

## DRAFT

BROOKLINE ADVISORY COMMITTEE  
Public Safety Subcommittee  
Warrant Articles 29 and 30  
General By-law and Zoning By-law Amendments RE:  
Expanded Outdoor Dining

The Public Safety Subcommittee held an initial public hearing on Warrant Articles 29 and 30 on March 24, 2021 at 6:00 PM and continued the hearing and deliberations on March 29, 2021 at 12:00 PM.

In attendance at the initial hearing were Meredith Mooney, Economic Development and Long-Term Planner; Kara Brewton, Economic Development Director; Anne Meyers, Co-Chair, Economic Development Advisory Board; David Gladstone, Board member, Chamber of Commerce; Kate Poverman, TMM-8; Jane Flanagan, TMM-15; and Subcommittee members David-Marc Goldstein, Neil Gordon, Susan Granoff, Alisa Jonas, and Janice Kahn (Chair).

In attendance at the continuance of the hearing were Meredith Mooney; Kara Brewton; David Gladstone, and all Subcommittee members, plus David Trevvett, Chair, Pedestrian Advisory Committee; Talia Glass, owner of Allium Market and Brookline resident; and David Leschinsky, owner of Eureka! and Brookline resident.

### **SUMMARY AND RECOMMENDATION**

The passage of Warrant Articles 29 and 30 would allow for expanded outdoor dining, both in terms of the time period for which the annual Food Vendor's License could be granted and the allowable outdoor areas to be used for that purpose.

Warrant Article 29 proposes amending the General By-Laws Article 8.10 - Food Vendor Licenses, Section 8.10.8 - Use of Sidewalks and Outdoor Premises to:

- Enable restaurants to use adjacent portions of the street and/or a third party's property for outdoor seating, which expands on the already permissible use of adjacent sidewalk space;
- Provide authority to the Select Board to grant annual licenses for year-round outdoor dining, whereas the current By-law limits the license to not more than 6 months of the year;
- Add the Health and Fire Departments to the departments from which the Select Board shall seek advice regarding license requests, and also replaces the Planning Board with the Planning and Community Development Department so that the process can be more stream-lined.

The Zoning By-Laws Article IV - Use Regulations, Section 4.04 – Limitation of Area of Accessory restricts uses outside a building's rear yard and unbuilt lot areas to not more than 25% of those areas. Warrant Article 30 proposes amending the Zoning By-Law to remove a restaurant's outdoor seating from that restriction. It also proposes amending Section 4.07 – Table

of Use Regulations subsection 38.C to reflect the expansion of the allowable time period for outdoor dining from seasonal to year-round.

By a vote of 5-0-0, the Public Safety Subcommittee recommends favorable action on Warrant Article 29 with one minor amendment to address a Scribner's error and another to provide clarity; and favorable action on Warrant Article 30, also with an amendment to correct a Scribner's error. See below for details.

## **DISCUSSION**

Throughout the past year, the COVID-19 pandemic has ravaged many small businesses, but restaurants were especially hard hit, given the higher risk of infection connected to indoor eating. Revenues for restaurants are down 60%, and many have had to take on significant debt to remain open, and it will likely take several years for most of these restaurants – those that will have survived – to return to pre-COVID financial stability.

To help keep restaurants afloat, both the State and the Town implemented temporary emergency regulations to allow for more outdoor dining. The measures taken included waiving fees, allowing outdoor dining to continue throughout the year, expanding the outdoor space that could be used for that purpose, and streamlining the application process. Other municipalities took even more aggressive steps: Waltham closed Moody Street to traffic to allow outdoor dining throughout the street, and Cambridge covered the restaurants' cost of infrastructure, such as heaters.

Many local restaurants took advantage of these regulations to expand to outdoor dining, which has not only helped them survive, but also has had the ancillary benefit of adding more vibrancy to the Town's commercial areas. In light of that, the Economic Development and Long Term Planning Division of the Planning and Community Development Department has taken the initiative to propose changes in our by-laws to foster continuation of outdoor dining. These two warrant articles incorporate some of those changes – allowing expansion in the number of months per year that dining can be permitted outdoors and in the outdoor areas that can be used for that purpose. While adjacent sidewalks can already be used for that purpose under our current By-Laws, the proposed changes would also allow restaurants to use a portion of the street, including up to 3 parking spaces, as well as sidewalks and private space of adjacent businesses that provide approval for such usage.

The subcommittee discussed various of the associated issues that could stem from this expansion in outdoor dining:

### **Items of Cost/Revenue:**

The most obvious direct costs would be the loss of revenue from metered parking spaces. Planning Department staff estimate that the loss would be approximately \$8,640 for the year. At the same time, Department staff projects that the additional revenue from the meals tax generated by more customers would be approximately \$13,000/year, though the Department acknowledges that this is a very rough estimate and assumes that restaurants would not yet be at full capacity indoors. Once that were to occur, then either the number of outdoor seats would

have to be decreased or additional bathroom accommodations would have to be provided. Members of the subcommittee also wondered whether there would be an increased need for a police presence to direct traffic or whether the use of streets with jersey barriers might result in damage to the pavement that would require more frequent repairs.

