

CITY OF NEW YORK
MANHATTAN COMMUNITY BOARD FOUR

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August 12, 2021

Marisa Lago, Chair
City Planning Commission
120 Broadway, 31st Floor
New York, NY 10271

Re: Open Restaurants Zoning Text Amendment

Dear Chair Lago,

On July 14, 2021, the Department of City Planning (DCP) presented its proposed Permanent Open Restaurants Zoning Text to Manhattan Community Board 4's (MCB4) Clinton/Hell's Kitchen Land Use Committee.

The proposed text amendment seeks to develop guidelines to extend permanently the emergency open restaurants order issued in 2020.

At its Full Board meeting on July 28th, MCB4 reaffirmed the Committee's strong objection to the process of developing the proposal and the failure of the proposal to consider the unintended, and potentially negative, consequences of its adoption¹. By a vote of 29 in favor, 0 opposed, 4 abstaining, and 0 present but not eligible to vote, the Board recommended **not** to approve the text amendments.

The failure of DCP to engage with the community or the Board before formulating the proposal, coupled with the fact that operational guidelines by the Department of Transportation have not been developed or even discussed with the larger community, were added reasons for the Board to recommend the text amendments be rejected. No compelling evidence was presented to show the proposal, should it be implemented, would financially benefit the City. And no assurance was offered that eliminating the current zoning regulations — thereby wiping out years of work the Board's Business License and Permits Committee spent developing workable stipulations —

¹ MCB4's Transportation Planning Committee wrote a separate letter on transportation concerns related to the Proposed Open Restaurants Text Amendment

would not adversely affect the quality of life and safety of residents and visitors to our residential neighborhoods.

A PROPOSAL TO ELIMINATE PROTECTION

Three main actions are needed to facilitate the future program — removal of locational prohibitions, changes to the Sidewalk Café Program, and the creation of a Roadway Café Program. The text amendment would expand the universe of allowed “geographies” for sidewalk cafés; remove other zoning text that enables sidewalk cafés; and grandfather existing enclosed cafés.

The Board strongly objects to the elimination of the current zoning rules governing the placement of sidewalk cafés without adequate protections in place.

The proposed changes intend to remove references to sidewalk cafes from the zoning text based on the premises that legislation and rules will be substituted, and the Department of Transportation will take over the administration of this program. The following sections are affected: ZR, Article 1, Chapter 2, and 4, ZR Sections 22-00, 32-411, 33-05 & 43-03, 52-34, 73-243, 83-05 97-03, 97-13, 97-14, 97-412, 109-02, 117-03, 117-05.

This is an extensive action which has the potential to affect quality of life for many and encroach on scarce transportation resources. It should not be rushed through.

In fact, by eliminating the sidewalk café language, this process is also removing protections to communities on many streets and special districts where sidewalk cafes were not permitted — protections which DCP now calls “outdated geographic prohibitions on where sidewalk cafes can be located.” This is being done without providing at the same time a substitute law to protect those same communities. This creates the risk that necessary protections communities have relied upon for years will be lost when legislation is passed.

Examples abound:

- In districts with heavy pedestrian volumes near Grand Central Station or the Port Authority Bus Terminal, sidewalk cafés are not permitted. With this zoning, they would become permitted and there is no guarantee that siting guidelines will be adequate to prevent installation in such areas. In fact, based on the draft we have seen, we know they will not.
- In districts like Hudson Yards, where sidewalk widening was mandated by the zoning on certain avenues in anticipation of high volume of pedestrians because of the exceptionally high-density of office buildings, the protection will be gone as well.
- In the West Chelsea Special District sidewalk cafes are only allowed on "wide streets" because the narrow streets have proven inadequate for sidewalk cafes.

- In residential streets with grandfathered non-conforming uses sidewalk cafes would now be permitted.

The rezoning and the legislation should go hand in hand, and one should not be reviewed and approved without the other one.

SIDEWALK WIDENING IS FOR PEDESTRIANS, NOT CAFES

The proposed text adds the following: *33-05 and 43-03 Outdoor Table Service Areas - Notwithstanding any other provisions of this Resolution, outdoor table service areas, associated with eating and drinking establishments, meeting all requirements set forth by the Department of Transportation shall be permitted within any required sidewalk widening areas.*

Sidewalk widening requirements apply in certain districts which are exceptionally congested, like the Times Square area. New buildings facades are recessed by 10 to 15 ft to widen sidewalks in order to relieve pedestrian overcrowding. In exchange the developer gets bonus height or FAR.

