

**Hospitality Industry Support:** [Hospitality Industry COVID-19 Assistance | Planning, Permitting and Construction \(fairfaxcounty.gov\)](#)

- Issues: **none identified based on low response rate**
- As of August 2022, one applicant applied for and was granted the COVID Hospitality Industry Fee Reduction
- May remain available to the hospitality industry for 1 year beyond the state of emergency
- To close out this program:
  - Fee waivers and project management support will continue for the life of the construction project, as documented in the uncodified ordinance
  - At the time of expiration, the website will be taken down
- **Proposed path forward** – Permit this exception to sunset at the end of the allowed one-year grace period following end of the declared emergency.

**Temporary medical facilities:** [Temporary Medical Structures in Response to COVID-19 | Planning, Permitting and Construction \(fairfaxcounty.gov\)](#)

- Issues: **reduction in available parking spaces, may not be allowed by zoning, may not be able to reach all who have set up facilities**
- As of August 2022, 15 facilities have been erected over the length of the pandemic
  - 6 at medical sites/pharmacies, 3 at shopping centers, 3 at office buildings, 1 at a place of worship, 1 at a private club, and 1 at a mobile home park (does not include Health Dept. sites)
  - 3 sites remain (1 each at a place of worship, shopping center, private club) – all are operated by Personix Health Care and perform drive-up rapid/PCR COVID testing
    - Personix Health Care attempted to shut down all remaining sites but was asked by the community to keep the three sites open
    - Personix Health Care serves primarily immune-compromised residents, churchgoers, residents traveling who need free testing from a CLIA certified lab, and residents who need a PCR test
- May remain for one year beyond the state of emergency
- Notifications of the expiration of this program will be sent to the log of applicants who have utilized this process over the past two years
- The webpage will be updated to explain the process to apply for permanent approval where permitted (outlined below)
- Any businesses will be able to take advantage of this program during the one-year extension
- **Potential path forward** – Permit this exception to sunset at the end of the allowed one-year grace period following end of the declared emergency.

**Outdoor gyms:** <https://www.fairfaxcounty.gov/fire-ems/sites/fire-ems/files/assets/documents/pdf/fire%20marshal/outdoor%20dining%20during%20cold%20weather.pdf>

- Issues: **reduction in available parking spaces, not enough parking for additional uses or seating, impacts to open space, noise impacts**
- May remain for one year beyond the state of emergency
- The process to establish this has allowed them to exist without notification to the County. Consequently, we may need to consider the efficacy of outreach efforts (press releases, BOS newsletters, social media, DTA mailers).

- Customers who wish to make outdoor gyms permanent will be directed to initiate the process outlined below at least 6 months before the one-year extension expires
- Any businesses will be able to take advantage of this program during the one-year extension
- Permit this exception to sunset at the end of the allowed one-year grace period following end of the declared emergency.

**Outdoor dining:** <https://www.fairfaxcounty.gov/fire-ems/sites/fire-ems/files/assets/documents/pdf/fire%20marshal/outdoor%20dining%20during%20cold%20weather.pdf>

- Issues: **reduction in available parking spaces, not enough parking for additional uses or seating, impacts to open space, noise impacts**
- May remain for one year beyond the state of emergency
- The process to establish this has allowed them to exist without notification to the County. Consequently, we may need to consider the efficacy of outreach efforts (press releases, BOS newsletters, social media, DTA mailers).
- Customers who wish to make outdoor dining/gyms permanent will be directed to initiate the process outlined below at least 6 months before the one-year extension expires
- Any businesses will be able to take advantage of this program during the one-year extension
- Permit this exception to sunset at the end of the allowed one-year grace period following end of the declared emergency. Alternatively, during the one-year grace period, the Board could consider an amendment to the Zoning Ordinance to allow these facilities to continue to operate by right subject to specific use standards. Staff can bring forward options for discussion and direction to a future Land Use Policy Committee Meeting. See Alternative Path Forward below.

