

BOROUGH OF MENDHAM
MORRIS COUNTY, NEW JERSEY

ORDINANCE #13-2021

**ORDINANCE OF THE BOROUGH OF MENDHAM, IN THE COUNTY OF MORRIS AND
STATE OF NEW JERSEY, AMENDING THE BOROUGH CODE TO PERMIT OUTDOOR DINING
AND OUTDOOR SEATING TO FACILITATE SMALL BUSINESS RECOVERY NEEDED
IN LIGHT OF THE COVID-19 PUBLIC HEALTH EMERGENCY**

WHEREAS, recent changes in the economy, including a public health emergency and resulting social distancing requirements, have led the Borough's Finance Committee to review outdoor dining requirements; and

WHEREAS, the Governing Body desires to enable local restaurants and food and beverage service establishments, with appropriate guidelines, to serve customers and encourage social distancing requirements; and

WHEREAS, the Governing Body also recognizes that notwithstanding the changes in the economic climate in 2020-2021, outdoor dining and outdoor seating can accommodate the Borough's long-term Master Plan vision of protecting the small-town character of the community, while also helping to maintain a healthy business district, which is also a Master Plan vision; and

WHEREAS, the Borough Planner has proposed certain amendments to the Borough Code to permit and regulate outdoor dining and outdoor seating, and the Borough Attorney has reviewed same; and

WHEREAS, the Governing Body recommends the amendments with respect to parking and approval as to outdoor dining and outdoor seating.

THEREFORE, BE IT ORDAINED by the Mayor and Council of the Borough of Mendham, in the County of Morris and State of New Jersey, as follows:

SECTION 1. Chapter 215, Zoning, is hereby amended and supplemented to add new Article XVIII, Outdoor Dining and Outdoor Seating; to read as follows:

"Article XVIII Outdoor Dining and Outdoor Seating

§ 215-62 Definitions.

As used in this article, the following terms shall have the meaning indicated:

- A. Food or Beverage Service Establishment – An establishment that serves any combination of food and/or beverages but is not considered a restaurant, such as a deli, coffee shop, ice cream shop, etc.
- B. Principal Building – The building whose principal facade fronts on the sidewalk or adjacent to where the outdoor dining or outdoor seating is proposed to be located. The "principal facade" shall be the face of the principal building facing the street right-of-way.
- C. Permitted Zone – Outdoor Dining and Outdoor Seating shall be permitted accessory uses to a permitted restaurant or food or beverage service establishment in the Historic District Zone and East Business Zone as defined in the Mendham Borough "Land Use Ordinance" and as shown on the Zoning Map of the Borough of Mendham.
- D. Person – Any individual, partnership, corporation, limited liability company, association, or other entity.
- E. Restaurant – An establishment located within the principal building, the primary activity of which is the preparation of food or sale of prepared food for consumption by the public on its premises.

- F. Sidewalk – The paved surface provided for the exclusive use of pedestrians and situated between and extending from any building line to the curb of any street (excluding therefrom any unpaved area).
- G. Outdoor Dining – An accessory use to a restaurant as defined herein which also is characterized by the following and in accordance with §215-70.
 - (1) The consumption of food by the public at tables located outside of the restaurant on a patio, deck or within that more or less rectangular portion of the sidewalk which lies within the area bounded by the public street, the principal façade, and the imaginary perpendicular lines running from the outer edge of such principal facade to the public street; and
 - (2) Containing readily removable tables, chairs, umbrellas, temporary railings, barriers and/or planters; and
 - (3) Unenclosed by fixed walls or ceilings, excepting fences, landscaping walls less than four (4) feet in height, retractable awnings, removable barriers, umbrellas, or other nonpermanent enclosures.
- H. Outdoor Seating – An accessory use to a food or beverage service establishment that provides an outdoor location for patrons to sit; however, does not include table service.
- I. Obstruction – Any tree, trash receptacle, street curb, parking meter, newspaper box, street sign or basement entry hatch lying within the area of the outdoor dining.
- J. Service Items – All dishes, utensils, containers, tablecloths, napkins, cutlery, and other items used in the operation or decoration of the outdoor dining area.
- K. Domes / Igloos – Coverings utilized for outdoor dining to protect diners from the elements.

