



# AGENDA REPORT

## Public Works

<b>DATE:</b>	September 24, 2024
<b>TO:</b>	Mayor Martinez and Members of the City Council
<b>FROM:</b>	Daniel Chavarria, PE, Public Works Director Robert Armijo, PE, Deputy Public Works Director / City Engineer
<b>Subject:</b>	Appeal of Encroachment Permit (#EN23-00843) Denial for Up and Under Pub & Grill BBQ Smoker
<b>FINANCIAL IMPACT:</b>	The Applicant has paid all required fees associated with the submission and review of encroachment permit #EN23-00843. There are no anticipated additional costs to the City because of this appeal.
<b>PREVIOUS COUNCIL ACTION:</b>	Not applicable.
<b>STATEMENT OF THE ISSUE:</b>	Nathan Trivers, owner of Up & Under Pub & Grill, is appealing the City Engineer's denial of encroachment permit application #EN23-00843, which seeks approval to place a BBQ smoker on the public sidewalk/street adjacent to 2 West Richmond Avenue. The denial is based fire safety concerns, municipal code violations, community complaints, and public right-of-way issues. The City Council must now determine whether to uphold or overturn the denial, considering both the Applicant's appeal and the City's regulatory and safety concerns.

<b>RECOMMENDED ACTION:</b>	ADOPT a resolution denying the appeal and upholding the City Engineer’s decision to deny encroachment permit application #EN23-00843 submitted by Nathan Trivers, owner of Up & Under Pub & Grill, to place a BBQ smoker on the public sidewalk/street in front of 2 West Richmond Avenue based on fire safety concerns, municipal code violations, community complaints, public right-of-way issues and failure to comply with other applicable state and local regulations. – Public Works (Robert Armijo 510-620-5477, Daniel Chavarria 510-620-5478)
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Applicant Nathan Trivers (“Applicant”), the owner of Up & Under Pub & Grill and tenant at 2 West Richmond Avenue, appeals the City Engineer’s denial of encroachment permit application #EN23-00843 which seeks to place a BBQ smoker on the public sidewalk/street in front of 2 W. Richmond Avenue.

The process to appeal the denial of an encroachment permit application is as follows: “Any person aggrieved by City Engineer’s decision may appeal by submitting a written appeal to City Clerk within 15 days of the date of the decision.” [Richmond Municipal Code (“RMC”) section 12.30.290] “City Council shall hold a hearing on the appeal at a regularly scheduled meeting not fewer than 14 days and not greater than 45 days after City receives the appeal. City shall provide appellant at least ten days' written notice of the hearing's date and time. City Council's decision on the appeal shall be final and binding.” [RMC 12.30.290(b)]

On August 15, 2024, Applicant appealed the denial of the encroachment permit. The hearing is being held on September 24, 2024, which is less than 45 days after the City received Applicant’s appeal. On September 12, 2024, the City Clerk sent Applicant written notice of this hearing by overnight mail. Notice of the hearing was also published in the West County Times on Saturday, September 14, 2024.

**BACKGROUND:**

On February 7, 2023, a Richmond Code Enforcement Officer conducted an inspection of the Up & Under Pub & Grill. During that inspection, a BBQ grill was observed on the city street and photographs were taken.

On February 9, 2023, the Code Enforcement Unit issued a Notice of Violation and Demand to Abate (“NOV”) to the property owner and Applicant. The NOV stated the BBQ grill was being stored on the city street in violation of RMC section 12.28.040

which prohibits placing “any material, machinery or apparatus for building, paving or other purposes” “on any street, sidewalk or public place in the City of Richmond” “for over twenty-four hours without a permit.” The NOV directed the BBQ grill be stored “on the property and not on the city street, sidewalk, or any other public space.” The NOV attached the photographs taken during the inspection on February 7, 2023. (Exhibit A – 2/9/2023 NOV.)

On February 28, 2023, the Code Enforcement Unit conducted a compliance inspection and found the BBQ grill remained stored on the city street. Photographs were taken. (Exhibit B – 2/28/2023 Photographs.)

On March 3, 2023, an Administrative Citation was issued to the property owner and Applicant. It included a \$250 fine for failing to remove the BBQ grill that was being stored on the city street. (Exhibit C – 3/3/2023 Administrative Citation.)

Applicant appealed the Administrative Citation. On April 4, 2023, a hearing was conducted on Applicant’s appeal. (Exhibit D – Report to Hearing Officer (without exhibits).) On April 12, 2023, the hearing officer issued a written decision upholding the Administrative Citation, writing:

The Appellant testified the smoker has been in use and stored in public area for over 13 years. Appellant does not dispute the fact that the smoker was stored on public roadway but believes the Appellant is unfairly targeted by a disgruntled neighbor. Appellant stated the smoke is used about four hours a week and during special events and does not have any suitable storage area in his restaurant.

The Appellant may have been using and storing the BBQ smokers on public streets for over 13 years, this does not mean the Appellant can legally store the BBQ smoker on public streets. Instead, the Appellant was in violation of RMC 12.28.040 for over 13 years.