#### ***Other zoning approvals***

- Issues: **conformance with previous zoning approvals, uses which may or may not be permitted**
- As of August 2022, approximately 21 sites have taken advantage of the uncodified ordinance, although several coincide with the temporary medical facilities count above
- May remain for one year beyond the state of emergency
- Notifications of the expiration of this program will be sent to the log of applicants who have utilized this process, as permitted by the uncodified ordinance
- New businesses can take advantage of this program during the one-year extension
- **Potential path forward** – Permit this exception to sunset with at the end of the allowed one-year grace period following end of the declared emergency. Customers who wish to make COVID-related changes permanent will be directed to initiate the process outlined below at least 6 months before the one-year extension expires

#### ***Current process for structures and uses to request approval to remain (Assumes no change to the Zoning Ordinance to facilitate these uses):***

##### **Zoning**

- Zoning determination to be requested (if needed)
  - Estimated free 30-day review if no entitlement applies to the property
  - \$520.00 fee and 30-day review if an entitlement applies to the property
  - Dept. of Planning & Development (DPD) will evaluate conformity of structures with any existing entitlements and zoning regulations

- DPD will identify any necessary zoning approvals, which may include a zoning determination, entitlement, or amendment to an entitlement
- Any zoning approvals must be secured before next steps

#### **Site Approval**

- Minor site plan (MSP) approval required, in most cases.
  - \$3901.00 fee plus 55% of original fee per subsequent submission
  - 45-day review for initial submission plus 28-day review per subsequent submission
  - If parking is impacted, the MSP must include a parking tabulation prepared by a licensed engineer
    - \$980.40 per submission
    - 60-day review minimum dependent upon whether there is a need for an administrative or Board approval
- If the project includes land disturbance, a consultation with the Site Application Center is recommended to determine any necessary site approvals
  - fees and timeframes dependent upon necessary site-related process

#### **Building Permits**

- For tents less than 900 sf, no permits will be required
- For tents 900-6,000 sf, permit will be required from the Fire Marshal's Office
  - \$150 fee and 30-day review
- For tents greater than 6,000 sf, building permits will be required
  - \$108 base fee + \$4.32 technology fee + 4.10% estimated cost of work and resubmission fees (\$108 base fee + \$4.32 technology fee per discipline per resubmission)
  - 45-60 days for first submission, 28-30 days for subsequent reviews
- Trailers/manufactured structures may require tie down permits
  - \$108 base fee + \$4.32 technology fee, 6 to 8-week review
- For any other structures, a consultation with the Permit Application Center is recommended to determine whether building permits are needed
  - fees and timeframes dependent upon necessary permits

#### **Final approvals**

- Structures may require Non-residential Use Permits (Non-RUP), if applicable
  - \$70 fee and 7-10 business days for review
- If a minor site plan has been issued, a final inspection is required from Site Inspections and the Fire Marshal's Office.

#### **Enforcement**

- Will be investigated on a complaint basis only

#### **Alternative potential path forward**

##### ***Option Added to Zoning Ordinance Amendment Work Program***

- Consideration of ways to allow the continuation of outdoor dining in parking areas following the conclusion of the declared emergency
- Timing is to be determined but will be within the one-year extension
- Possible approach
  - 3-pronged approach
    - Seating already permitted by Zoning Ordinance as an accessory use

- Seating utilizing tents and parking spaces (either by-right or with an administrative permit below)
- New patios/decks to accommodate seating (normal process outlined above)
- Add outdoor dining as a permitted accessory use either by right or with an administrative permit subject to use standards such as
  - Limitation on area (square feet) or % of parking lot
  - Would not count against parking minimum requirement
  - Limitation on hours of operation
  - If by administrative permit, reasonable fee similar to other accessory uses
  - Time limit, i.e valid for 2-5 years or no time limit
  - Include other standards set forth in Emergency Ordinance dealing with heaters and tents (6-month inspections required and inspection reports to be submitted to Fire Marshal)
  - Set minimum distances from residential uses
  - No requirements for building permits or site-related plans
- Coordination of this approach with Fire Marshal and Health Department necessary
- Outreach necessary
  - Health Dept. will reach out to all restaurants/food establishments within the one-year grace period upon their annual inspections
  - Utilize DTA mailers to reach customers

**AMENDMENTS TO AN 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 APPROVING TEMPORARY COUNTY-OPERATED HYPOTHERMIA  
PREVENTION SHELTERS, AUTHORIZING A STREAMLINED PROCESS FOR  
APPROVING TEMPORARY MODIFICATIONS TO ACTIVITIES, USES, AND  
STRUCTURES IN RESPONSE TO THE EMERGENCY AND ITS IMPACTS, AND  
REDUCING CERTAIN ZONING AND DEVELOPMENT FEES**

AMENDMENTS TO AN UNCODIFIED ORDINANCE to provide a method to assure continuity in Fairfax County government during the COVID-19 Emergency and its aftermath, as authorized by Virginia Code § 15.2-1413, by approving temporary County-operated hypothermia prevention shelters, authorizing a streamlined process for approving temporary use modifications in response to the emergency and its impacts, and reducing certain zoning and development fees.

