



## Legislation Text

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File #: 63445, Version: 1

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### Fiscal Note

No City appropriation required.

### Title

Authorizing the City's execution of a Maintenance Agreement with Suhr Building, LLC to allow the use of a portion of the Main Street right-of-way for permanent fencing that surrounds an outdoor café adjacent to the property located at 102 King Street, together with the transfer of ownership of said fencing to the City. (4th AD)

### Body

WHEREAS, Suhr Building, LLC ("Owner") is the owner of the property located at 102 King Street, in the City of Madison, Dane County, Wisconsin, legally described in attached Exhibit A ("Property"); and

WHEREAS, the Owner's tenant currently operates a sidewalk café in the E. Main Street public right-of-way adjacent to the Property, governed by that certain Encroachment Agreement between the City of Madison ("City") and the Owner, recorded on April 7, 2010 in the Office of the Dane County Register of Deeds as Document No. 4646510; and

WHEREAS, the City's Common Council adopted Resolution File ID 50596, Enactment # RES-18-00291, on April 10, 2018 ("Resolution"), which sets forth new policy guidelines for altering certain landscape planting beds and governing certain sidewalk cafes in the public right-of-way proximate to the Capitol Square, including the right-of-way adjacent to the Property; and

WHEREAS, pursuant to the Resolution, the Owner and/or the Owner's tenant or designee's sidewalk cafe shall be governed by a sidewalk café license; therefore, the aforementioned Encroachment Agreement encumbering the Property will be terminated upon the issuance of a sidewalk café license; and

WHEREAS, the Owner desires to keep and repair the existing railing, or permanent fencing ("Fencing") associated with the sidewalk café in the E. Main Street right-of-way to define the outdoor sidewalk café configuration, as depicted on attached Exhibit B ("Café Area"); and

WHEREAS, the City conditionally supports this request provided the Owner and the City enter into a Maintenance Agreement for the Fencing ("Agreement"), prior to the termination of the aforementioned Encroachment Agreement, with ownership of the Fencing being transferred to the City in exchange for maintenance of the Fencing by the Owner.

NOW, THEREFORE, the City and the Owner shall enter into the Agreement, subject to the following obligations, which are assumed by the Owner, its heirs, successors and assigns:

- 1. Ordinances.** The Owner agrees to comply with all applicable Madison General Ordinances ("MGO").
- 2. Removal.** If the City needs the right-of-way for a public purpose, or if the Fencing is no longer used to support an outdoor sidewalk café, the Owner agrees to remove the Fencing upon ten (10) days written notice by City. The Owner, its successors and assigns shall be entitled to no damages for removal of the Fencing, and if the Owner does not remove the same upon due notice, it shall be removed at the Owner's expense and the cost therefore levied against the Property as a special charge for current service rendered.
- 3. Required Licenses and Permits.** The Owner understands that certain licenses and permits are or may

be required to install and/or repair the Fencing surrounding the Café Area. It is Owner's responsibility to obtain any necessary licenses or permits, which may include, but is not limited to the permit described below:

- a. Permit to Excavate in Public Right-of-Way. An application for this permit may be required for certain maintenance, repair and/or replacement activities for the Fencing. Applications can be obtained online or from City Engineering Division located at 1600 Emil Street, Madison, WI 53713.
- 4. No Grade Change.** No change in the grade within the Café Area shall be made without the prior written approval of the City Engineering Division ("City Engineer").
- 5. Maintenance.** The Owner agrees to maintain the Fencing, as needed, or as may be reasonably required by the City, within the Café Area: Nothing in this Agreement shall prohibit the Owner from contracting with third parties to comply with its responsibilities under this Agreement.
- 6. Revisions by Owner.** The Owner may request the City to allow changes to the Fencing and shall be permitted to make such changes if the City Engineer approves the changes in writing. The Owner shall obtain all necessary permits and approvals prior to reconstructing the Fencing.
- 7. Revisions by City.** The City has the right to reconstruct the Fencing around the Café Area and to construct it in such a way that differs from the initial construction. In such event, the City has the right to levy special assessments on the Property for the cost of the Fencing to the extent not covered (and paid for by the Owner) under this Agreement in accordance with City Policy and State Statutes.
- 8. Public Safety.** The City shall have the right to require the Owner to promptly construct or reconstruct the Fencing around the Café Area if it is or becomes a safety hazard, as reasonably determined by the City Engineer, when ordered in writing by the City Engineer to do so. Following receipt of the City Engineer's written order, the Owner shall effect the construction or reconstruction at the Owner's expense, even if the change results in modification of the Fencing previously approved by the City.  
  