Although the Appellant feels he is unfairly targeted by a disgruntled neighbor, the complaint is valid as Code Enforcement Officer Causey performed an impartial inspection and the allegation of violation of RMC 12.28.040 is sustained. Code Enforcement Officer Causey’s duty is to perform inspections regardless of who originated the complaint. A sustained finding that may have been filed by the Appellant’s disgruntled neighbor is not a valid argument for dismissing the fine and not a valid reason for allowing the Appellant to continue operating the BBQ smoker that violates RMC 12.28.040.

(Exhibit E – 4/12/2023 Hearing Officer Findings/Determination.)

Applicant appealed the Hearing Officer Findings/Determination. A hearing was held on May 26, 2023, and on June 8, 2023, the hearing officer upheld the Hearing Officer Findings and Determination dated April 12, 2023. (Exhibit F – Report to Hearing Officer (without exhibits); Exhibit G – 6/8/2023 Hearing Officer Findings/Determination.)

On October 12, 2023, Applicant submitted encroachment permit application #EN23-00843 seeking approval to place a BBQ smoker on the public sidewalk/street adjacent to his establishment at 2 West Richmond Avenue. (Exhibit H – 10/12/2023 Encroachment Permit Application.)

While the encroachment permit application was being reviewed, the City made several attempts in early 2024 to have Applicant remove the BBQ smoker from the public right-of-way voluntarily without success.

On July 31, 2024, after completing a careful review of the application and consulting with other City departments, the City Engineer in the Public Works Department denied the permit in writing, citing several regulatory and safety concerns. (Exhibit I – 7/31/2024 Encroachment Permit Denial Letter.)

On August 15, 2024, the City Clerk received the Applicant's appeal. (Exhibit J – Appeal received 8/15/2024.)

On September 12, 2024, the City Clerk mailed, via overnight mail, a letter to the Applicant advising that the hearing of his appeal had been scheduled for the September 24, 2024 City Council meeting and included a copy of the Notice of Hearing. The Notice of Hearing was also published in the West County Times on Saturday, September 14, 2024. (Exhibit K – Notice of Hearing.)

## **DISCUSSION:**

RMC 12.30.010 recognizes “[t]he public rights-of-way are unique, physically limited public resources held in trust for the public’s benefit, and they require proper management to maximize their efficiency and minimize the taxpayers’ costs; to protect against foreclosure of future economic expansion due to premature exhaustion of these resources; and to minimize the inconvenience to, and negative effects on, the public from use of these rights-of-way by individuals, contractors, utility companies, video service providers, utilities, special districts, et al.”

As such, RMC 12.28.040 prohibits placing “any material, machinery or apparatus for building, paving or other purposes” “on any street, sidewalk or public place in the city of Richmond” “for over twenty-four hours without a permit.” Moreover, RMC [12].30.030 requires “any person” to “obtain a permit . . . before placing any encroachment in, on, over, or under any [right of way] within the City.”

RMC 12.30.280(a) relates to “Decisions on permits and encroachment agreements.” According to RMC 12.30.280(a)(1), “City Engineer shall put their decision to grant or to deny a permit in writing and deliver it to applicant within five calendar days following the decision. Notice of a decision to deny the permit shall enumerate the reason(s) for denial.”

Applicant’s permit application underwent review by multiple City departments, including Public Works, Fire, Building, and Planning, to ensure compliance with the Richmond Municipal Code and safety regulations. The timeline from the application submission in October 2023 to the denial in July 2024 reflects the careful review process across these departments, given the workload and resources of the Public Works Department and other departments.

The City Engineer denied the application based on the following seven reasons:

**1. Incomplete Application:**

**Denial:** The application was incomplete, lacking a site plan or drawing to confirm ADA compliance.

**Appeal:** The applicant contends they promptly submitted the missing information and questions why the City delayed feedback for nine months.

**2. Fire Code Compliance:**

**Denial:** The smoker violates California Fire Code § 308.1.4, which prohibits open-flame cooking devices within 10 feet of combustible materials.

**Appeal:** The applicant argues that no combustible materials are within 10 feet of the smoker, asserting compliance with fire codes.

**3. Municipal Code Compliance:**

**Denial:** Richmond Municipal Code §§ 11.96.030 and 11.96.040 prohibit unauthorized cooking facilities in public spaces.

**Appeal:** The applicant asserts that the smoker has been in place for 12 years without any enforcement issues, challenging the City's sudden change in interpretation.

**4. Community Complaints:**

**Denial:** The City received multiple complaints about the smoker from community members.

**Appeal:** The applicant requests proof of multiple complaints and suggests the complaints may originate from one individual rather than the broader community.

**5. Public Right of Way Management:**

**Denial:** The City expressed concern that allowing the smoker would contradict public right of way management objectives and expose the City to liability.

**Appeal:** The applicant points to the 12-year history of safely using the public space without incident and argues this should be taken into consideration.

**6. Planning Division Comments:**

**Denial:** The smoker may be non-compliant with Bay Area Air Quality Management District (BAAQMD) regulations and the applicant's current use permits do not authorize BBQ equipment on the sidewalk.