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

- 1. That the following amendments to this uncodified ordinance are hereby adopted:**

**A. Purpose of the Ordinance.**

This ordinance is intended to provide a method to assure continuity in Fairfax County government as the County continues to address and recover from 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 address significant public health issues, sustain the County's economy, and ensure the continued ability of County agencies and deliberative bodies to carry out their functions during this emergency and its aftermath without compromising public health, safety, and welfare.

This ordinance was 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." Effective March 16, 2020, Governor Northam and the State Health



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

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

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

The Governor allowed Amended Executive Order 62 to expire, moving Northern Virginia into Phase One on May 28, 2020. In Executive Order 65, issued on June 2, the Governor ordered that most of the Commonwealth, but not including Northern Virginia, would move into Phase Two on June 5. On June 9, 2020, the Governor amended Executive Order 65 to order Northern Virginia's entry into Phase Two on June 12. In Executive Order 67, issued on June 30, 2020, the Governor ordered the Commonwealth's entry into Phase Three, which further relaxed restrictions on activities.

Beginning in December 2020, the Governor issued Executive Order 72 and a series of amendments establishing and eventually easing "Commonsense Surge Restrictions" applicable to businesses, public and private in-person gatherings, schools, and institutions of higher education. With the widespread distribution of effective vaccines, the state has now made tremendous progress in combatting COVID-19.

But even as the Governor's Executive Order 79 anticipates the end of statewide public health restrictions, it recognizes that the virus remains a serious risk to unvaccinated people. In addition, new COVID-19 variants continue to be discovered and account for a significant portion of cases in the U.S. It is not yet known to what extent current vaccines will be successful against these variants. In the Fairfax Health District alone, there have been more than 78,000 confirmed and probable cases of COVID-19, and the virus has taken the lives of more than 1,100 people. While more than half the County's residents have been fully vaccinated, a substantial portion have not received even one



dose, including children less than 12 years old, who are not yet eligible to receive vaccinations. Given these factors, there remains an unquantifiable risk of a resurgence of the virus.

The virus's economic impacts have also been particularly dire. The County sustained approximately 50,000 job losses and experienced unemployment claims 28 times the normal rate. A disproportionate number of these job losses were in service industries--particularly the restaurant industry. Although some of these jobs have been recovered, there is still a significant need to address and ameliorate the economic impacts experienced in this sector of the County's economy.

Executive Order 68, like earlier such orders, recognized the need "to protect the health, safety, and well-being of Virginians experiencing homelessness during this pandemic." To that end, the Hypothermia Prevention Program is an integral part of Fairfax County's Housing Crisis Response System. Serving over 1,000 people who seek shelter from cold every winter, the program operates from November through March. It operates in some full-time emergency shelters and a series of overflow shelters, the latter typically located in churches and County-owned or -leased buildings. In most years, faith communities have typically provided temporary hypothermia prevention shelters. But in the pandemic, they faced new challenges that rendered them either unable to participate in the program or able to do so only at significantly reduced capacity. To accommodate COVID-related protective measures and a potential increase in the number of people needing this service, in 2020 the County anticipated enlarging the program to include more locations and larger facilities. Given the then-imminent cold weather, it was impractical to subject those sites to the time-consuming, individualized approval processes that might ordinarily apply. This ordinance thus identified those sites and included measures to enable their use as emergency shelters around the winter of 2020–21. No changes are being made to this portion of the ordinance for the winter of 2021–22.

The Board of Supervisors desires to remove unnecessary obstacles to businesses that seek to return to and stay in business. This ordinance was originally adopted in part to address various modifications to uses, activities, and structures required to comply with COVID-related government requirements and guidelines. With the end of the emergency now seemingly in sight, modifications will also be needed to facilitate businesses' recovery in the face of the emergency's lingering impacts, including public expectations related to public health and safety. Businesses are particularly vulnerable to the risk of a resurgence of disease and its attendant requirements for social distancing, occupancy limitations, and increased ventilation, among others. Even if these additional features are not statutory requirements, there is a general expectation in the public and in many industries that additional precautions are desirable and expected.

