



Agenda Report

Fullerton City Council

MEETING DATE: AUGUST 16, 2022

TO: CITY COUNCIL / SUCCESSOR AGENCY

SUBMITTED BY: KELLEEE FRITZAL, CONSULTANT/SPECIALIST

PREPARED BY: KELLEEE FRITZAL, CONSULTANT/SPECIALIST
KIMBERLY HALL BARLOW, ASSISTANT CITY ATTORNEY

SUBJECT: PUBLIC RIGHT-OF-WAY RESTORATION AT HARBOR AND COMMONWEALTH, TERMINATION OF ENCROACHMENT AT 100 NORTH HARBOR BOULEVARD AND POSSIBLE CONSIDERATION OF A SETTLEMENT AGREEMENT APPROVAL

SUMMARY

Consideration of restoring the public right-of-way sidewalk at Harbor and Commonwealth to public use which requires adoption of a resolution, directing staff to terminate the existing Site Lease and Encroachment Agreements and notify the leaseholder and property owners of such termination and possible consideration of a Settlement Agreement Approval.

RECOMMENDATION

1. Adopt Resolution No. 2022-XXX.

RESOLUTION NO. 2022-XXX - A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FULLERTON, CALIFORNIA, DECLARING THE NEED TO RETURN PUBLIC RIGHT-OF-WAY AT THE NORTHEAST CORNER OF HARBOR BOULEVARD AND COMMONWEALTH AVENUE TO PUBLIC USE

2. Find that the Site Lease and Encroachment Agreement is terminable and should be terminated based on default by abandonment and failure to pay required rent.
3. Find that restoration of the full width of the public sidewalk adjacent to 100 North Harbor Boulevard is necessary and appropriate.
4. Direct staff to notify the leaseholder of the termination and notify the property owner of 100 North Harbor Boulevard to remove any and all encroachments into the public

right-of-way within 60 days of such notice or pursuant to the terms of any settlement agreement and to restore the right-of-way to its previous condition.

5. Approve Settlement Agreement between the City of Fullerton and Mario Marovic for Commonwealth and Harbor LLC allowing the City Manager to sign final agreement, in a form approved by City Attorney's Office.

CITY MANAGER REMARKS

The City Manager requests City Council approval of the attached agreement or, in lieu of approving the agreement, to provide potential amendments to consider in the agreement.

PRIORITY POLICY STATEMENT

This item matches the following Priority Policy Statements:

- Public Safety
- Infrastructure and City Assets.

FISCAL IMPACT

As a part of the settlement agreement, the City would agree to waive building fees, plan check and inspection fees as well as past due lease revenue due to the restaurant closure.

DISCUSSION

The Planning Commission approved a Conditional Use Permit for two new restaurants located at 100 North Harbor Boulevard (northeast corner of Harbor Boulevard and Commonwealth Avenue) on February 16, 2022. Prior to their decision, the Planning Commission received correspondence and heard testimony opposed to the continued use of a portion of the public right-of-way (sidewalk) along the Commonwealth frontage for private restaurant use. City Council approved the use of the public right-of-way in 2004 for a prior tenant through a Site Lease Agreement and Encroachment Agreement. The Planning Commission directed staff to inform City Council of this issue as the Planning Commission did not have authority to render a decision on the private use of the sidewalk since a prior City Council entered into the Agreement.

Staff recommends that if City Council desires to restore the public right-of-way sidewalk at Harbor and Commonwealth, City Council should direct staff to give notice to the leaseholder and to the 100 North Harbor Boulevard property owner that the City has terminated the site lease and encroachment agreement originally entered into with its previous tenant in 2004 due to breach by the tenant and the City's determination that the restoration of the right-of-way for public use is necessary and appropriate, requiring removal of existing encroachment. City Council continued this item at the April 5, 2022 City Council meeting at the request of the property owner and continued the item at the June 7, 2022 City Council meeting to allow staff to negotiate a Settlement Agreement with the Property Owner to remove the easement and restore the public right-of-way.

Background

The City entered a “Site Lease Agreement and Encroachment Agreement” (the “Original Agreement”) with Intimate Inns of California, Inc. DBA Florentine’s Tuscany Club (“Prior Tenant”) in November 2004 to allow Florentine’s to use certain portions of the City’s sidewalk area on Commonwealth Avenue adjacent to the property (the “Encroachment Area”) for its business purposes. The City made the agreement not with the property owner but rather with the Prior Tenant. The City and the Prior Tenant entered into the “First Amendment to Encroachment License Agreement” (the “First Amendment”) on July 18, 2017. This report will refer to the Original Agreement and the First Amendment will collectively as the “Agreement.” The Encroachment Area covers approximately 384 square feet.

Florentine’s closed in October 2020. To staff’s knowledge, it appears that the tenant has not paid the required rent for the leased area (approximately \$485 per month) to the City. By its terms, the Agreement would terminate on May 30, 2023. The Agreement is expressly made non-assignable except with the City’s consent. No party has sought such assignment. Further, the Agreement states that vacating the premises is a material default. If City Council desires to restore the public right-of-way to a full width sidewalk, then staff requests that City Council declare the lease in default and direct staff and the City Attorney to send notice of termination of the Agreement to the Prior Tenant as the Lessee with a copy to the property owner.

City Council may find it desirable to fully restore the public right-of-way at this location for pedestrian use. The downtown area has seen an increase in outdoor recreation activity, particularly pedestrian activity, since the onset of the COVID-19 pandemic. The location of the encroachment at the northeast corner of Commonwealth and Harbor is the only one of the four corners at this intersection with the narrowed pedestrian corridor caused by the encroachment. Removal of the encroachment will allow for additional pedestrian capacity. Several members of the public have requested restoration of the public right-of-way to its full width. If City Council desires to restore the sidewalk to its full width, then staff recommends that City Council declare that it is necessary and appropriate to restore the public right-of-way at this location to public use and adopt Resolution No. 2022-XXX declaring the need to do so.

The property owner of 100 North Harbor Boulevard, Mario Marovic and Commonwealth and Harbor LLC (“Marovic”), has made renovations at the location and previously executed an acknowledgement that the owner would have to remove the encroachment into the right-of-way at the owner’s expense, should the City decide to restore the full public right-of-way to public use. The City has negotiated a draft Settlement Agreement with the Property Owner based on discussions with Marovic on how to restore the Public-Right-of-Way.

The general terms of the Settlement Agreement include:

- Marovic will pay all costs for design, materials, demolition and restoration of the public right-of way.
- A detailed Schedule of Performance has been prepared with construction commencing no later than March 6, 2023 and completed no later than June 30, 2023.

- Marovic will provide a personal guarantee to ensure that the full costs would be met should any default in performance occur.
- City will waive building fees and plan check and inspection fees.
- Marovic will pay rent on the encroachment space monthly until removed.

Attachments:

- Attachment 1 – Resolution No. 2022-XXXX
- Attachment 2 – Draft Settlement Agreement

cc City Manager Eric J. Levitt