**Appeal:** The applicant asserts that BAAQMD regulations apply to char broilers, not smokers, and that they cook far below the threshold required for registration. They also argue that their use permits have never been an issue.

**7. Building Division Comments:**

**Denial:** Concerns were raised regarding insurance, proximity to public travel, smoke impact, and the need for Contra Costa County Health permits.

**Appeal:** The applicant claims they have passed all environmental health inspections and have requested records to confirm this. They have not received the necessary documentation to address this point in full.

The City Engineer's denial was based on seven areas of non-compliance, each of which remains valid despite Applicant's appeal.

**1. Incomplete Application:**

The application lacked a complete site plan or drawing showing the BBQ smoker's placement relative to public spaces, which is necessary to confirm compliance with the Americans with Disabilities Act (ADA). However, the letter denying the encroachment permit explicitly stated that "Despite the incomplete application, [the City Engineer had] sufficient details to make a determination on the application given what information was submitted." While the Applicant later submitted additional information, this delay prevented staff from fully assessing the impact on public way accessibility in a timely manner. Given the smoker's potential to obstruct pathways, this remains a legitimate concern.

2. **Fire Code Compliance:**

The California Fire Code §308.1.4 prohibits the operation of open-flame cooking devices within 10 feet of combustible materials. The Applicant contends that no combustible materials are within this range, but staff has observed the smoker being placed near wooden structures such as a doorway, parklet, and telephone pole. The photographs taken in February 2023 show the smoker on the street, next to a parklet and adjacent to a sidewalk. These photographs also show a tree and building nearby. These observations suggest that the fire code violation is valid, and allowing the smoker to remain in these locations would pose significant safety risks to the public.

3. **Municipal Code Compliance:**

Richmond Municipal Code §§ 11.96.030 and 11.96.040 prohibit unauthorized cooking facilities from being placed in public spaces. Although the applicant states that the smoker has been in place for 12 years without issue, this does not negate the current violation of municipal codes. The City's responsibility to uphold public safety and protect public spaces overrides any precedent set by the past use of the smoker.

4. **Community Concerns:**

The City received complaints regarding the smoker's presence in the public right of way. While the applicant argues that these complaints may come primarily from one individual, this does not negate that the presence of the smoker in the public right of way violates multiple municipal and may violate state regulations. The Public Works Department conducted an impartial review of the encroachment permit, and this concern is one of many reasons that justify the decision to deny the permit. The complaints, even if limited, demonstrate a public concern that must be addressed.

5. **Public Right of Way Management:**

RMC Chapter 12.30 emphasizes the efficient and safe management of public right of way to protect public resources and minimize liability. Allowing a BBQ smoker to occupy a public sidewalk or street introduces liability risks, particularly concerning pedestrian safety, fire hazards, and potential accidents. Even with the applicant's history of safe operation, future risks cannot be ignored.

6. **Planning Division Comments:**

The BBQ smoker may require registration with the Bay Area Air Quality Management District (BAAQMD) under its commercial cooking equipment

regulations. The Applicant asserts that their smoker is not subject to these regulations but has not provided formal documentation from BAAQMD to confirm this. Without verification that their equipment is exempt, the City's concern about air quality compliance remains valid, and this must be resolved before proceeding with the encroachment request.

**7. Building Division Comments:**

The Building Division raised concerns about insurance requirements, proximity to public travel, and the potential impact of smoke on nearby structures. The Applicant claims to have passed health inspections but has not provided the necessary documentation to fully address these issues. The proximity of the smoker to public areas and the risk of smoke affecting nearby buildings remain critical concerns, supporting the denial.

Staff recommends that the City Council deny the applicant's appeal and uphold the City Engineer's denial of encroachment permit #EN23-00843 by resolution. (Exhibit L - Resolution No. \_\_24.) While the Applicant raises points regarding the delay in the application process and community complaints, the Applicant was well-aware of the City's concerns of placing a BBQ smoke in a public right of way from the prior code enforcement efforts when he applied for the encroachment permit. The denial of the encroachment permit is consistent with the City's prior code enforcement actions and justified based on non-compliance with fire safety regulations, municipal codes, and public safety concerns. The applicant has not provided sufficient evidence to demonstrate compliance with BAAQMD, ADA, or building codes. Allowing the smoker to remain in a public area, whether the street or sidewalk, introduces unacceptable risks to both the City and to the public.

**DOCUMENTS ATTACHED:**

- Exhibit A – 2/9/2023 Notice of Violation
- Exhibit B – 2/28/2023 Photographs
- Exhibit C – 3/3/2023 Administrative Citation
- Exhibit D – 3/30/2023 Report to Hearing Officer (without exhibits)
- Exhibit E – 4/12/2023 Hearing Officer Findings/Determination
- Exhibit F – 5/24/2023 Report to Hearing Officer (without exhibits)
- Exhibit G – 6/8/2023 Hearing Officer Findings/Determination
- Exhibit H – 10/12/2023 Encroachment Permit Application
- Exhibit I – 7/31/2024 Encroachment Permit Denial Letter
- Exhibit J – Appeal received 8/15/2024
- Exhibit K – Notice of Hearing
- Exhibit L – Resolution No. \_\_24