§ 215-63 Permit required.

No person shall operate an outdoor dining area or outdoor seating area within the Borough of Mendham without obtaining an outdoor dining or outdoor seating permit by satisfying all the requirements of this Article. The permit shall be issued by the Zoning Officer and may contain conditions. The permit must be renewed annually. If an application is denied, the Applicant may file an appeal with the Zoning Board.

§ 215-64 Application.

- A. Each applicant for an outdoor dining or outdoor seating permit shall submit and file an application with the Borough, Zoning Officer together with five (5) copies of a layout plan (as defined below), and the appropriate fee. The application shall set forth:
 - (1) The name and address of the Applicant,
 - (2) The name and address of the owner of the principal building (if other than the applicant), and
 - (3) The name and address of the person who has prepared the layout plan; and shall be accompanied by the written authorization and approval of the owner of the principal building (if other than the applicant).
- B. The term “layout plan” shall mean a written plan setting forth the following information and such other additional information, if any, as may be subsequently requested by the Borough.

- (1) A description of the principal building and description of all properties immediately adjacent to such building; and
 - (2) A description of the proposed design and location of the outdoor dining or outdoor seating, its dimensions and all temporary structures, equipment, and apparatus to be used in connection with its operation, including tables, temporary fences and barriers, planters, service carts, chairs, awning, umbrellas (including any name to be displayed thereon), lighting and electrical outlets (if any); and
 - (3) A statement of the seating capacity of the proposed outdoor dining or outdoor seating and of the existing restaurant or service business actually operated by the applicant in the principal building; and
 - (4) A diagram demonstrating that pedestrian traffic along the sidewalk or outdoor area on which the outdoor dining or outdoor seating is proposed to be located will in no way be blocked by obstructions; and that the provisions of Section 215-70 be satisfied. Such diagram shall also include a drawing of the outdoor dining area or outdoor seating area itself with all appurtenances and shall show all obstructions' location within the area of the outdoor dining area. The diagram shall be drawn to scale and shall include all dimensions of any and all items located or proposed to be located within the area of the outdoor dining or outdoor seating. The layout plan shall be referred to the Zoning Officer, or other appropriate official designated by the Borough administration from time to time to review such plans, who shall thereupon recommend approval, disapproval, or modification of the plan within 10 business days following its submission. The Zoning Officer may also refer the layout plan to the Fire Chief, Chief of Police, Construction Official, Health Officer, Borough Engineer and/or the Borough Planner for their review and recommendation. The Zoning Officer may seek referral to the Planning Board for initial applications or renewals deemed by any Borough official to present potential impact to health, safety, welfare, or morals of the community; and
 - (5) If any service items shall be made of disposable or non-reusable materials, the proposed means for disposal of such service items, together with a drawing of the design of the proposed trash receptacles to be utilized.
- C. In the application to be submitted, the Applicant may request that the Borough Council grant the Applicant a waiver from compliance with any aspects of the requirements of §215-70 of this article.

§ 215-65 Insurance required.

No outdoor dining permit shall be issued unless the permit holder shall have first filed with the Municipal Clerk and a copy of an insurance policy or certificate of insurance, issued by a company duly authorized to transact business under the laws of this State, providing for the payment of not less than \$1,000,000 to satisfy all claims for damage by reason of bodily injuries to, or the death of, any person as a direct result of the operation of the outdoor dining or for injury to any person occurring on the premises occupied by such cafe, and further providing for the payment of not less than \$10,000 to satisfy all claims for property damage occurring as a direct or indirect result of the operation of such outdoor dining and naming the Borough of Mendham as an additional insured.

§ 215-66 Indemnification agreement required.

No outdoor dining or outdoor seating permit shall be issued unless the permit holder shall have first executed with the Municipal Clerk an indemnification agreement pursuant to which the permit, in further consideration of the issuance of the permit, shall agree to forever defend, protect, indemnify and save harmless the Borough of Mendham, its officers, agents and employees, from, and against, any and all claims, causes of action, injuries, losses, damages, expenses, fees and cost arising out of, or which may arise out of, the permit holders operation of such an outdoor dining area or outdoor seating area.