This ordinance, as amended, is needed to establish a clear, simple process for determining the permissibility of such modifications under zoning regulations. To that end, this ordinance suspends any proffer, development condition, or ordinance provision to the extent it would otherwise preclude a temporary modification to an activity, use, or structure where the Zoning Administrator determines the modification is needed to respond to the COVID-19 emergency or its impacts. The cost and time to meet ordinary requirements for such modifications would compound the stress on economically challenged businesses, hinder opportunities to revitalize the County's economy, and risk the closure of such businesses. At the same time, processing and deciding a multitude of applications on an urgent basis would be extremely difficult, if not impossible, for the County government. It would consume extraordinary amounts of time and attention on the part of the County's staff and its deliberative bodies, at a time when they are also strained by the emergency and its aftermath. And without a simplified process, there would likely be increased noncompliance, leading to yet more avoidable expenditures of staff time and resources to enforce zoning regulations. These factors, separately and collectively, would threaten the County's continuity in government.

Because various hospitality uses were especially impacted by the COVID-19 emergency, this ordinance reduces or waives certain zoning and development fees for those businesses, defined in Section C, as they work to reestablish, reconfigure, or expand their spaces during the emergency and its aftermath.

The impacts of the COVID-19 emergency are expected to continue well into the future, far beyond the six-month period during which this ordinance was originally designed to be effective. Many County businesses have made or are anticipated to make substantial investments in modifying their activities, uses, and facilities to respond to the pandemic and its impacts. Extending this ordinance's effective period—from six months to twelve months after the end of the local state of emergency—will enhance the ability of these businesses to realize a return on their investments while maintaining COVID-related health protocols; the extension will also defer or avoid the need for County processing of numerous applications for such modifications.

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

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

Virginia Code § 15.2-1413 authorizes localities to adopt an ordinance to “provide a method to assure continuity in its government, in the event of an enemy attack or other disaster,” “[n]otwithstanding any contrary provision of law, general or special.” The Governor's Declaration of a State of Emergency found that “[t]he anticipated effects of



COVID-19 constitute a disaster as described in § 44-146.16 of the Code of Virginia.” A 2021 amendment to § 15.2-1413 expanded, from six to twelve months, the period within which an ordinance adopted under the statute must cease effect.

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

### **C. Definitions.**

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

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

“Hospitality uses” means any hotel or motel; restaurant, catering establishment, or craft beverage establishment; indoor commercial recreation establishment; or health and exercise facility, large or small—as these uses are defined in the County’s Zoning Ordinance (Chapter 112.1 of the County Code).

“Hypothermia prevention shelter” means any facility that provides a temporary shelter for people experiencing homelessness, does not require occupants to sign leases or occupancy agreements, and is operated by Fairfax County during the fall and winter seasons to prevent injury, illness, and death due to cold weather. This use includes providing transportation to or from the shelter via van or other means; space for overnight stays; warming centers during the day; and provision of meals or other food to shelter occupants, staff, and volunteers.

“Temporary” means not exceeding the period this ordinance is in effect.

“Zoning Administrator” means the County’s Zoning Administrator or her designee within the Department of Planning and Development.

#### **D. Hypothermia prevention shelters.**

1. The Board of Supervisors hereby approves the establishment of one or more temporary, hypothermia prevention shelters on any of the sites identified in **Appendix A** from November 1, 2020, until April 1, 2021. The use in such a location is hereby deemed a feature shown on the Comprehensive Plan. No further administrative approval, proffer condition amendment, special exception amendment, special permit amendment, or any other development approval is required as long as the hypothermia prevention shelter complies with all of the conditions of this ordinance.
2. For purposes of this ordinance, the Board hereby temporarily suspends any proffer, development condition, or ordinance provision that would otherwise restrict the establishment of a hypothermia shelter under this ordinance.
3. Any hypothermia prevention shelter established under this ordinance or the prior emergency ordinance must operate primarily within one or more existing buildings.
4. Operating a hypothermia prevention shelter changes the application of the state building code such that the facility would temporarily become one of transient overnight housing. In doing so, additional life safety measures apply. Review, inspection, and approval of each building, or portion thereof, by the building official and fire official is required to ensure that the temporary use is safe and meets the spirit and functional intent of the current Uniform Statewide Building Code. Approval is not guaranteed and may be conditional, such as, but not necessarily limited to, requiring the installation of smoke and carbon monoxide detectors/alarms, requiring panic hardware on doors, and limiting the occupant load.