To offset those costs, however, the Select Board is planning to impose fees, with \$600/restaurant being considered if the restaurant makes use of parklets, and likely somewhat lower fees if only sidewalk space is used. Additionally, having more people attracted to the commercial areas because of the availability of outdoor dining could result in higher usage of commercial areas overall, which could generate higher tax revenue from higher value properties.

#### Other collateral concerns raised:

Other concerns included increasing difficulties walking on sidewalks by the elderly and disabled, and risks to pedestrians of being exposed to the COVID-19 virus if they were to be forced to walk too close to diners. Dr. Swanee Jett, Director of the Public Health Department, analyzed the current temporary regulations and determined that the proposed distancing requirements were sufficient to keep the public safe. Also, David Trevvett, the Chair of the Pedestrian Advisory Committee offered his support of the warrant articles.

Another concern was the potential noise impact on neighboring residents. Meredith Mooney responded that – at least currently – very few outdoor dining facilities are located in mixed-use buildings. She noted a few in Brookline Village, such as Blossom Bar, but to her knowledge, there have been no noise complaints. Additionally, opening hours can vary for outdoor and indoor dining so that noise complaints can be addressed without shortening dining options for indoor dining.

#### Impact on Neighboring Retailers:

The subcommittee questioned whether the loss of parking spaces/more crowded sidewalks was a concern to neighboring retailers. Members of the business community at the hearing expressed their belief that all the retailers in town are supportive of anything that can be done to help the survival of restaurants, who they are aware are struggling. It is their belief that a thriving restaurant scene will also help all retailers in the commercial areas.

#### Legislative History:

A member of the subcommittee wondered why the current By-Law limited outdoor dining to only 6 months of the year – was there a substantive reason to not have year-round dining? The Planning Department provided the legislative history, which showed that the current laws were passed based on the urging of restaurant owners. These businesses wanted at least some form of outdoor dining allowed, and at the time, there did not seem to be a need for outdoor dining beyond 6 months of the year. Time will tell the extent to which there will be an interest in outdoor dining much beyond the seasonal six months of warmer weather once indoor dining once again becomes an option post-COVID.

#### Use of Propane Heaters:

Most restaurants with outdoor dining use propane heaters to warm diners. The subcommittee explored whether these should be restricted in light of the Town's efforts to reduce fossil fuel

usage. We obtained an analysis of the differential impact of CO2 of using propane compared to electricity for such heating purposes. The analysis – surprisingly – indicated that heating with electricity would actually result in a greater release of CO2 under current circumstances and technology unless the restaurant were to use Brookline’s 100% green electricity program. The analysis suggested that electricity would not be substantially better than propane until perhaps 5 years from now. The subcommittee then considered proposing a sunset clause, but upon further deliberation rejected that option. It would not be equitable to single out restaurants for the prohibition of propane heaters and no other entities or residents, especially at a time when apparently alternative technology does not exist that would result in less CO2, and when the restaurant community has just invested thousands of dollars to purchase these heaters to enable them to remain afloat. Further, all of the FFF warrant articles filed to date include exemptions for portable propane appliances for cooking or heating. Planning Department staff also contacted other municipalities and learned that none of them have restricted the use of propane heaters, and Cambridge paid for their purchase on behalf of restaurants to provide them further support.

The subcommittee would like to urge the Town to develop a coherent Town wide approach that addresses the use of propane for all users and purposes as part of its planning to meet our goal of becoming fossil fuel free by 2050.

#### Consideration of a Sunset Clause for Expanded Outdoor Dining:

Some members of the subcommittee proposed a sunset clause for expanded outdoor dining, so that it could be evaluated at the time of the sunset and if successful, it could be made permanent. The majority of the subcommittee felt that legislatively, it is the same whether to have a sunset clause and later vote to make outdoor dining permanent, or to vote to retract expanded outdoor dining if it is not successful. For the restauranteurs, having a sunset clause would only make life that much more difficult. Outdoor dining has been a lifeline for them, and even with outdoor dining, usage has decreased by 60%, and it will take several years for restaurant owners to recover from all the debt that they have incurred to become whole once again. A sunset clause would make them think twice about whether to invest further in infrastructure to make their outdoor dining facilities successful. Additionally, if problems are identified, the guidelines can be modified to make cures without the need to terminate the expansion altogether. And finally, it was believed that outdoor dining is overall a beneficial addition to the Town’s commercial area, enabling restaurants to generate more income, provide a draw to commercial areas by both residents and non-residents, which will positively increase demand for retail generally, and add some vibrancy to the Town’s commercial areas that has been lacking.