§ 251-67 Maintenance agreement required.

No outdoor dining or outdoor seating permit shall be issued unless the permit holder shall have first executed and filed with the Municipal Clerk a maintenance agreement pursuant to which the permit, in further consideration of the issuance of a permit, shall agree, at the option of the Borough, to either repair at its sole cost and expense, any damage caused to the sidewalk by the operation of the outdoor dining or outdoor seating area, or to reimburse the Borough in full for all costs and expenses incurred by it making any such repairs.

The Zoning Officer may require a bond to be filed by the permit in an amount to be fixed by the Borough.

§ 251-68 Permit fee.

The fees for an outdoor dining permit shall be as set forth in Chapter 102, Fees and Rates, of the Borough Code.

§ 215-69 Term of permit: renewals.

All outdoor dining or outdoor seating permits shall be issued for the period commencing March 1 and ending November 30 (inclusive) of a particular year. Permits may be renewed by filing of an application in accordance with the provisions of § 215-64. If a permit renewal is denied by the Zoning Officer, the Applicant may file an appeal with the Zoning Board.

§ 215-70 Rules, regulations, and specifications.

An outdoor dining or outdoor seating area authorized and operating pursuant to this Article shall comply with all of the following regulations and specifications and such others as may be adopted from time to time by the Borough Council of the Borough of Mendham.

- A. The outdoor dining or outdoor seating area shall be operated and maintained in conformance with the layout plan as finally approved.
- B. Igloos/Domed seating shall be permitted as part of the outdoor seating furniture and shall be counted as an accessory furnishing and not a separate structure.
- C. No furniture, apparatus decoration or appurtenance used in connection with the operation of the outdoor dining or outdoor seating area shall be placed within 50 feet of any fire hydrant, plug or standpipe without the specific written authorization of the chief of the Fire Department; and
- D. No furniture, apparatus, decoration, appurtenance used in connection with the operation of the outdoor dining area or outdoor seating area shall be located in such a way as to impede the safe and efficient ingress and egress to or from any building or structure. At least four (4) feet of unobstructed walkway shall be provided for access from any door or opening on the business facade to the street.
- E. The maximum outdoor seating capacity shall not increase the total seating capacity (inside and out) of the eating establishment by more than 20%. The outdoor seating may exceed 20% of the indoor capacity when an equal number of indoor seats are taken out of service. For food or beverage service establishments that have no indoor seating, up to 12 seats may be added for an outdoor seating area. All establishments must provide for a minimum 6-foot distance between tables and adjust the number of outdoor seats allowed accordingly.
- F. No furniture, apparatus, decoration, or appurtenance used in connection with the operation of the outdoor dining area or outdoor seating area shall be located in such a way that less than four (4) feet of paved sidewalk unobstructed remains open for the exclusive use of pedestrians (the "required pedestrian passageway"), nor shall any such furniture, apparatus, decoration, or appurtenance project or protrude into, on or above, the required pedestrian passageway. All outdoor dining areas (not required for outdoor seating areas) shall have portable barriers or planters not less than three feet nor more than four feet in height which shall be placed around the outdoor dining area on the sidewalk to define the cafe areas and the unobstructed pedestrian passageway. If the outdoor dining area is not on a sidewalk, a fence or barrier that conforms to the Borough's ordinances shall be permitted.

