or retail space only be allowed during certain operating hours, or appropriate screening and/or fencing be provided as determined to be necessary to mitigate the nuisance.
7. **Limiting Use to Storefront Businesses.** Townships should carefully consider the scope of businesses subject to the regulations imposed under an ordinance regulating outdoor businesses. The ordinance should dictate which industries fall under the provisions of the ordinance (restaurants, retail, etc.), which outdoor public or private places may be utilized by the businesses, and whether the ordinance includes or excludes mobile food vendors. Mobile vendors, such as a standard food truck, generally present a different myriad of regulatory and health concerns outside of those presented by storefront restaurants due to the mobile nature of the business. A township may consider how mobile vendors fit within a limited outdoor dining or retail space environment given that they do not generally operate in conjunction with an interior business of the same function on the same property.
8. **Protecting the Township's Interest.** A property owner or permit applicant may be required to provide a certificate of general liability in an amount set by the Township, naming the Township as additional insured, as well as provide an endorsement to the policy, naming the Township as additional insured. In addition, a Township could consider requiring applicants for outdoor space agree to indemnify and hold the Township harmless if an accident were to occur through the permit holder's use of the outdoor space.
9. **ADA Compliance.** To guarantee outdoor dining and retail spaces are accessible to all members of the community, a Township's ordinance should require businesses adopt accessible floor plans compliant with the Americans with Disabilities Act ("ADA"). For example, entrances to outdoor dining or retail spaces should be 36 inches wide to accommodate individuals using assistive transportation devices. *ADA Accessibility Guidelines (ADAAG)*, 4.3.3.
10. **Outdoor Dining Post-COVID-19 and Duration Limits.** While COVID-19 has influenced the recent rise in discussion surrounding the expansion of outdoor dining and retail, its benefits could extend far beyond the time of social distancing. The expansion of businesses into public or private areas such as streets, alleyways, or sidewalks is a common

phenomenon in places outside of the United States. Europe's coveted café culture offers unique outdoor dining experiences by lining city streets and main market squares, for example. With outdoor dining becoming a popular trend, Townships should discuss whether they want to permit outdoor dining or retail post COVID-19. And while Michigan is geographically and culturally different from Europe, there already has been a rising phenomenon in Michigan's available outdoor dining experiences. Even prior to COVID-19, outdoor domes have become increasingly popular within the last several years permitting Michigander's to dine outside during the wintertime while enjoying the snow.

While there are many facets of outdoor dining and retail space to consider, these ten issues can start your conversation on whether such regulations are appropriate for your Township. If you have any questions, feel free to contact the experienced municipal lawyers at Fahey Schultz Burzych Rhodes, PLC.

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