#### **E. Temporary, COVID-necessitated use modifications.**

1. The Board of Supervisors hereby suspends any proffer, development condition, or ordinance provision to the extent it would otherwise preclude a temporary modification to an activity, use, or structure where the Zoning Administrator determines the modification is needed to respond to the COVID-19 emergency and its impacts. In making such a determination the Zoning Administrator may impose reasonable conditions. Any request for a modification must be submitted in writing to the Zoning Administrator, who may require additional submission material.



2. This provision does not generally apply to property zoned to any R district or to the residential portion of any P district; however, it does apply to any approved public use, child care center, independent or assisted living facility, school, place of worship, or other nonresidential use, regardless of zoning district.
3. The Zoning Administrator may revoke an approval given under this ordinance or the prior emergency ordinance if the Zoning Administrator determines that an establishment is being operated in a manner that is inconsistent with the approval or that otherwise adversely impacts the health, safety, and welfare of the community.

#### **F. Fee Reductions.**

1. Special exception and special permit application fees, as set forth in Section 8102 of the Zoning Ordinance, are hereby reduced by 75% of the prevailing fee for hospitality uses, as defined in Section C above. A request for reduction in special exception or special permit fees must be submitted in writing to the Zoning Administrator.
2. The following fees—established in Appendix Q of the County Code and collected by Land Development Services and the Office of the Fire Marshal—are hereby reduced by 65% when they are being incurred to reestablish, reconfigure or expand a building configuration for a hospitality use, as defined in Section C above:

##### **I. Building Development Fees**

- B. Building Permit and Other Fees. The filing fee, which represents 35% of the permit application cost, will be the only fee required for building applications. The remaining 65% of the fee, which is charged prior to issuance of the building permit, will be waived. All trade and resubmission fees will continue to be charged in full.

##### **H. Fire Prevention Division (Fire Marshal) Fees**

- (A) Plan Review Fees. 35% of the initial architectural plan review fee will be charged. The remaining 65% of the fee will be waived. All shop drawing review fees and all resubmission fees will continue to be charged in full.

All acceptance testing and inspection fees; reinspection fees; and fees for plan review and inspections performed outside business hours will continue to be charged in full.



## II. Site Development Fees

- A. Plan and Document Review Fees
- C. Site Inspection Fees
- D. Fire Prevention Division (Fire Marshal) Fees
- E. Site Permit Fees
- F. Waiver, Exception, Modification and Exemption Fees

## III. Miscellaneous Fees

These fee reductions do not include fees paid to the Department of Public Works and Environmental Services, Wastewater Management Planning & Monitoring Branch per Chapter 67, article 10, of the County Code. A request for any fee reduction must be submitted in writing to the Director of Land Development Services.

## G. Scope of Application.

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

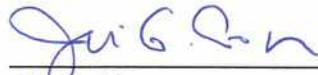
## H. Supersession of Inconsistent Requirements.

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

2. That this ordinance will become effective upon adoption.
3. That this ordinance will remain in effect no longer than 12 months after the Board of Supervisors terminates the local Declaration of Emergency. Within that 12-month period, the Board will resume normal governmental authority in accordance with Virginia Code § 15.2-1413 by repealing this ordinance in compliance with Virginia Code § 15.2-1427.
4. That the sections, subsections, paragraphs, sentences, clauses, phrases, and words of this ordinance are severable. If any section, subsection, paragraph, sentence, clause, phrase, or word is declared unconstitutional or otherwise invalid by the lawful judgment or decree of any court of competent jurisdiction, its unconstitutionality or invalidity shall not affect the validity of any of the remaining sections, subsections, paragraphs, sentences, clauses,

phrases, and words of this ordinance, since the same would have been enacted by the Board of Supervisors without and irrespective of any unconstitutional or otherwise invalid section, subsection, paragraph, sentence, clause, phrase or word being included.

GIVEN under my hand this 27<sup>th</sup> day of July, 2021.



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

**AMENDMENTS TO AN 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 APPROVING TEMPORARY COUNTY-OPERATED HYPOTHERMIA PREVENTION SHELTERS, AUTHORIZING A STREAMLINED PROCESS FOR APPROVING TEMPORARY MODIFICATIONS TO ACTIVITIES, USES, AND STRUCTURES IN RESPONSE TO THE EMERGENCY AND ITS IMPACTS, AND REDUCING CERTAIN ZONING AND DEVELOPMENT FEES**

**Appendix A**

**Potential Hypothermia Prevention Shelter Sites by Human Services Region**

**Region 1:**

1. South County Building – 8350 Richmond Highway, Alexandria, VA 22309

**Region 2:**

2. Lincolnia Senior Center – 4710 N Chambliss Street, Alexandria, VA 22312

**Region 3:**

3. North County Human Services Building – 1850 Cameron Glen Drive, Reston, VA 20190

**Region 4:**

4. Braddock Glen (Senior Center) – 4027-B Olley Lane, Fairfax, VA 22032

**Countywide Backup:**

1. Government Center – 12000 Government Center Parkway, Fairfax, VA 22035
2. Pennino Building – 12011 Government Center Parkway, Fairfax, VA 22035
3. Herrity Building – 12055 Government Center Parkway, Fairfax, VA 22035
4. Former Container Store – 8508 Leesburg Pike, Vienna, VA 22182



**AMENDMENTS TO AN 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**

AMENDMENTS TO AN UNCODIFIED ORDINANCE to provide a method to assure continuity in Fairfax County government during the COVID-19 Emergency and its aftermath, as authorized by Virginia Code § 15.2-1413, 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 amendments to this uncodified ordinance are hereby adopted:**

**A. Purpose of the Ordinance.**

This ordinance is intended to provide a method to assure continuity in Fairfax County government as the County continues to address and recover from 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 and its aftermath without compromising public safety.

This ordinance was 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." Effective March 16, 2020, Governor Northam and the State Health Commissioner jointly issued an Order declaring a state public health emergency. On

March 17, 2020, the Fairfax County Director of Emergency Management, with the consent of the Board of Supervisors, declared a local state of emergency due to the potential spread of COVID-19. The local Declaration of Emergency remains in effect until the Board of Supervisors takes appropriate action to end it.

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

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

With the impending expiration of Phase Zero in Northern Virginia, the Board held a special meeting on May 28 to consider an uncodified emergency ordinance to provide a method to assure continuity in Fairfax County government during the 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. The Board adopted the emergency ordinance, which would have expired after 60 days unless repealed or readopted.

The Governor allowed Amended Executive Order 62 to expire, moving Northern Virginia into Phase One on May 28, 2020. In Executive Order 65, issued on June 2, the Governor ordered that most of the Commonwealth, but not including Northern Virginia, would move into Phase Two on June 5. Under Phase Two, among other things, indoor dining and indoor fitness and exercise activities were allowed subject to capacity limits; given these limits, the continued allowance for outdoor dining and outdoor fitness and



exercise activities remained critical to sustain these businesses. On June 9, 2020, the Governor amended Executive Order 65 to order Northern Virginia's entry into Phase Two on June 12. In Executive Order 67, issued on June 30, 2020, the Governor ordered the Commonwealth's entry into Phase Three, which further relaxed restrictions on activities.

At a regular meeting on July 14, 2020, the Board held a public hearing and adopted this ordinance. As originally adopted, the emergency ordinance allowed only tents with all sides open. With impending cold fall and winter weather, however, establishments will need to be able to enclose tents for the comfort of their patrons and staff. Allowing tents to be enclosed will promote the ability of establishments to continue in business while following social distancing requirements. At a regular meeting on October 20, 2020, the Board held a public hearing and adopted amendments clarifying the circumstances when a permit from the fire official is required for a tent or group of tents; allowing tents to be closed on one or more sides; and adding provisions regarding the use of heaters, both inside and outside tents.

Since then, the Governor issued Executive Order 72 and a series of amendments establishing and then easing "Commonsense Surge Restrictions" applicable to businesses, public and private in-person gatherings, schools, and institutions of higher education. With the widespread distribution of effective vaccines, the state has now made tremendous progress in combatting COVID-19.

But even as the Governor's Executive Order 79 anticipates the end of statewide public health restrictions, it recognizes that the virus remains a serious risk to unvaccinated people. In addition, new COVID-19 variants continue to be discovered and account for a significant portion of cases in the U.S. It is not yet known to what extent current vaccines will be successful against these variants. In the Fairfax Health District alone, there have been more than 78,000 confirmed and probable cases of COVID-19, and the virus has taken the lives of more than 1,100. While more than half the County's residents have been fully vaccinated, a substantial portion have not received even one dose, including children less than 12 years old, who are not yet eligible to receive vaccinations. Given these factors, there remains an unquantifiable risk of a resurgence of the virus.

The virus's economic impacts have also been particularly dire. The County sustained approximately 50,000 job losses and experienced unemployment claims 28 times the normal rate. A disproportionate number of these job losses were in service industries--particularly the restaurant industry. Although some of these jobs have been recovered, there is still a significant need to address and ameliorate the economic impacts experienced in this sector of the County's economy.



But for this ordinance, under current County ordinances and regulations, business owners would typically be required to pursue a range of applications to allow outdoor dining and outdoor fitness and exercise activities. In the midst of the COVID-19 emergency and its aftermath, the cost and time to meet such requirements would compound the stress on economically challenged businesses, hinder the opportunity presented by relaxed state restrictions to revitalize the County's economy, and likely result in the de facto closure of more such businesses. At the same time, processing and deciding such a multitude of applications on an urgent basis would be extremely difficult, if not impossible, for the County government and would consume extraordinary amounts of time and attention on the part of the County's staff and its deliberative bodies, at a time when they are also strained by the emergency and its impacts. These factors, separately and collectively, would threaten the County's continuity in government if the ordinance were to expire too soon.

The Board of Supervisors desires to continue reducing these impacts of the COVID-19 emergency and its aftermath to business owners, to the communities those businesses serve and who wish to support them, and to County government. To that end, this ordinance, like the emergency ordinance it replaced, automatically approves outdoor dining and outdoor fitness and exercise activities that meet certain conditions, including those established by the Governor in any applicable executive order of the Governor.

Many County businesses have made or are anticipated to make substantial investments in modifying their activities and uses, as allowed by this ordinance, to respond to pandemic and its impacts. Extending this ordinance's effective period—from six months to twelve months after the end of the local state of emergency—will enhance the ability of these businesses to realize a return on their investments while maintaining COVID-related health protocols; the extension will also defer or avoid the need for County processing of numerous applications for such modifications.

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

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

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

2021 amendment to § 15.2-1413 expanded, from six to twelve months, the period within which an ordinance adopted under the statute must cease effect.

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

### **C. Definitions.**

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

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

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

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

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

### **D. Expansion of Outdoor Dining and Outdoor Fitness and Exercise Activities.**

1. The Board of Supervisors hereby approves, without the need for any individualized determinations, the expanded use of outdoor space for outdoor dining and for fitness and exercise activities, all subject to the following conditions:
  - a. This approval is valid only for establishments located in zoning districts where they are already approved to operate by right, by a proffer condition, by



special exception, by special permit, or by other development approval. No further administrative approval, proffer condition amendment, special exception amendment, special permit amendment, or any other development approval is required as long as the outdoor activity complies with all of the conditions of this ordinance. Further, no temporary special permit or other zoning permit is required to close one or more private streets for the purpose of allowing outdoor dining or outdoor fitness and exercise activities. To qualify under this ordinance, an establishment must have a valid Non-Residential Use Permit/Certificate of Occupancy and, in the case of outdoor dining, a Food Establishment Permit.

