

ORDINANCE 300

An Ordinance of the Common Council of the City of Elkins, West Virginia,
Revising Chapter 93: Streets, Sidewalks, and Public Places of the City Code
to Establish Rules and Regulations for Outdoor Dining in Public Spaces

WHEREAS, The Common Council of the City of Elkins, West Virginia, recognizes the positive nature of extending dining options to create an active streetscape and to encourage pedestrian and retail friendly traffic to the downtown area of the City; and

WHEREAS, the purpose of this Ordinance is to establish regulations for the facilitation of outdoor dining as a safe use of the public right of way; and

WHEREAS, it is in the best interests of the citizens of the City to provide an additional safe and appealing option for dining outdoors.

NOW THEREFORE, be it ordained and enacted by the Common Council of the City of Elkins, West Virginia that Chapter 93: Street, Sidewalks, and Public Places be amended and supplemented by adding the following sections: **OUTDOOR DINING IN PUBLIC PLACES**

Sec. 93.115 - Outdoor dining rules and regulations

The City of Elkins Zoning Officer is hereby authorized to promulgate reasonable rules and regulations regarding the administration of the requirements of this article, to review all Outdoor Dining Area permit applications and to either grant or deny such permits under this article. Copies of such regulations, as amended from time to time, shall be maintained by the Zoning Officer, posted on the City's website and filed in the City Clerk's office, and shall be available to interested parties at all reasonable times.

Sec. 93.116 - Compliance with federal, state, and local laws and regulations

(a) The operation of an Outdoor Dining Area pursuant to a permit granted under this article shall comply with the Americans with Disabilities Act, all provisions of state and local building and fire codes, as well as all state and local health laws and regulations regarding the service and preparation of food. The operations of an Outdoor Dining Area shall also be conducted in accordance with the code provisions and regulations of the West Virginia Alcoholic Beverage Control Administration (WVABCA). Nothing in this article shall be intended to alter or abridge any applicable federal, state, and local laws or the Operator's responsibility to comply with all code provisions and regulations of the WVABCA.

(b) Nothing in this article shall be intended to alter or abridge the prohibition of service of alcoholic beverages or possession thereof on public property in the City, except that any permitted Outdoor Dining Area Operator and patrons of permitted Operator's Outdoor Dining Area shall be deemed to be exempt from said prohibition during the hours of operation of the Outdoor Dining Area and only within the confines of said area.

Sec. 93.117 - Definitions

(a) *Operator* shall mean a person, organization, proprietorship, corporation, or other similar entity lawfully operating a business located in the City of Elkins', that possesses a valid State of West Virginia food vendor's permit and has been issued an Outdoor Dining Area permit.

(b) *Outdoor Dining Area* shall mean a confined area of the public sidewalk designated by a site plan approved by the City through its Zoning Officer, and which area is adjacent to Operator's building/permanent structure, where patrons may sit at tables while consuming food and beverages, which may include any beverage regulated by the WVABCA contingent on proper licensure by the WVABCA.

Sec. 93.118 - Permit Process

(a) An applicant for an Outdoor Dining Area permit shall file an application with the City of Elkins Zoning Officer. An application for an Outdoor Dining Area permit shall be accompanied by a \$25 annual permit fee , valid through June 30, for an outdoor dining area, and shall include: a site plan, drawn to scale showing the layout for the Outdoor Dining Area which accurately depicts the existing sidewalk conditions, including sidewalk width from building face to curb; location and dimensions of tree wells; locations of lamp posts, traffic and parking signs, signal poles, trash receptacles, benches, and other sidewalk features or obstructions; as well as design, location, size and space of the dining area, chairs, tables, aisles between tables; and if applicable, enclosures; routes of ingress and egress; clearances between the seating area and the curb; and any such additional requirements of the Zoning Officer with respect to type, style, or specifications of the Outdoor Dining Area, including those requirements subject to the approval of the WVABCA.