The Public Safety approved the substance of both Warrant articles, though its motion recommends a slightly revised Warrant Article 29 that (1) adds the word “*proper*” before “notice” in the first line of Section 8.10.8 to emphasize that the type of notice provided to the public must be in accordance with the provisions for notice required of the Select Board, and (2) adds the word “*its*” before “designee” to correct a Scribner’s error; and a revised Warrant Article 30 that adds “*s and in business and industrial districts, and as provided in §§ 5.44, 5.53, 5.63, and 5.72*” to Section 4.04 – 3 following the words “and M-2.5 District” because those words are part of the provision but were inadvertently cut off in the drafting of the warrant article.

The recommended motion is as follows, with the Public Safety subcommittee modifications noted in red:

## **ARTICLE 29**

Submitted by: Planning & Community Development Department, Economic Development Division

**To see if the Town will amend the General By-laws, Section 8.10.8 - Use of Sidewalks and Outdoor Premises, of Article 8.10 – Food Vendors License, as follows (additions are underlined and deletions appear in stricken text):**

### **ARTICLE 8.10 FOOD VENDOR LICENSES**

#### **SECTION 8.10.8 USE OF SIDEWALKS AND OUTDOOR PREMISES**

The Select Board may, upon written application by a licensed Food Vendor, after proper notice and hearing, grant, upon such terms and conditions as they ~~it~~ determines to be necessary and desirable, ~~that a~~ Licensed Food Vendor the right to use the an adjacent outdoor portion area as part of the licensed premises to accommodate outside seating for patrons. Such duly licensed outside seating areas may include and/or a portion of a town street or sidewalk area and/or a third party's property with acceptable proof of third-party consent. ~~that is contiguous to the licensed premises for outside seating for Patrons.~~ Prior to such a grant, the Select Board shall seek advisory reports from the ~~Planning Board~~ Planning & Community Development Department, Building Commissioner, Police Department, Fire Department, Health Department, and Commissioner of Public Works, as the Select Board or its designee may determine. ~~No such grant shall be for more than six months in any license year.~~ No such grant shall extend beyond the term of the license. Any right granted hereunder shall be subject to revocation if the exercise of the grant interferes with public safety and convenience.

Or act on anything relative thereto.

## **ARTICLE 30**

Submitted by: Planning & Community Development Department, Economic Development Division

**To see if the Town will amend the Brookline Zoning By-Laws, §4.04 Limitation of Area of Accessory Uses, §4.07 Table of Use Regulations of Article IV Use Regulations, and §6.02 Off-Street Parking Space Regulations of Article VI Vehicular Service Uses Requirements, as follows (proposed deletions appear in stricken text):**

### **ARTICLE IV USE REGULATIONS**

#### **§4.04 – LIMITATION OF AREA OF ACCESSORY USES**

1. No accessory use or uses within a building shall occupy more than a combined total of 25 per cent of the floor area of the principal building, other than required off- street parking.
2. No accessory use or uses not within a building shall occupy more than a combined total of 25 per cent of the unbuilt lot area, or of the required rear yard area, other than required off-street parking or outdoor seating for a licensed Food Vendor as defined in Article 8.10 of the Town's General By-Laws.
3. No accessory use shall occupy part of the required front or side yards, except off- street parking as required in M-1.0, M-1.5, M-2.0, and M-2.5 Districts and in business and industrial districts, and as provided in §§ 5.44, 5.53, 5.63, and 5.72.

#### **§4.07 – TABLE OF USE REGULATIONS**

**38C.** Open-air use, other than commercial recreation facilities, ~~seasonal~~ outdoor seating for a licensed Food Vendor as defined in Article 8.10 of the Town's General By-Laws that does not exceed six months in each calendar year, and Uses 22 to 28, inclusive. Use 38C shall include ~~including~~ but not be limited to the sale of flowers, garden supplies, or agricultural produce.

### **ARTICLE VI VEHICULAR SERVICE USES REQUIREMENTS**

#### **§6.02 – OFF-STREET PARKING SPACE REGULATIONS**

3. Places of Public Assembly shall include Uses 9, 12 to 14 inclusive, 16, 30, and 34, as listed in

#### **Article IV.**

- a. Where Places of Public Assembly are provided with benches rather than fixed individual seats, each 1.5 linear feet of bench shall equal one seat.
- b. Where no fixed seats are used, each 20 square feet of public floor area shall equal one seat.
- c. Places of worship need not provide the requirements specified in this section.
- d. Bowling alleys shall provide two parking spaces for each alley.
- e. For recreational or social uses primarily designed for neighborhood or Town-wide activities and owned or operated by an agency of the Town, the Board of Appeals may by special permit modify the requirements of this section.

- f. For any place of public assembly that obtains a license for ~~seasonal~~ outdoor seating subject to **§8.10.8** of the Town's General Bylaw, the additional ~~seasonal~~ outdoor space shall be exempt from parking requirements.

Or act on anything relative thereto.