

## **MEMORANDUM**

To: Sarah Holt

From: Thad Boggs, Assistant Law Director

Date: January 19, 2022

Re: Tucci's building expansion

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### **BACKGROUND AND QUESTION PRESENTED**

The owner of the property at 35 North High Street (“Tucci’s”) is scheduled to come before the Architectural Review Board at its January 26, 2022, meeting for informal review of plans that will include either (a) an addition to the existing primary structure on the property, or (b) improvements to the detached temporary structure upon the property, which was originally permitted in response to the COVID-19 pandemic.

This memorandum addresses the question of square footage limitations for eating and drinking facilities, and for accessory structures. It does not address the merits of architectural treatments or other considerations germane to the Board’s review.

### **BRIEF ANSWER**

The proposed addition to the primary existing structure on the property is not subject to the square footage limitations on accessory structures, and it is not subject to the square footage limitations in the HD-Historic Core zoning district for eating and drinking facilities so long as it does not extend beyond the footprint of the combined outdoor patio and primary structure.

### **ANALYSIS**

The HD-Historic Core zoning district has use-specific development standards for “eating and drinking facilities,” limiting them “to no more than 3,500 square feet of gross floor area in the Historic Core . . . unless approved by the Architectural Review Board.” C.O. 153.172(C)(3)(d). The general definitions for Chapter 153 of the Codified Ordinances, relative to all zoning regulations for the City, defines “eating and drinking” as a use—a “facility that prepares or serves food or beverages for on- or off-premises consumption.” The term “facility” is not specifically defined in Chapter 153, and so it should be interpreted according to its ordinary meaning; Merriam-Webster defines a “facility” as “something . . . established to serve a particular purpose.” This does not resolve whether an eating and drinking “facility” is inclusive of both indoor and outdoor areas, however. Chapter 153 also provides a definition for “outdoor dining and seating,” which refers to “an area accessory to an eating and drinking facility . . . outside of the principal structure.” The

reference to the outdoor dining and seating as “accessory to” the facility does not imply that it is separate from the facility itself; being “accessory” to the facility simply means that it is “subordinate to” or “aid[s] or contribut[es] in a secondary way,” as Merriam-Webster defines this sense of the word.

Considering the applicable text, and the principle that ambiguities in zoning ordinances are normally construed in favor of the property owner, it is my opinion that the term “eating and drinking facility” in this context includes the entire area used for eating and drinking, both indoor and outdoor. The Tucci’s restaurant has operated the indoor and outdoor dining areas as a single facility for twenty-five years. This predates the application of the use-specific square footage restriction, which only came into existence when the HD-Historic Core district was created and the property was rezoned in 2021. **Therefore, it is my opinion that Tucci’s indoor and outdoor space constitute a single eating and drinking facility, and that facility is an existing use that is not limited by the 3,500 square foot restriction that would be applicable to new eating and drinking facilities in the HD-Historic Core.**

Having addressed the use-specific area limitation, the next question is the applicability of limitations on physical structures. The HD-Historic Core district has no limitation on building footprint; *see* Table 153.173A. And the site already has variances for lot coverage and parking. **Accordingly, the principal structure on the site could be expanded to the full extent of the existing eating or drinking facility, i.e., to cover the entire outdoor dining area.**

Accessory structures, however, are subject to area limitations. Per C.O. 153.074(D), accessory structures in non-residential districts (which includes HD-Historic Core, per 153.002(B)(26)) may not exceed 25% of the gross floor area of the principal structure. An “accessory structure” is defined as “[a] subordinate structure or building, the use of which is incidental to and customarily used in connection with the principal structure or use and which is located on the same lot with the principal structure or use.” C.O. 153.002(A)(1)(a). Thus, Tucci’s original concept plan that called for retention of the detached temporary structure there now would have been subject to the limitation on size of accessory structures it was not integrated as a part of the principal structure.

## **CONCLUSION**

The proposed addition to the primary existing structure on the Tucci’s property is not subject to the use-specific area limitation for eating and drinking facilities in the HD-Historic Core because the “facility” is inclusive of both the indoor and outdoor areas that had existed onsite prior to the creation of that use-specific area limitation. Additionally, an expansion of the existing structure could enclose the entire outdoor patio area because the HD-Historic Core district does not have a limitation on building footprint.