(b) After reviewing the application and site plan, the Zoning Officer shall determine if the proposed Outdoor Dining Area, consistent with the requirements of this article, is reasonable, promotes safe pedestrian and retail friendly vitality, and that there is adequate space remaining within the public right-of-way to facilitate safe circulation of pedestrian traffic, while promoting the overall public health, safety and welfare. Thereafter, the Zoning Officer may approve, approve with conditions, or deny an application. The approved plan and permit shall be posted at the Operator's premises, visible to customers and the public. No material change

to the approved plan shall be made without prior written approval by the Zoning Officer.

(c) The Outdoor Dining Area permit term shall be for one year to coincide with the city's fiscal year (July 1 – June 30), unless revoked prior to expiration, and may be renewed on an annual basis. An annual permit fee of \$25 shall be assessed for renewal of an existing Outdoor Dining Area permit.

(d) Any Operator holding a valid existing permit for a particular Outdoor Dining Area that continues to utilize that Outdoor Dining Area, shall be deemed to have re-applied for permission to use the same space for a succeeding permit term. Such Operator shall pay the applicable annual renewal permit fee, complete all renewal paperwork and comply with any other renewal requirements of the Zoning Officer, on or before June 30. If the Operator fails to meet all renewal requirements, then the Operator's permit shall be deemed to have expired.

(e) The issuance of an Outdoor Dining Area permit does not grant or imply vested rights to use of the area by the Operator, but instead is a privilege granted to the Operator. The City retains the right to deny the issuance of a permit or the renewal of a permit for any lawful reason. The City shall have broad discretion to grant or revoke permits issued pursuant to this article in the interests of promoting pedestrian and retail friendly vitality, and improving the overall public health, safety, and welfare.

Sec. 93.119 - Standards for outdoor dining areas

(a) The Outdoor Dining Area shall be located adjacent to the property of an existing and lawful establishment of a permitted Operator and shall be under the responsible direction and control of that Operator.

(b) The Outdoor Dining Area may be open to patrons between the hours of 6:00 a.m. and 11:00 p.m. daily. In the event a permitted Operator intends to serve any beverage regulated by the WVABCA in an Outdoor Dining Area, all code provisions and regulations of the WVABCA regarding permitted days and hours of service shall be followed.

(c) All furniture or other personal property located on the public sidewalk/right-of-way by Operator must be readily removable without damage to the surface of public sidewalk/right-of-way. Penetrations into or permanent fixtures placed upon the public sidewalk/right-of-way by Operator are strictly prohibited.

(d) The Zoning Officer shall have the authority to determine when furniture, personal property and associated enclosures must be removed from the public sidewalk/right-of-way.

(e) At least 42 inches of unobstructed corridor space must be maintained between the outer dimension of the Outside Dining Area and the curb or nearest obstruction, in order to ensure a clear pedestrian passageway along the sidewalk. In order to achieve a continuous pedestrian walkway, the pedestrian passageway shall be a straight line, parallel to the building face or curb line, for the entire length of the Outdoor Dining Area.

(f) An unobstructed clearance of 42 inches, must be maintained between a fire hydrant and any furniture or enclosures of an Outdoor Dining Area.

(g) The Outdoor Dining Area must be kept sanitary, neat, and clean at all times and shall be free from the accumulation of food and litter.

(h) In order to control litter, the use of disposable plates and utensils is discouraged.

(i) Noise from an Outdoor Dining Area which unreasonably disturbs neighboring commercial or residential occupants is prohibited.

(j) In order to serve any beverage regulated by the WVABCA in an Outdoor Dining Area, the designated area must be included in the floor plan for the licensed premises as approved by the WVABCA. Any beverage regulated by the WVABCA shall be served and consumed only on the enclosed or bounded portion of the public sidewalk designated and permitted by the City as an Outdoor Dining Area. Patrons are not permitted to carry any beverage regulated by the WVABCA out of the Outdoor Dining Area.