- Other sections of the zoning text are pretty explicit: "No *street* trees are permitted on a sidewalk widening. No vehicle storage, parking or storage of trash is permitted on a sidewalk widening. Gratings may not occupy more than 50 percent of the sidewalk widening area nor be wider than one half the width of the sidewalk widening."

- Permitting the widened space to be used for sidewalk cafes is double dipping because the buildings already got the bonuses AND would be taking back the community benefit: it is also counter to the goal and sets up a bad precedent for future sidewalk extensions that are also designed to ease pedestrian crush.

- A current example is the proposal for the Penn Complex where all buildings would be recessed by 5 to 15 ft to accommodate the massive volume of pedestrians. With this proposed clause, the buildings could both get bonuses and take back the space for sidewalk cafes in the future. Pedestrians and commuters would once again be squeezed.

While the City spends millions expanding sidewalks, this clause would hand over sidewalk space designed to alleviate congestion for pedestrians to landlords who already benefitted from their bonus. The Board finds this altogether a bad idea and a bad precedent.

Sidewalk cafes must not be installed on sidewalk widenings.

CAFES ON RESIDENTIAL STREETS

Current zoning does not permit sidewalk cafes in residential districts. (See Zoning Resolution Article I, chapter 4, section 14-011). This prohibition has a sound basis in public policy: Even if

a grandfathered eating or drinking establishment is permitted in a residential district, allowing that establishment also to have a sidewalk cafe would add significantly to the disruption of a reasonable residential quality of life.

MCB4 has spent hundreds of hours mediating issues related to noise from eating and drinking establishments. It is our experience that outdoor operations on very residential streets create many quality of life issues that affect hundreds of residents.

Accordingly, MCB4 urges that the prohibition of any outdoor eating or drinking facilities in residential districts be preserved in the Zoning Resolution. We further request that restaurant space in an otherwise residential district not be permitted under the Open Restaurants program. The zoning should continue to require such establishments to be within a #completely enclosed building# and not be subject to the enclosure provisions of Section 32-411.

It is crucial that this as well as the other provisions in this letter, remain in the zoning text or be added to the new legislation

The prohibition of any outdoor eating or drinking facilities in residential districts must be preserved in the Zoning Resolution.

OPEN THE WINDOWS, SHARE THE NOISE

32-411 & 32-412

In C1, C5, C6-5 or C6-7 Districts C1 C5 C6-5 C6-7

In other Commercial Districts C2 C3 C4 C6-1 C6-2 C6-3 C6-4 C6-6 C6-8 C6-9 C8

“all such #uses# shall be located within #completely enclosed buildings# except for store fronts or store windows, associated with eating and drinking establishments, which may be opened to serve customers outside the #building#.”

Storefronts and store windows already are permitted to be open, as attested by the hundreds of French doors and garage doors that have been approved by the Department of Building and the successful operation of sidewalk cafes under current zoning. This paragraph seems to give to eating and drinking establishments the right to open their doors and windows regardless of the noise or impact on the community.

While the noise code would govern, there are only two Department of Environmental Protection (DEP) inspectors in the City and NYPD has great difficulty enforcing these issues. As you are well aware, noise complaints are the most frequent complaints in the City. Although MCB4 has been successful in requesting that many establishments keep French doors and garage doors closed for noise reasons, were this zoning change implemented, future establishments could point to this provision and argue that zoning explicitly permitted them to keep doors and windows open.

The language should be removed or changed to: “all such #uses# shall be located within #completely enclosed buildings# except for those #uses# permitted by the Department of

Transportation in an area adjacent or in front of the store front associated with eating and drinking establishments

Opening doors and windows should remain prohibited when amplified sound is used inside.

PLEASE BE SEATED

The definition of doors and windows is crucial in particular when read in the context of section 52-34 Commercial Uses in Residence Districts:

In all #Residence Districts#, a #non-conforming use# listed in Use Group 6, 7, 8, 9, 10, 11B, 12, 13, 14 or 15 may be changed, initially or in any subsequent change, only to a conforming #use# or to a #use# listed in Use Group 6. In the case of any such change, the limitation on #floor area# set forth in Section 32-15 (Use Group 6) shall not apply. Eating or drinking ~~places,~~ establishments with musical entertainment, but not dancing, thus permitted as a change of #use#, shall be limited exclusively to the sale of food or drink for on-premises consumption by seated patrons within a #completely enclosed building# subject to the enclosure provisions of Section 32-411.