- b. This emergency approval automatically expires upon the repeal of this ordinance.
- c. Occupancy of the outdoor dining area(s) for any single establishment may not exceed 50% of the lowest occupancy load specified on the establishment's Non-residential Use Permit/Certificate of Occupancy or Maximum Occupancy Certificate. For any outdoor dining area(s) serving multiple establishments, total seating must be no more than 50% of the total combined lowest occupancy loads for all the establishments.
- d. Seating area(s) must be accessible for disabled patrons.
- e. Any area used for outdoor dining or for fitness and exercise activities must be clearly delineated by cordon, marking or other means.
- f. If a tent is no larger than 900 square feet and is at least 12 feet from any another tent, it requires no permit. If a tent is larger than 900 square feet, it requires a permit from the fire official, through the Office of the Fire Marshal. If multiple tents are separated by less than 12 feet but their combined area does not exceed 900 square feet, no permit is required. If multiple tents are separated by less than 12 feet and their combined area exceeds 900 square feet, a permit from the fire official is required. The normal fee for such a permit is hereby waived for any establishment applying under this ordinance. If the fire official has issued a permit for one or more tents but there is a material change to what was approved, including closure on any side, a new permit is required.
- g. Any tent must be located at least 20 feet from any building that is on a separate lot and be securely anchored to prevent collapse or uplift during inclement weather. Any tent or tent area larger than 900 square feet must be flame resistant with appropriate labeling affixed to the tent material.



- h. No cooking or open flame is permitted under any tent unless approved by the fire official. One or more heaters are allowed as long as they are listed by a nationally recognized testing laboratory for the use and comply with the requirements of the Statewide Fire Prevention Code. Those requirements include, but are not limited to, that any such heater be maintained at least 10 feet from any tent exit or combustible material.
- i. All tables, chairs, umbrellas, tents, lighting, and other accessories must be removable and maintained in good visual appearance and condition. The outdoor area must be kept free of trash and debris, and any trash containers must be removed or appropriately stored at the end of each business day.
- j. Any heater used outdoors must comply with the Statewide Fire Prevention Code and the Uniform Statewide Building Code, as applicable. In particular, portable outdoor gas-fired heating appliances, known as patio heaters, are allowed subject to those regulations, which include such requirements as not using the heater within 20 feet of a tent; not storing the heater within a tent; maintaining a five-foot clearance from buildings, combustibles, and exits; ensuring it is a device listed by a nationally recognized testing laboratory; and ensuring that it is used with an integral fuel tank.
- k. No outdoor dining area, outdoor fitness and exercise area, or associated equipment or activity may obstruct a fire lane or fire equipment, such as fire hydrants and fire department connections; any building entrance or exit or any other area marked or designated for life safety or ADA accessibility; or pedestrian passage on any trail, right-of-way, or sidewalk, without adequate alternative pedestrian passage. Street access must be maintained for fire department vehicular response.
- l. Any outdoor dining area must be located entirely on impervious surfaces, such as existing patios, sidewalks, or paved parking spaces. No additional physical alteration—including, for example, addition or enlargement of any deck or paved surface—may be made to the site to accommodate outdoor dining or fitness and exercise. Outdoor fitness and exercise activities are allowed on impervious surfaces and on adjacent open space as appropriate.
- m. Adequate onsite parking must be maintained for onsite users. This ordinance does not permit any reduction in the number or accessibility of parking spaces designated for individuals with disabilities. Relocation of any such space requires approval by the County's building official, must not compromise accessibility, and must not violate any other legal requirement.

- n. No additional business sign or advertisement is permitted except as permitted under Article 12 (Signs) of the Zoning Ordinance.
  - o. Before using any outdoor area for outdoor dining or for fitness and exercise activities under this ordinance, each establishment is responsible for ensuring that it has the necessary right to do so under this ordinance and that it has permission from the property owner. Each property owner is also responsible for ensuring that no such use occurs on the owner's property without permission.
  - p. The use must comply with all other requirements of any executive order of the Governor (including but not limited to requirements for social distancing, use of face coverings, and cleaning and disinfection); any rules promulgated by the Virginia Alcoholic Beverage Control Authority (including but not limited to Topic 16); and any other applicable code or ordinance.
2. No establishment may operate under this ordinance unless it fully complies with the ordinance and with all other applicable requirements as referenced in paragraph 1(o). Any establishment that fails to fully comply may be subject to criminal and/or civil enforcement, including injunctive relief.

#### **E. Scope of Application.**

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

#### **F. Supersession of Inconsistent Requirements.**

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

- 2. **That these ordinance amendments will become effective upon adoption.**
- 3. **That this ordinance will remain in effect no longer than 12 months after the Board of Supervisors terminates the local Declaration of Emergency. Within that 12-month period, the Board will resume normal governmental authority in**



accordance with Virginia Code § 15.2-1413 by repealing this ordinance in compliance with Virginia Code § 15.2-1427.

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

GIVEN under my hand this 27<sup>th</sup> day of July, 2021.



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