- G. Service items shall be made of non-disposable and reusable materials; provided, however that upon a showing of need by the Applicant and of adequate provision of outdoor waste receptacles for the disposal of disposable and non-reusable materials, an outdoor dining or outdoor seating permit may provide for the use of disposable and non-reusable items. The furniture to be used in the operation of the outdoor dining area shall be made of durable materials and tables shall be of adequate size to serve the patrons of the outdoor dining area.
- H. The outdoor area utilized by the outdoor dining or outdoor seating shall be kept clean and free of litter. Sidewalks/patios shall be washed daily, if needed, and trash receptacles shall be provided as required and approved from time to time by the Borough.
- I. Outdoor lighting shall be in accordance with the requirements of §195-47 of the Borough Code and shall adhere to the following standards:
 - (1) No colored lighting is permitted.
 - (2) All lighting must be directed towards the outdoor dining area or outdoor seating area and away from adjoining properties.
 - (3) All lighting exclusively lighting the outdoor dining area or outdoor seating area must be turned off when the outdoor dining area is closed.
- J. Noise shall be kept at such a level as to comply with all aspects of the provisions of the NJ State Noise Control Act (N.J.A.C. 7:29-1 et seq.).
- K. Outdoor dining areas or outdoor seating areas shall be permitted to operate only with a permit granted pursuant to this Article and only from 7:00 a.m. until 10:00 p.m. Monday through Thursday and 7:00 a.m. to 11:00 p.m. Friday and Saturday. Outdoor dining shall be permitted to operate from March 1 through November 30 (inclusive) of a particular year. Outdoor seating shall be permitted to operate year round.
- L. Within 30 minutes after the closing of the restaurant or service establishment, the operator shall have all furniture, apparatus, decorations, barriers, planters and appurtenances and any other items used in connection with the operation of such outdoor dining removed from any sidewalk. Outdoor enclosed patios may maintain sturdy furniture overnight, however other movable items such as umbrellas, bus areas, etc. shall be stored in a safe and secure interior location.
- M. One (1) outdoor menu display is permitted, not to exceed three (3) square feet.
- N. The outdoor dining area or outdoor seating area shall be operated and maintained by the same person who operates and maintains the related restaurant or service establishment to which the outdoor dining or outdoor seating is an accessory use.
- O. The operator shall comply with all ordinances of the Borough of Mendham, however outdoor dining shall be exempt from site plan review and parking requirements.
- P. Notwithstanding anything to the contrary in this Article or any other laws and ordinances of the Borough but subject to review and approval of the Borough Zoning Officer, a person may be permitted to display the name of the establishment operating the outdoor dining or outdoor seating area on umbrellas to be used at the outdoor dining area or outdoor seating area.
- Q. Fire pits and LP-gas fire pits are not permitted within any sidewalk area. LP-gas mushroom-type heaters are permitted but shall not be used in buildings, including tents, or partially covered canopy-type enclosures, foyers, and enclosed courtyards. For LP-gas mushroom-type heaters, the minimum safety instructions are, but not limited to, the following:
 - (1) The mushroom-type heater unit shall not be left unattended.

- (2) The unit shall be placed on a hard and level surface.
- (3) The unit's LP-gas tank shall be turned off when the heater is not in use.
- (4) The unit shall not be used if wind velocity is greater than 10 mph to prevent flame-out.
- (5) LP-Gas maximum inlet pressure shall meet the manufacturer's recommendations.
- (6) After the use, the heater unit shall meet the manufacturer's recommendations.
- (7) The unit shall only be used outdoors in a well-ventilated area.
- (8) The unit shall not be handled while in use.
- (9) The unit shall be so placed as to keep children away.
- (10) The units shall be placed at least five (5) feet from any flammable materials, such as carpet, drapes, decorations, chemicals, paper goods, furniture, etc.
- (11) Units shall be sufficiently anchored so as to prevent accidental tip-over.
- (12) Units shall be sufficiently cordoned-off as to prevent casual contact by the public.
- (13) Unit hook-up may require the use of a suitable crescent or box-end wrench only.
- (14) Tanks shall be stored five feet from any doorway or building opening.

Compliance with all such rules, regulations, and specifications to be ensured and confirmed by the Code Enforcement Officer, Borough Official, or their designee.

§ 215-71A Outdoor dining or outdoor seating outside permitted zone; other ad hoc variations.