**Adjacent City Projects.** The City has the right to construct and reconstruct streets, sidewalks, utilities, or other infrastructure, as well as maintain city-owned terrace trees adjacent to the Property, which may impact the Fencing that the Owner is responsible for maintaining under this Agreement. In the event of such construction or reconstruction impacting the Fencing, the Owner shall be obligated to restore, replace or reconstruct the damaged or altered Fencing at its sole cost and expense to the extent the costs and expenses to accomplish the same shall not be collectible by the City from adjacent property owners through special assessments, agreements between the City, and the adjacent owners or otherwise.
- 9. Damage.** The City shall not be responsible for the repair of any damage to the Fencing, regardless of who or what caused said damage.
- 10. Improvement Specifications.** No solid structure or improvements higher than 42 inches. No solid structure or improvements within a minimum of 24 inches from the back of curb.
- 11. Indemnification.** The Owner shall be liable to and hereby agrees to indemnify, defend and hold harmless the City, and its officers, officials, agents and employees, against all loss or expense (including liability costs and attorney's fees) by reason of any claim or suit, or of liability imposed by law upon the City, or its agents or employees, for damages because of bodily injury, including death at any time resulting therefrom, or sustained by any person or persons or on account of damage to property, including loss of use thereof, arising from, in connection with, caused by or resulting from: acts or omissions of the Owner or their contractors and subcontractors in the performance of the Owner's obligations under this

Agreement, whether caused by or contributed to by the negligent acts of the City, its agents or employees; provided, however, that to the extent that any such negligent or willful acts of the City are attributable to third-party contractors of the City, nothing shall prevent Owner from asserting claims against such third-party contractors.

**12. Insurance.** The Owner agrees to carry or cause to be carried the following insurance coverages with respect to the Fencing located therein:

- a. Commercial general liability insurance covering as named insured, the owner, and naming the City, its officers, officials, agents and employees as additional insureds, with a minimum limit of \$1,000,000 per occurrence. This policy shall also be endorsed for contractual liability in the same amount, and apply on a primary and noncontributory basis. Any subcontractor of Owner engaged in providing labor and materials in relation to this Agreement shall be required to maintain a similar commercial general liability policy.
- b. Statutory workers' compensation insurance as required by the State of Wisconsin. Any subcontractor of Owner engaged in providing labor and materials in relation to this Agreement shall also be required to maintain workers' compensation insurance for all of the latter's employees. The Owner, and any subcontractor(s), shall also carry minimum Employers Liability limits of \$100,000 Each Accident, \$100,000 Disease - Each Employee, and \$500,000 Disease - Policy Limit.

As evidence of the above-required coverages, the Owner shall furnish the City with a certificate of insurance on a form approved by the City, and, if requested by the City Risk Manager, owner shall also provide copies of additional insured endorsements or policy. Such certificate shall list the following as Certificate Holder:

City of Madison  
ATTN: Risk Management, Rm 406  
210 Martin Luther King Jr. Blvd.  
Madison, WI 53703

The amounts listed above reflect the standard coverages and limits required today by the City. The required coverages are expected to change over time and the Owner shall increase the above required insurance limits and coverages when required by the City provided that the proposed increases or coverage changes are consistent with City policy for similar applications. All policies shall provide the City thirty (30) days advance written notice of cancellation, non-renewal or material changes to the policy during the term of this Agreement.

**13. Termination.** The City and the Owner agree that this Agreement may be terminated at any time upon written notice from the Owner to the City, following removal of the Fencing.