The language, combined with the section above, allows establishments with music to no longer require that patrons to be seated, allows them to do so in an establishment with open doors and windows and in a sidewalk café in residential district. *This is a recipe for disaster for those residential districts.* Up to now, sidewalk cafes have always required patrons to be seated and it is a very useful feature. Standing patrons will typically exceed the maximum occupancy allowed, have a tendency to drift into the rest of the sidewalk further reducing the right of way, and are typically more rowdy than seated patrons.

Also, music has never been allowed in sidewalk cafes. This makes sense as the music affects all users of the street and residents living above and its volume level increases to cover traffic noise or music from competing establishments. Currently on Restaurant Row, one cannot have a quiet dinner as every other establishment blasts music that can be heard from 500' away.

It may have escaped City Planning, but thousands of our residents live above bars, restaurants, and cafés on our avenues and streets. They should not be forced to suffer day and night amplified music played on the sidewalk.

In both residential and commercial districts, it is crucial that the clause concerning “seated patrons only” and music restricted to indoor with doors and windows closed be retained. The sentence” *limited exclusively to the sale of food or drink for on-premises consumption by seated patrons within a #completely enclosed building#*” should be retained and—“*subject to the enclosure provisions of Section*” removed.

The requirement that patrons be seated, and no music be permitted in sidewalk cafes must remain.

A SIDEWALK IS NOT A SERVICE AISLE

In its prior letters on the Open Restaurants program, MCB4 has proposed critical changes to the siting criteria, including width of the right of way and definition of obstructions, that we believe would better balance the interests of the residential/pedestrian community and eating and drinking establishments. Although we understand that proposed siting criteria are not currently under consideration, a draft of those criteria was included in the circulated materials, and MCB4 wishes to comment early on with respect to another particularly problematic proposed change.

Current sidewalk café rules require a three-foot service aisle in addition to the eight-foot pedestrian clear path. The proposed siting criteria appear to eliminate that mandatory service aisle and, instead of specifying the dimensions of the service aisle, state: “Assumes service aisle is within café designated area.” MCB4 believes that the dimensions of a mandatory service aisle within the sidewalk café footprint, ideally the current three feet, must be specified.

MCB4 has seen that sidewalk café operators, naturally eager to maximize revenue, squeeze as many chairs and tables as possible into every square inch of their allocated sidewalk café footprint. Without the requirement of a mandatory service aisle with explicitly stated dimensions, establishments are likely to eliminate the service aisle, with their patrons being served from the pedestrian clear path – defeating the purpose of the pedestrian clear path and further invading the very limited sidewalk space reserved for pedestrians.

A service aisle must be explicitly designated and required.

CONCLUSION

MCB4 is on record for supporting the 2020 emergency order for Open Restaurants and sidewalk cafes. We have written in support multiple times and made constructive suggestions on how to ameliorate the program.

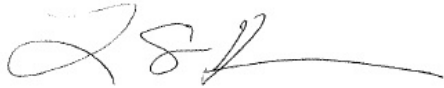
However, we strongly object to the process the City is using to roll out this new permanent program. Even though removing references to sidewalk cafés from the zoning text may seem innocuous, we cannot support it unless the provisions related to special districts and excluded areas, sidewalk widening, doors and windows and grandfathered commercial use in residential districts are properly addressed in the zoning or by an adequate substitute in the legislation — an adequate substitute that does not adversely affect the quality of life, sanitation, and safety of our residential neighborhoods. And that a transparent and formal public review process be required before the siting of sidewalk and roadside cafés.

This letter deals mainly with the proposed zoning text changes. The Board expects further discussion about the effect the expansion of open sidewalk restaurants would have on pedestrians, bike lanes, traffic, sanitation, fire and police emergency response, and residential quality of life.

As one of the districts in the City with the greatest concentration of sidewalk cafes, we are requesting that the rezoning and the legislation go hand in hand, that one not be approved

without the other, that the Department of Transportation undertake public consultations as soon as possible to hear our input to the legislation and administration and operation of the proposed permanent program.

Sincerely



Lowell D. Kern
Chair
Manhattan Community Board 4



Jean Daniel Noland
Chair
Clinton/Hell's Kitchen Land Use Committee

Cc: Hon. Jerrold Nadler, U.S. Representative
Hon. Brad Hoylman, NYS Senator
Hon. Linda Rosenthal, NYS Assembly Member
Hon. Richard Gottfried, NYS Assembly Member
Hon. Corey Johnson, Speaker, City Council
Hon. Gale Brewer, Manhattan Borough President
Henry Gutman, Commissioner, NYC Department of Transportation