Sec. 93.120 - Additional Requirements

(a) Prior to the issuance of a permit, the applicant must agree, in writing, that it shall indemnify, defend, and save harmless the City, its officers, agents, and employees, from and against all liability, claims, suits, damages, losses, costs, attorneys' fees and expenses of any or all types arising out of, or related in any way to, the permitted Outdoor Dining Area.

(b) The applicant shall maintain such general liability insurance with at least \$1,000,000 coverage per each occurrence and shall ~~the~~ name as additional insured the City of Elkins, its agents, officers, directors and employees. A copy of said insurance policy shall be furnished to the City of Elkins.

(c) The authorization and privilege granted by a permit approved under this section shall be terminated due to the Operator's failure to comply with any federal, state or local laws, any unabated nuisances or whenever the City desires to use the affected public right-of-way for

any public purpose. In the event the City shall have a public need for use of the right-of-way, or the property affected by the right-of-way, the City may terminate the use of such right-of-way by written notification to the applicant for the removal of any encroachments, and the Operator shall cease use of the right-of-way unless and until such time the City has no public need for use of the right-of-way. Said removal shall be completed by the date specified in the notice and shall be accomplished by the applicant without cost to the City. If the applicant fails or neglects to remove the encroachment within the time specified, the City shall have the right to remove the encroachment, at the expense of the Operator, and shall not be liable to the Operator for any loss, financial or otherwise, or damage to the encroachment or personal property within the encroachment area.

Sec.93.121– Denial or Revocation of Permit

(a) An Outdoor Dining Area permit is a privilege granted to the Operator that may be revoked by the City upon finding by the Zoning Officer that the Operator has violated any federal, state or City law applicable to the Outdoor Dining Area or the operation thereof, including but not limited to, compliance with all code provisions and regulations of the WVABCA, that the continued operation of the Outdoor Dining Area poses a threat to the health, safety or welfare of the public, or that the Outdoor Dining Area constitutes a public nuisance.

(b) An applicant who has been denied a permit, or an Operator whose permit has been revoked may appeal the denial or revocation to the City of Elkins Board of Zoning Appeals (BZA). The provisions of Chapter 152 of the City of Elkins Zoning Ordinance shall apply. Such appeal may be made in writing within thirty (30) days following the decision appealed from, on forms available at the Zoning Officer, and shall set forth the basis on which the person contests the decision. Within ten (10) days of receipt of the appeal by the BZA, the BZA shall set a date and time for a public hearing. The public hearing shall be held within forty-five (45) days of receipt of the appeal to the BZA. The BZA shall conduct a public hearing on the appeal and may: deny the appeal and uphold the original order, requirement, decision or determination; grant the appeal and overturn the original order, requirement, decision or determination; or, issue an order which denies part of the appeal and grants part of the appeal. The BZA shall make written findings of fact and conclusions of law on which the BZA based its decision. The decision of the BZA may be appealed by either party, within thirty (30) days, to the Randolph County Circuit Court, as set forth in WV Code §8A-9-1, et seq.

Sec. 93.122 – Penalty

Any Operator who violates any provision of this article shall, upon conviction, be fined up to \$100 per day. Each day any violation of this article shall continue shall constitute a separate offense.

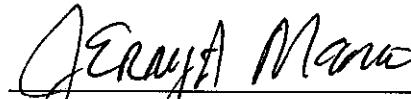
This Ordinance shall become effective upon passage.

If any portion of this Ordinance shall, for any reason, be declared invalid by any court of competent jurisdiction, such invalidity shall not affect the remaining provisions hereof and Common Council determinations that it would have adopted this Ordinance without the invalid provision.

PASSED AND APPROVED ON FIRST READING July 7, 2022.

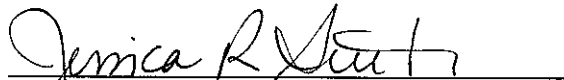
PASSED AND APPROVED ON SECOND AND FINAL READING THIS 28th DAY OF July, 2022

CITY OF ELKINS, WEST VIRGINIA



Jerry A. Marco, Mayor

Attest:



Jessica R. Sutton, City Clerk