**14. Severability.** If any part or parts of this Agreement shall be held unenforceable for any reason, the remainder of this Agreement shall continue in full force and effect. If any provision of this Agreement is deemed invalid or unenforceable by any court of competent jurisdiction, and if limiting such provision would make the provision valid, then such provision shall be deemed to be construed as so limited.

**15. Binding Effect.** The covenants and conditions contained in this Agreement shall apply to and bind the City and the Owner and their heirs, legal representatives, successors and assigns. Nothing herein shall prevent the Owner from transferring their interests in the Property and, upon such transfer; the obligations of such Owner under this Agreement shall become the obligation of the transferee.

- 16. Entire Agreement.** This Agreement constitutes the entire agreement between the City and the Owner with respect to the subject matter hereof and supersedes any prior understanding or representation of any kind preceding the date of this Agreement. There are no other promises, conditions, understandings or other agreements, whether oral or written, relating to the subject matter of this Agreement. This Agreement may be modified only in writing and must be signed by the Owner and the City.
- 17. Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.
- 18. Wavier.** The failure of either the City or the Owner to enforce any provisions of this Agreement shall not be deemed a waiver or limitation of said party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.
- 19. Run with the Land.** All the terms, conditions, covenants and other provisions contained in this Agreement, including the benefits and burdens, shall run with the Property and shall be binding upon and inure to the benefit of and be enforceable by the Owner and the City and their respective successors and assigns. This Agreement shall be recorded in the office of the Dane County Register of Deeds. In the event of the sale of the Property, the City shall be given notice of the change of ownership in accordance with the provisions of Paragraph 23.
- 20. Default/Remedies.** If the Owner fails to complete any maintenance of the Fencing as required by this Agreement within a reasonable period, the City has the right to complete the maintenance and charge the costs of such maintenance either as a direct charge to the Owner or a special assessment levied upon the Property.
- 21. Nondiscrimination.** In the performance of the services under this Agreement the Owner agrees not to discriminate against any employee or applicant because of race, religion, marital status, age, color, sex, disability, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs, or student status. The Owner further agrees not to discriminate against any subcontractor or person who offers to subcontract on this contract because of race, religion, color, age, disability, sex, sexual orientation, gender identity or national origin.
- 22. Counterparts and Transmittal of Signatures.** This Agreement may be signed in counterparts, each of which shall be taken together as a whole to comprise the same Agreement. Signatures on this Agreement may be exchanged between the Owner and the City by facsimile, electronic scanned copy (.pdf) or similar technology and shall be as valid as original; and this Agreement may be converted into electronic format and signed or given effect with one or more electronic signature(s) if the electronic signature(s) meets all requirements of Wis. Stat. ch. 137 or other applicable Wisconsin or Federal law. Executed copies or counterparts of this Agreement may be delivered by facsimile or email and upon receipt will be deemed original and binding upon the Owner and the City, whether or not a hard copy is also delivered. Copies of this Agreement, fully executed, shall be as valid as an original.
- 23. Notices.** All notices to be given under the terms of this Agreement shall be signed by the person sending the same, and shall be sent or delivered to the addresses of the Owner and the City specified below. If electing to utilize electronic mail, said emails shall be sent to the email addresses provided below with an active read receipt and shall include a statement that the electronic mail constitutes notice under the terms of this Agreement.

For the City:

Office of Real Estate Services  
Economic Development Division - City of Madison  
P. O. Box 2983  
215 Martin Luther King, Jr. Boulevard, 3<sup>rd</sup> Flr

Madison, WI 53701-2983  
[jfrese@cityofmadison.com](mailto:jfrese@cityofmadison.com) and [ores@cityofmadison.com](mailto:ores@cityofmadison.com)

For the Owner: Suhr Building, LLC

Attn: Scott Lewis  
121 S. Pinckney Street, Suite 400  
Madison, WI 53703  
[scott@cmimanagement.net](mailto:scott@cmimanagement.net)

Any party hereto may, by giving five (5) days written notice to the other party in the manner herein stated, designate any other address in substitution of the address shown above to which notices shall be given.

BE IT FURTHER RESOLVED that the Mayor and City Clerk are hereby authorized to execute any and all additional documents that may be required to complete the actions contemplated herein.