Notwithstanding anything to the contrary contained in this Article or any other laws and ordinances of the Borough of Mendham, the Zoning Officer may issue permits to operate outdoor dining or outdoor seating which may otherwise vary from certain of the other requirements of this Article. All Outdoor Dining and Seating will be allowed only in permitted zones along Main Street and Hilltop Road. The issuance of such permits shall be on terms and conditions as the Zoning Officer may deem fit and may include, but shall not be limited to, the following situations: (a) the issuance of permits to establishments that are not situated in the permitted zone; (b) the issuance of permits to establishments which may not be deemed to be restaurants, but are deemed permitted and approved food or beverage establishments or restaurants under this Article; (c) the inclusion of certain private property as part of a particular outdoor dining area; and (d) the establishment of hours of operation which may differ from the requirements otherwise set forth in this article.

§ 215-71B Temporary suspension of Borough permit.

Notwithstanding anything to the contrary contained in this Article or any other laws and ordinances of the Borough of Mendham, the Borough may Temporarily suspend an outdoor dining or outdoor seating permit in the event of emergency or for other reasons or purposes including, but not limited to, the facilitation of Borough-sponsored events.

§ 215-72 Alcoholic beverages.

The outdoor dining area or outdoor seating area of an establishment that holds a Class C Plenary Retail Consumption permit (permit holder) upon which a restaurant has been authorized to operate pursuant to this Article may constitute premises for the sale and consumption of alcoholic beverages provided that the permit holder of the restaurant or

service establishment of which the outdoor dining or outdoor seating is a part obtains a place to place transfer of its existing liquor permit to include the outdoor dining area or outdoor seating area pursuant to the applicable provisions of Chapter 65 of the Code of the Borough of Mendham and N.J.S.A. 33:1-1 et seq. Such approval shall be separate from, and must be obtained in addition to, the permit to operate an outdoor dining area or outdoor seating area pursuant to this Article.

An establishment that does not hold a Class C Plenary Retail Consumption permit may permit patrons, as provided by N.J.S.A. 2C:33-27, to consume wine and beer in the outdoor dining area or outdoor seating area upon which the restaurant has been authorized to operate. All restrictions placed on establishments pursuant to N.J.S.A. 2C:33-27 will be strictly enforced.

§ 215-73 Enforcement officer; notice of violation; failure to comply.

The Zoning Officer of the Borough of Mendham (or his designee) shall be charged with the responsibility for enforcing the provisions of this Article. Upon a determination by the Zoning Officer (or his designee) that a permit holder has violated one or more of such provisions, the Zoning Officer shall give written notice to the permit holder to correct such violation within a time specified by the Zoning Officer. In the event that the permit holder fails or refuses to correct such violation within such time period, the outdoor dining permit or outdoor seating permit shall thereupon, and automatically, be revoked.

Upon the revocation of such permit, the permit holder, upon written request, shall be entitled to a hearing before the Zoning Board.

§ 215-74 Penalties.

Any person convicted of violation of this Article shall be subject to a fine not to exceed \$500. Each violation of a section or subsection of this Article, and each day that a violation continues shall constitute a separate offense.”

SECTION 2. Chapter 215, Zoning, Article VI, Historic Business Zone, Section 215-17B(5) is hereby amended to read as follows:

“Eating Establishments (excluding drive-throughs).”

SECTION 3. Chapter 215, Zoning, Article VI, Historic Business Zone, Section 215-17C is hereby amended to read as follows:

“Accessory uses and structures customarily incidental to permitted uses, including required off-street parking and solar panel systems subject to the standards set forth in § 215-31.1. The storage of all goods and materials shall be in the rear of any structure and shall be screened from view by a solid fence or wall enclosure. Outdoor dining and outdoor seating are subject to § 215-62 through § 215-74.”

SECTION 4. This Ordinance may be renumbered for the purpose of codification.

SECTION 5. All ordinances of the Borough of Mendham that are inconsistent with the provisions of this Ordinance, are hereby repealed to the extent of such inconsistency.

SECTION 6. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this Ordinance.

SECTION 7. This Ordinance shall take effect immediately upon final passage, approval and publication as required by law.

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[Certification and Signature Page Follows]

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Introduced, as amended: September 9, 2021
Public Hearing: September 27, 2021
 Tabled to October 13, 2021
 Tabled to October 25, 2021

Adopted: