



# FAIRFAX COUNTY

## PROPOSED ZONING ORDINANCE AMENDMENT

### STAFF REPORT Outdoor Dining

**December 15, 2023**

#### Hearing Dates

**Planning Commission: January 10, 2024, at 7:30 p.m.**

**Board of Supervisors: February 6, 2024, at 4:00 p.m.**

#### Staff Contact

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Americans with Disabilities Act (ADA): Reasonable accommodation is available upon 48 hours advance notice. For additional information on ADA call 703-324-1334 or TTY 711 (Virginia Relay Center).



PLANNING & DEVELOPMENT

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## Background

In response to the challenges posed by the COVID-19 pandemic, Fairfax County, as well as many other jurisdictions, adopted an Uncodified Ordinance to aid businesses in adapting to the restrictions and prohibitions on indoor gatherings. *The Uncodified Ordinance to Provide a Method to Assure Continuity in Fairfax County Government During the Novel Coronavirus Disease 2019 (COVID-19) Emergency and Its Aftermath by Temporarily Approving Outdoor Dining and Outdoor Fitness and Exercise Activities Subject to Certain Conditions, Thereby Suspending Any Requirement for Individualized Approvals of Such Activities* ([Uncodified Ordinance](#)), was initially adopted by the Board of Supervisors (Board) on July 14, 2020, and was last amended on July 27, 2021. This ordinance allows for outdoor dining without individual approvals. It applies to existing restaurants, food establishments, breweries, distilleries, wineries, or tasting rooms that were previously permitted with a Nonresidential Use Permit and a Food Establishment Permit, subject to specific conditions. The ordinance is set to expire on March 1, 2024.

Based on the positive response and minimal complaints received, the Board directed staff to explore ways to continue the outdoor dining program beyond the end of the COVID-19 emergency and expiration of the Uncodified Ordinance (March 1, 2024). The proposed amendment aims to make outdoor dining a permanent feature by establishing it as a permitted accessory use.

The proposed amendment was carried over from the 2023/2024 Zoning Ordinance Work Program (ZOWP) and is currently identified on the [FY 2024/2025 ZOWP](#) (Topic #9) as a First-Tier item.

Existing Zoning Ordinance Regulations: The Zoning Ordinance currently does not include a definition for “outdoor dining,” but the term is commonly used in conjunction with “outdoor seating,” which is considered an accessory use that is permitted by right in all districts that allow restaurants and craft beverage production establishments. While previously parking was required for outdoor seating areas exceeding a certain number of seats, the recently adopted

Parking Reimagined amendment (effective January 1, 2024) removes the requirement for separate parking for outdoor seating, which provides greater flexibility for restaurants and other food establishments to provide outdoor dining.

## Proposed Regulations

The amendment proposes to mostly maintain the approach outlined in the Uncodified Ordinance that permits outdoor dining on private property by right, subject to specific standards, and to introduce a new administrative permit process (AP) for outdoor dining in parking lots. As proposed, any outdoor dining use must meet the general standards for accessory uses contained in subsection [4102.7](#) of the Zoning Ordinance and the definition of an [accessory use](#). Any outdoor dining proposal that includes permanent structures or enclosures will be considered an expansion of the principal use and will require site plan and building permit approval. The proposed standards will not apply to an existing outdoor dining setup that has a valid zoning approval and is shown on a site plan. As proposed, the standards aim to provide a streamlined process for food establishments that wish to have outdoor dining on private property, such as the sidewalk, patio, or parking lot.

The proposed amendment is summarized below, and the proposed text is provided in [Attachment 1](#).

### **Definition and General Standards Applicable to All Outdoor Dining**

The proposed standards mostly carry forward the regulations outlined in the Uncodified Ordinance that address a variety of topics, including the Americans with Disabilities Act (ADA), alcohol, furniture, life safety, location, parking, pedestrian circulation, and signs. Staff solicited input from stakeholders on these standards, including industry groups such as NVBIA/NAIOP, land use attorneys, shopping center owners and restaurant owners, and researched neighboring jurisdictions for best practices. Staff also worked closely with other County departments including the Department of Code Compliance (DCC), the Environmental Health division of the Health Department (EH), Fire Marshal's Office, and Land Development Services (LDS) to ensure the program will be compliant with life safety and accessibility requirements of the County Code.

**Definition:** The proposed amendment will add a new definition to [Article 9](#) of the Zoning Ordinance to allow outdoor dining as an accessory use to restaurants, both carry out and drive-through, craft beverage production establishments, and other similar use that has a nonresidential use permit and food establishment permit. To clearly differentiate the outdoor dining from the indoor dining area, the use is further defined as an area set up outside the confines of the principal structure with tables, chairs, and other furnishings for the purpose of selling, offering for sale, and serving food and beverages by an adjoining food establishment in which the same food and beverages are offered for sale, sold, and served. Because the outdoor dining use is considered a temporary setup and to ensure

flexibility and safety, the definition further stipulates that the outdoor dining area cannot include any permanent structures or fixtures, i.e., all tables, chairs, umbrellas, tents, lighting, and any other accessories must be removable. Any tent must be maintained in good repair and safe condition. As the outdoor dining area is intended primarily for the consumption of food and beverages, any audio or video entertainment must meet the Noise Ordinance limitations. Any activity in the outdoor dining area may not be of such a nature or extent that it would meet the definition of [public entertainment](#), which is only allowed with the approval of a special exception in specific zoning districts. Additionally, if an establishment wishes to offer outdoor dining with permanent structures, the establishment must obtain approval of a site plan and/or building permit. This type of setup would be considered a part of or expansion of the principal use and would not be classified as an accessory outdoor dining use.

**Location and Safety Standards:** Staff proposes allowing outdoor dining as an accessory use in all zoning districts where food establishments are permitted, subject to applicable standards for each permission type as detailed below. Outdoor dining will not be permitted on properties where it is explicitly prohibited by any relevant proffered condition, development condition, special permit, or special exception condition. To ensure the

outdoor dining will be ADA compliant and provide for the safety of pedestrians, patrons, and wait staff, the amendment proposes that all outdoor dining areas must be set up entirely on impervious surfaces. Additionally, to avoid conflicts with parked vehicles, the amendment proposes a requirement that the outdoor dining area be clearly marked and separated from any parked vehicles. It is recommended that ropes, bollards, planters, or other objects be used to delineate the outdoor dining area and provide safety and adequate clearance for pedestrian access. Additionally, the amendment proposes that any extension cords used to supply power to audio or video equipment may not create a trip hazard and must meet all County Code

requirements, including the Virginia Maintenance Code regarding flexible cords. Any tent proposed in the outdoor dining area is required to comply with the Fire Code, which requires that any single tent larger than 900 square feet or multiple tents separated by less than 12 feet and exceeding a combined area larger than 900 square feet obtain a permit from the Office of the Fire Marshal. All tents, regardless of size, must be securely anchored to prevent collapse or uplift during inclement weather. Lastly, no cooking, open flame or



*Figure 2: Recommended outdoor dining setup with clear and adequate pedestrian pathway*



*Figure 1: Not recommended outdoor dining setup due to lack of clear pedestrian pathway*

outdoor heaters are permitted under any tent unless approved by the Office of the Fire Marshal.

**Size:** The Zoning Ordinance defines an accessory use as a use that is subordinate in purpose, area, or extent to the principal use served. Consistent with this definition, the amendment requires the accessory outdoor dining area to not exceed 50 percent of the indoor dining floor area of the associated establishment. For purposes of calculating the outdoor dining area, indoor dining is proposed to include all areas of an establishment primarily devoted to the serving and consumption of food and drinks. If multiple establishments are served by the same outdoor dining area, then the cumulative area may not exceed 50 percent of the combined indoor dining floor area for all establishments. In staff's opinion, limiting the outdoor dining area based on the indoor seating area is a more accurate way to determine the allowable outdoor dining area than the occupancy limit provided in the Uncodified Ordinance. This is also helpful in investigating potential violations, as DCC Investigators would be able to easily measure the outdoor dining and indoor dining area during their investigation to determine compliance.

Staff recognizes that indoor dining areas of food establishments vary substantially, with some establishments having a very small indoor dining area with no more than two to four seats or with no seating area with mostly a window presence. To ensure fair treatment of all establishments regardless of the size of their indoor dining area, the amendment proposes an option with no size limit<sup>1</sup> or a range for the Board's consideration that would allow the outdoor dining area for a single food establishment to be a minimum of 250 square feet or a set percentage (with advertised range from 25 percent to 75 percent) of the indoor dining area, whichever is greater.



*Figure 2: Food establishment with small indoor dining area and prominent window presence*

Since any proposed outdoor dining setup is required to comply with all County, State, and Federal Codes, including the Virginia Uniform Statewide Building Code (USBC), if an establishment's outdoor seating arrangement leads to an increase in the overall occupancy of the establishment, then additional plumbing, i.e., bathroom fixtures could be required to accommodate the increased occupant load. For those outdoor dining setups allowed by right without staff review, staff proposes to inform and educate food establishment operators of this potential requirement and will work with partner agencies to update relevant websites. If a complaint is received, compliance will be reviewed on a case-by-case basis during the investigation process. However, for those setups in parking lots that require

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<sup>1</sup> This option was added after authorization to provide additional flexibility and is reflected in the text included in [Attachment 1](#).

an administrative permit, the permit application will include staff review to ensure compliance with all County Code requirements.

**Noise:** As noted above, any outdoor dining use proposed on the sidewalk, patio or in parking lots is subject to the County's Noise Ordinance. To address potential noise-related concerns stemming from outdoor dining activities, the amendment proposes that the operating hours for outdoor dining areas be generally consistent with the business hours of the principal use. Given the operating hours of some establishments could be as late as 2:00 a.m., the amendment proposes an option for the Board's consideration to prohibit outdoor dining before 7:00 a.m. or after 10:00 p.m. if the outdoor dining area is located directly adjacent to or abutting single-family developments.

**Parking:** While parking was previously required for outdoor seating areas exceeding a certain number of seats, the recently adopted Parking Reimagined amendment (effective January 1, 2024) removes the requirement for separate parking for outdoor seating.

#### **Standards when permitted by administrative permit (AP)**

The amendment proposes to allow outdoor dining in parking lots with an administrative permit issued by the Zoning Administrator. As proposed, the dining area may not be located in any accessible parking spaces, access aisles, street access for emergency vehicles, or required parking lot landscaping. An application fee of \$205 is proposed, which is the general fee charged for seasonal sales, special events, and other types of accessory use applications. The permit would be issued to the operator of the associated food establishment and remain valid as long as the establishment remains in operation. As with all other AP reviews, staff will review the submission to ensure all standards are met. Once the permit is issued, the Zoning Administrator may revoke the permit if the outdoor dining operation fails to comply with the proposed standards.

Similar to outdoor dining on patios and sidewalks, the amendment proposes the maximum size of any outdoor dining located in a parking lot be limited to 50 percent of the indoor dining area. If an establishment provides outdoor dining on both the sidewalk/patio and the parking lot, the cumulative size may still not exceed 50 percent of the indoor dining area. Alternatively, to curb potential overcrowding of the parking lot with multiple outdoor dining setups, staff proposes an option for the Board's consideration that would limit the size of outdoor dining in parking lots to a fixed size per establishment, ranging from 500 to 1,000 square feet instead of a percentage of the indoor dining area.

Regardless of the size of the outdoor dining area, the total number of available parking spaces may not be reduced to below the minimum required for the site. Staff proposes a grace period of approximately two months after adoption of the Ordinance for existing outdoor dining setups that may not be compliant with the proposed standards to come into compliance with the new standards, and for staff to establish the administrative permit application in the

County's PLUS system. Staff intends to conduct additional outreach announcing the adoption of the ordinance and the new standards applicable by collaborating with the Environmental Health Division and sending flyers to all establishments with a valid food permit.

### Jurisdictional Research

Staff has researched regulations relating to outdoor dining in Arlington County, the Cities of Fairfax and Falls Church, and the Town of Vienna. All of these jurisdictions permit outdoor dining through an administrative approval process and require outdoor dining areas to meet standards similar to those proposed in this amendment. A summary of the jurisdictional research is set forth in [Attachment 2](#).

### Community Outreach

Staff has presented the topic of outdoor dining at six outreach meetings, including standing land use committee meetings, and meetings with industry groups such as NVBIA/NAIOP, land use attorneys, shopping center owners, and restaurant owners. The Board's Land Use Policy Committee and the Planning Commission's Land Use Process Review Committee have also been briefed on the amendment. Additionally, staff hosted two community meetings which were recorded and posted on the dedicated [Outdoor Dining ZOA website](#). Information regarding the amendment, including draft text, an associated white paper, and presentation materials, was shared on the website throughout the amendment process. Feedback from stakeholders and industry representatives has been generally supportive of the amendment. If the amendment is adopted, staff will conduct further targeted outreach to establishments with existing outdoor dining setups regarding the proposed amendment and the next steps during the proposed grace period.

### Summary

Outdoor dining can significantly improve the pedestrian experience throughout the County. By activating the street-level pedestrian environment, it can increase vibrancy and make commercial areas more social and active. Staff recommends that the amendment become effective at 12:01 a.m. on the day following adoption. However, in order to allow existing outdoor dining setups to come into compliance with the new standards, staff proposes to provide a grace period for becoming compliant with the new requirements until April 30, 2024, unless any life safety issues are identified. This grace period will allow sufficient time to educate the public on the new standards and allow those existing outdoor dining setups that will become noncompliant as a result of the new standards to come into compliance.

## Proposed Text

In the revisions shown below, text to be deleted is identified with ~~strike-through~~ and text to be added is underlined. Advertised options are included **(in parentheses, italics, and bold)**. When an option is presented as a range, the Board may approve any number within the advertised range. The proposed changes are based on the provision of the adopted Zoning Ordinance in effect as of May 10, 2023.

**#1 INSTRUCTION: Amend subsection 4102.7 by adding new subsection (L) Outdoor Dining as shown below and renumbering the remaining subsections accordingly.**

# ARTICLE 4 - USE REGULATIONS

## 4102. Use Standards

Each use must comply with its related standards, including standards for all uses, standards for the zoning district where the use is located, and standards for the specific use. Uses established as of the effective date of this Ordinance may not be altered, modified, or enlarged in any way that conflicts with, or compounds an existing conflict with, the use standards.

## 7. Accessory Uses

### L. Outdoor Dining

#### **Standards applicable to all outdoor dining areas:**

- (1)** Outdoor dining is permitted as accessory to the following uses or when approved as part of a site plan unless the use is expressly prohibited by any applicable proffered condition, development condition, special permit, or special exception condition.<sup>2</sup>
- (a)** Restaurant;
  - (b)** Carryout restaurant;
  - (c)** Restaurant with drive-through;
  - (d)** Craft beverage production establishment; and
  - (e)** Any other similar use with a valid Nonresidential Use Permit and that has a food establishment permit.
- (2)** All outdoor dining must be in accordance with the following standards:
- (a)** The outdoor dining area for any single food establishment may not exceed an area equal to 50 percent of the indoor dining floor area of the establishment. Additionally, for any outdoor dining area serving multiple establishments, the total area devoted to outdoor dining may not exceed an area equal to 50 percent of the total combined indoor dining

<sup>2</sup> This text has been slightly modified from the authorized text for plain English and clarification purposes.

floor area for all establishments. *(Option: No limit on outdoor dining size or outdoor dining areas may not exceed a range from 25 percent to 75 percent of the indoor dining area or up to 250 square feet in area, whichever is greater.)*

- (b)** The hours of operation must generally conform to the business hours of the principal use. *(Option: Outdoor dining may not occur before 7:00 a.m. or after 10:00 p.m. when located directly adjacent to or abutting a single-family development or as otherwise approved by the Board in conjunction with a rezoning or other action before the Board.)*
- (c)** Any area used for outdoor dining must be clearly delineated by cordon, marking, or other means. All outdoor dining areas must be located entirely on impervious surfaces.
- (d)** The outdoor dining area may not obstruct any fire equipment, building entrance or exit, area marked or designated for emergency egress or ADA accessibility, or pedestrian passage on any trail or sidewalk.
- (e)** All tables, chairs, umbrellas, lighting, and other accessories must be temporary and removable. All tents must be maintained in good repair and safe condition.
- (f)** A single tent larger than 900 square feet, or multiple tents separated by less than 12 feet and exceeding a combined area larger than 900 square feet, requires a permit from the Office of the Fire Marshal. All tents, regardless of size, must be securely anchored to prevent collapse or uplift during inclement weather.
- (g)** Outdoor heaters are not permitted under any tent unless approved by the Office of the Fire Marshal.
- (h)** No business sign or advertisement is permitted in the outdoor dining area, except as permitted by Article 7.
- (i)** The outdoor dining area must be kept free of trash and debris. Any extension cords associated with audio or video entertainment equipment may not create a tripping hazard and should meet all other County, State, and Federal Codes.
- (j)** Outdoor dining areas are subject to all applicable provisions of the County Code and federal and state codes.

**Standards when permitted by administrative permit:**

- (3)** Outdoor dining located in a parking lot must comply with the following standards:

  - (a)** The outdoor dining area may not reduce the number of available parking spaces below the minimum required for the site.<sup>3</sup> *(Option: Any outdoor dining area provided in a parking lot may not exceed a range from 500 square feet to 1,000 square feet per establishment and may not reduce the number of parking spaces below the minimum required for the site)*

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<sup>3</sup> This text has been slightly modified from the authorized text for plain English and clarification purposes.

- (b) The outdoor dining area may not be located in any designated accessible parking spaces, access aisles, street accesses for fire department vehicles, or parking lot landscaping that is located in or part of the parking lot.

**#2 INSTRUCTION: Amend Article 8 – Administration, Procedures, and Enforcement, Section 8102. General Terms to add a new fee for outdoor dining as shown below.**

## ARTICLE 8 – ADMINISTRATION, PROCEDURES, AND ENFORCEMENT

### 8102. Fee Schedule

**TABLE 8102.1: FEE SCHEDULE**

This table includes standard fees related to approvals under the Zoning Ordinance. Additional fees may apply related to review or approval by other County departments or governmental or quasi-governmental agencies, or in accordance with Appendix Q of the County Code.

APPLICATION TYPE	FEE [1]
<b>ADMINISTRATIVE PERMITS</b>	
General Fee Unless Otherwise Listed	\$205
<b>Accessory Uses</b>	
<u>Outdoor Dining</u>	<i>\$205 (Option: \$100 - \$205)</i>

**#3 INSTRUCTION: Amend Article 9 – Definitions and Ordinance Interpretations, Section 9102. General Terms to add a new definition for outdoor dining as shown below.**

## ARTICLE 9 - DEFINITIONS AND ORDINANCE INTERPRETATION

### 9102. General Terms

#### **Outdoor Dining**

An accessory outdoor seating area that is intended solely for the consumption of food and beverages, served by an adjoining food establishment, does not include permanent structures, and is outside the confines of the principal structure. This use does not include any use meeting the definition of a public entertainment use.<sup>4</sup>

<sup>4</sup> This text has been slightly modified from the authorized text for plain English and clarification purposes.

**#4 INSTRUCTION: Amend Article 9 – Definitions and Ordinance Interpretations, Section 9103. Uses to edit the definition of a carryout restaurant as shown below.**

## 9103. Uses

### **Restaurant, Carryout**

Any establishment whose primary business is to prepare and sell ready-to-consume food or beverages, primarily for consumption off-site. Up to eight indoor seats may be provided for on-site consumption or customer waiting; the seats provided as part of accessory outdoor dining provided in accordance with subsection 4102.7 are not included in this maximum limitation. A restaurant with more than eight seats is considered a restaurant. A carryout restaurant does not include a restaurant with drive-through facilities, convenience store, or craft beverage production establishment.

## Summary of Jurisdictional Research

The following jurisdictions permit outdoor dining through an administrative approval process and require outdoor dining areas to meet standards similar to those proposed in this amendment as summarized below.

Arlington County has established a permanent outdoor café program that applies to all outdoor cafés. The new standards specify that outdoor cafés can only be accessory to the main use of a food establishment and must be set up adjacent to the main use, either on private property, including parking area or a public sidewalk. All tables, chairs, and barriers must be placed on a paved and flat surface. While low fences or barriers (less than three feet tall) are allowed within the café area, no element of the outdoor café can be permanently affixed to the sidewalk. This includes canopies or awnings, fences, tables and chairs, or heating or cooling elements. The hours of operation for outdoor cafés cannot extend past the normal operating hours of the main food establishment. Additionally, live entertainment, gaming activities, TVs, and piped-in or amplified music are permitted only between 9:00 a.m.-10:00 p.m. Sundays through Thursdays, and between 9:00 a.m.-11:00 p.m. on Fridays and Saturdays. However, for outdoor dining located in the side or rear yard abutting or across an alley from a residential district, such sound or audio or video entertainment is not permitted. Outdoor dining in parking areas can be reviewed and approved administratively by the Zoning Administrator. The outdoor café may not occupy parking spaces needed to meet the required parking specified in the Zoning Ordinance. However, a Use Permit option may provide food establishments with the ability to use up to four required parking spaces for outdoor cafes through a modification. The outdoor café may occupy no more than 612 square feet (equivalent of four parking spaces measured 8 feet 6 inches by 18 feet). The outdoor dining area is required to maintain an ADA accessible route, pedestrian passage, clearance around Fire Department Connections on buildings, clearance around fire hydrants, clearance between bicycle racks, and a 10-foot distance from any transit stops or shelters. When located in parking areas, the outdoor dining may not be located in ADA spaces, may not obstruct vehicular travel aisles and pedestrian pathways, and should not block points of egress or pedestrian circulation paths. Tents are permitted for shade with proper permits, and planters and/or protective barriers may be provided, and the outdoor café location may not obstruct access to loading areas. There is a one-time license application fee of \$150 for the Outdoor Café License.

Fairfax City has a Seasonal Outdoor Dining Pilot Permit Program that allows temporary dining on private property and the public right-of-way between March 1 through November 30. The outdoor dining may be located in oversized walkways, paved areas near a building entrance, plazas, or parking lots located on private property, including those that are part of a shopping center. All seasonal outdoor dining must be on an existing hard surface such as a walkway, patio, or parking area, and cannot be located on ADA parking spaces or required

parking spaces. Dining areas must maintain a minimum of three feet of clear space at the base of fire hydrants and fire department connections. The outdoor dining must maintain a clear path accessible for patrons to/from and within the outdoor dining area at all times. The pilot permit program is permitted through an administrative approval process and must meet certain design guidelines prior to approval. The seasonal outdoor dining permit must be renewed each year with an annual application fee of \$100.

Falls Church City adopted changes related to their outdoor dining use permits which included creation of a new outdoor dining definition. There is a one-time administrative permit required and the permit allows for administrative reductions in required parking to accommodate outdoor dining, add administrative conditions, and conduct inspections. The permit may be revoked for any unaddressed code violations. Required submission materials include aerial map, exterior photos showing existing site conditions on all four sides of the building with pictures of adjacent business, plat or site plan that depicts the proposed seating area including location, number of seats and tables, dimensions of the outdoor seating area, property lines, location and type of barriers proposed, layout of the interior of the restaurant including toilets and seating layout, ADA parking and pathways, trash and loading areas, restaurant exit points, any temporary or permanent signage, other temporary elements such as lights, umbrellas, canopies, tents, planters, serving stations, portable outdoor heaters or heating elements. There is no fee for review and approval of the outdoor dining permit.

Town of Vienna adopted a new outdoor dining ordinance, which provides businesses with additional options for offering outdoor dining. The code changes allow for both seasonal and permanent outdoor dining options, on decks, patios, walkways, and in parking spaces. However, outdoor dining is not permitted within 60 feet of residentially zoned properties. It is allowed between 60 to 75 feet of residentially zoned and utilized properties, provided additional provisions are met. The new ordinance allows for administrative approval for setups of 12 seats and any outdoor dining with 13 seats or more requires a conditional use permit. Furniture and other outdoor features are subject to review and approval by the Board of Architectural Review. Permanent outdoor dining seats must meet the parking requirement for restaurants, with one parking space required per four seats. Seasonal outdoor dining may be permitted in off-street parking spaces from April 1 to October 31. No more than 20 percent of the required off-street restaurant parking spaces may be used for seasonal outdoor dining, with hours of operation generally limited to between 9:00 a.m. and 9:00 p.m.