

FINAL – ADOPTED ON 5/28/20

AN EMERGENCY UNCODIFIED ORDINANCE TO PROVIDE A METHOD TO ASSURE CONTINUITY IN FAIRFAX COUNTY GOVERNMENT DURING THE NOVEL CORONAVIRUS DISEASE 2019 (COVID-19) EMERGENCY 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

AN EMERGENCY UNCODIFIED ORDINANCE to provide a method to assure continuity in Fairfax County government during the COVID-19 Emergency, as authorized by Virginia Code §§ 15.2-1413 and -1427, by temporarily approving outdoor dining and outdoor fitness and exercise activities subject to certain conditions, thereby temporarily suspending the need for individualized approvals for such activities.

Be it ordained by the Board of Supervisors of Fairfax County:

1. That the following uncodified ordinance is hereby adopted:

A. Purpose of the Ordinance.

This ordinance is intended to provide a method to assure continuity in Fairfax County government during the COVID-19 emergency. Fairfax County government comprises not only the Board of Supervisors, but also numerous County agencies and deliberative bodies that fulfill essential government functions and provide essential government services within the locality. These provisions are intended to sustain the County’s economy and ensure the continued ability of County agencies and deliberative bodies to carry out their functions during this emergency without compromising public safety.

This ordinance is being adopted in response to the COVID-19 outbreak. The World Health Organization declared COVID-19 a global pandemic on March 11, 2020. On March 13, 2020, the President of the United States declared that the COVID-19 outbreak in the United States constitutes a National Emergency beginning March 1, 2020. On March 12, 2020, Governor Ralph Northam issued a Declaration of a State of Emergency due to Novel Coronavirus (COVID-19). The Governor declared the emergency “to continue to prepare and coordinate our response to the potential spread of COVID-19, a communicable disease of public health threat” and he found that “[t]he anticipated effects of COVID-19 constitute a disaster as described in § 44-146.16 of the Code of Virginia.” The Governor’s Declaration of a State of Emergency remains in effect until June 10, 2020, unless sooner amended or rescinded. Effective March 16, 2020, Governor

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1 Northam and the State Health Commissioner jointly issued an Order declaring a
2 state public health emergency. On March 17, 2020, the Fairfax County Director
3 of Emergency Management, with the consent of the Board of Supervisors,
4 declared a local state of emergency due to the potential spread of COVID-19.
5 The local Declaration of Emergency remains in effect until the Board of
6 Supervisors takes appropriate action to end the declared emergency.

7 The Public Health Emergency Order issued jointly by the Governor and the State
8 Health Commissioner effective March 16, 2020, consistent with all other expert
9 opinions, observes that COVID-19 spreads from person to person, transmitted
10 via respiratory droplets, and can be spread from an infected person who does not
11 have symptoms to another person. The Order states that no vaccine or known
12 treatment options exist at this time.

13 On March 23, 2020, the Governor issued Executive Order 53, which ordered all
14 public and private schools closed for the remainder of the 2019–20 school year
15 and imposed temporary restrictions on restaurants, recreational entertainment,
16 public and private gatherings, and non-essential retail businesses. By virtue of
17 amendments on April 15 and May 4, 2020, the restrictions on restaurants and
18 non-essential businesses remained in effect until May 14, 2020. On March 30,
19 2020, the Governor issued Executive Order 55, which ordered all individuals in
20 Virginia to remain at their places of residence until June 10, 2020, except as set
21 forth in that order and Executive Order 53.

22 On May 8, 2020, the Governor issued Executive Order 61, introducing Phase
23 One in the state’s strategy to ease some of the temporary restrictions instituted in
24 Second Amended Executive Order 53 and Executive Order 55 (orders referred to
25 collectively as Phase Zero). On May 12, 2020, the Governor issued Executive
26 Order 62 extending Phase Zero for Northern Virginia through May 28, 2020.
27 That order was amended on May 14, 2020, to extend Phase Zero for other
28 jurisdictions.

29 As part of Phase One, restaurants are permitted to reopen to the extent they
30 have seating in outdoor spaces with limited capacity and adequate spacing.
31 Phase One also allows fitness and exercise facilities to reopen for outdoor
32 activities only. The Governor’s executive orders have provided additional
33 procedural and regulatory discretion to the Virginia Alcoholic Beverage Control
34 Authority, which has issued guidance for outdoor dining in Topic 16.

35 With the impending expiration of Phase Zero in Northern Virginia, the County
36 needs to be prepared for Phase One. Under current County ordinances and
37 regulations, business owners would typically be required to pursue a range of

1 applications to allow outdoor dining and outdoor fitness and exercise activities.
2 In the midst of the COVID-19 emergency, the cost and time to meet such
3 requirements would compound the stress on economically challenged
4 businesses, hinder the opportunity presented by Phase One to revitalize the
5 County’s economy, and likely result in a continued de facto closure of such
6 businesses. At the same time, processing and deciding such a multitude of
7 applications on an urgent basis would be virtually impossible for the County
8 government and would consume extraordinary amounts of time and attention on
9 the part of the County’s staff and its deliberative bodies, at a time when they are
10 also strained by the emergency. These factors, separately and collectively,
11 threaten the County’s continuity in government.

12 The Board of Supervisors desires to reduce these COVID-19 emergency impacts
13 to business owners, to the communities those businesses serve and who wish to
14 support them, and to County government. To that end, this emergency
15 ordinance automatically approves outdoor dining and outdoor fitness and
16 exercise activities that meet certain conditions, including those established by the
17 Governor in Phase One.

18 It is not the intent of this emergency ordinance to infringe on the ability of any
19 town—Clifton, Herndon, or Vienna—to provide a method to assure continuity in
20 its own government. For that reason, the ordinance will not apply in any of those
21 towns unless and until the town’s governing body, by ordinance, decides to be
22 subject to this emergency ordinance.

23 **B. Virginia Statutory Authority for the Ordinance.**

24 Virginia Code § 15.2-1413 authorizes localities to adopt an ordinance to “provide
25 a method to assure continuity in its government, in the event of an enemy attack
26 or other disaster,” “[n]otwithstanding any contrary provision of law, general or
27 special.” The Governor’s Declaration of a State of Emergency found that “[t]he
28 anticipated effects of COVID-19 constitute a disaster as described in § 44-146.16
29 of the Code of Virginia.”

30 The Virginia Attorney General has defined “continuity in government” as
31 coordinated efforts undertaken to assure the continuation of local government’s
32 essential functions during an emergency.

33 Virginia Code § 15.2-1427 authorizes counties to adopt emergency ordinances
34 without prior notice; however, no such ordinance may be enforced for more than
35 60 days unless readopted in conformity with the provisions of the Virginia Code.

1 **C. Definitions.**

2 “Continuity in Fairfax County government” includes, without limitation, those
3 actions, and the coordination of actions, that are necessary to assure the
4 continuation of the County’s essential functions and services. By way of example
5 and not limitation, such necessary actions include those related to (1) the
6 County’s finances, such as the public hearings and adoption of the FY 2021
7 budget, tax rate, and utilities fees; appropriations of funds; and funding requests;
8 (2) contracts that need Board action; (3) applications, appeals, or other requests
9 that are subject to mandatory or directory time frames for action; (4) satisfying
10 due process or other constitutional requirements; (5) public safety; and
11 (6) measures that help sustain the County’s economy.

12 “Emergency” means the outbreak of the respiratory illness referred to as the
13 novel coronavirus or COVID-19, as described in the Governor’s Declaration of a
14 State of Emergency and the local Declaration of Emergency, and the spread and
15 effects of COVID-19, which constitute a disaster as defined in Virginia Code
16 § 44-146.16.

17 “Outdoor dining” means delivery, takeout, and outdoor dining and beverage
18 services operated by any restaurant, as defined in this ordinance. The term does
19 not include outdoor entertainment.

20 “Restaurant” includes any restaurant, dining establishment, food court, brewery,
21 microbrewery, distillery, winery, or tasting room.

22 “Fitness and exercise activities” means fitness and exercise activities conducted
23 by any fitness center, gymnasium, recreation center, sports facility, or exercise
24 facility.

25 **D. Expansion of Outdoor Dining and Outdoor Fitness and Exercise**
26 **Activities.**

27 1. The Board of Supervisors hereby approves, on an emergency basis and
28 without the need for any individualized determinations, the expanded use
29 of outdoor space for outdoor dining and for fitness and exercise activities,
30 all subject to the following conditions:

31 a. This emergency approval is valid only for establishments located in
32 zoning districts where they are already approved to operate by right, by
33 a proffer condition, by special exception, by special permit, or by other
34 development approval. No further administrative approval, proffer
35 condition amendment, special exception amendment, special permit

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- 1 amendment, or any other development approval is required as long as
2 the outdoor activity complies with all of the terms and conditions of this
3 emergency ordinance. Further, no temporary special permit or other
4 zoning permit is required to close one or more private streets for the
5 purpose of allowing outdoor dining or outdoor fitness and exercise
6 activities. To qualify under this emergency ordinance, an
7 establishment must have a valid Non-Residential Use
8 Permit/Certificate of Occupancy and, in the case of outdoor dining, a
9 Food Establishment Permit.
- 10 b. This emergency approval automatically expires upon the repeal or
11 expiration of this emergency ordinance.
- 12 c. Occupancy of the outdoor dining area(s) for any single establishment
13 may not exceed 50% of the lowest occupancy load specified on the
14 establishment's Non-residential Use Permit/Certificate of Occupancy
15 or Maximum Occupancy Certificate. For any outdoor dining area(s)
16 serving multiple establishments, total seating must be no more than
17 50% of the total combined lowest occupancy loads for all the
18 establishments.
- 19 d. Seating area(s) must be accessible for disabled patrons.
- 20 e. Any area used for outdoor dining or for fitness and exercise activities
21 must be clearly delineated by cordon, marking or other means.
- 22 f. A permit from the Office of the Fire Marshal is required for any tent or
23 tent area (aggregate area of multiple tents separated by less than 12
24 feet) that is larger than 900 square feet. The normal fee for such a
25 permit is hereby waived for any establishment applying under this
26 ordinance. A single, temporary tent no larger than 900 square feet
27 does not require a permit.
- 28 g. Any tent must (1) be flame-resistant with appropriate labeling affixed to
29 the tent material, (2) remain open on all sides, (3) be located at least
30 20 feet from any building, and (4) be securely anchored to prevent
31 collapse or uplift during inclement weather.
- 32 h. No cooking or open flame is permitted under any tent unless approved
33 by the Office of the Fire Marshal.

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- 1 i. All tables, chairs, umbrellas, tents, lighting, and other accessories must
2 be removable and maintained in good visual appearance and
3 condition. The outdoor area must be kept free of trash and debris, and
4 any trash containers must be removed or appropriately stored at the
5 end of each business day.
- 6 j. No outdoor dining area, outdoor fitness and exercise area, or
7 associated equipment or activity may obstruct a fire lane or fire
8 equipment, such as fire hydrants and fire department connections; any
9 building entrance or exit or any other area marked or designated for life
10 safety or ADA accessibility; or pedestrian passage on any trail, right-of-
11 way, or sidewalk, without adequate alternative pedestrian passage.
12 Street access must be maintained for fire department vehicular
13 response.
- 14 k. Any outdoor dining area must be located entirely on impervious
15 surfaces, such as existing patios, sidewalks, or paved parking spaces.
16 No additional physical alteration—including, for example, addition or
17 enlargement of any deck or paved surface—may be made to the site to
18 accommodate outdoor dining or fitness and exercise. Outdoor fitness
19 and exercise activities are allowed on impervious surfaces and on
20 adjacent open space as appropriate.
- 21 l. Adequate onsite parking must be maintained for onsite users. This
22 emergency ordinance does not permit any reduction in the number or
23 convenience of parking spaces designated for individuals with
24 disabilities so long as accessibility is not compromised.
- 25 m. No additional business sign or advertisement is permitted except as
26 permitted under Article 12 (Signs) of the Zoning Ordinance.
- 27 n. Before using any outdoor area for outdoor dining or for fitness and
28 exercise activities under this emergency ordinance, each
29 establishment is responsible for ensuring that it has the necessary right
30 to do so under this ordinance and that it has permission from the
31 property owner. Each property owner is also responsible for ensuring
32 that no such use occurs on the owner’s property without permission.
- 33 o. The use must comply with all other requirements of any executive
34 order of the Governor (including but not limited to requirements for
35 social distancing, use of face coverings, and cleaning and disinfection);
36 any rules promulgated by the Virginia Alcoholic Beverage Control

1 Authority (including but not limited to Topic 16); and any other
2 applicable code or ordinance.

3 2. No establishment may operate under this emergency ordinance unless it
4 fully complies with the ordinance and with all other applicable
5 requirements as referenced in paragraph 1(o). Any establishment that fails
6 to fully comply may be subject to criminal and/or civil enforcement,
7 including injunctive relief.

8 **E. Scope of Application.**

9 It is not the intent of this emergency ordinance to infringe on the ability of any
10 town—Clifton, Herndon, or Vienna—under Virginia Code § 15.2-1413 to provide
11 a method to assure continuity in its own government. For that reason, the
12 ordinance will not apply in any of those towns unless and until the town’s
13 governing body, by ordinance, decides to be subject to this emergency
14 ordinance.

15 **F. Supersession of Inconsistent Requirements.**

16 The provisions of this Ordinance apply notwithstanding any contrary provision of
17 law, general or special, as authorized in Virginia Code § 15.2-1413.

18 **2. That this ordinance will become effective upon adoption.**

19 **3. That this ordinance is being adopted on an emergency basis as allowed**
20 **by Virginia Code § 15.2-1427(F), and may be enforced for no more than**
21 **60 days from the date of adoption, unless the Board readopts this**
22 **ordinance in conformity with all applicable provisions of state law and**
23 **following the procedures established in this ordinance.**

24 **4. That the Clerk for the Board of Supervisors will schedule a public**
25 **hearing for July 14, 2020, at which the Board will consider readopting**
26 **this ordinance or a similar ordinance that assures continuity in Fairfax**
27 **County Government during the COVID-19 pandemic. Any such**
28 **ordinance will be limited in its effect to a period not exceeding six**
29 **months after the emergency and will provide for a method for the**
30 **resumption of normal governmental authority by the end of the six-**
31 **month period. The Clerk will publish descriptive notice of the Board’s**
32 **intention to propose the ordinance for passage once a week for two**

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1 **successive weeks in accordance with Virginia Code §§ 15.2-1427**
2 **and -2204.**

3 **5. That the sections, subsections, paragraphs, sentences, clauses,**
4 **phrases, and words of this ordinance are severable. If any section,**
5 **subsection, paragraph, sentence, clause, phrase, or word is declared**
6 **unconstitutional or otherwise invalid by the lawful judgment or decree**
7 **of any court of competent jurisdiction, its unconstitutionality or**
8 **invalidity shall not affect the validity of any of the remaining sections,**
9 **subsections, paragraphs, sentences, clauses, phrases, and words of**
10 **this ordinance, since the same would have been enacted by the Board**
11 **of Supervisors without and irrespective of any unconstitutional or**
12 **otherwise invalid section, subsection, paragraph, sentence, clause,**
13 **phrase or word being included.**

14 GIVEN under my hand this _____ day of _____ 2020.

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Jill G. Cooper
Clerk for the Board of Supervisors
Department of Clerk Services