

BOROUGH OF AVALON
CAPE MAY COUNTY
NEW JERSEY

ORDINANCE No. 874 - 2024

AN ORDINANCE AMENDING CHAPTER 26 OF THE CODE OF THE BOROUGH OF AVALON (SUBDIVISION AND SITE PLAN REVIEW) TO ALLOW OUTDOOR DINING FOR FOOD SERVICE ESTABLISHMENTS WITHIN THE BOROUGH SUBJECT TO OBTAINING AN OUTDOOR DINING PERMIT

WHEREAS, the Borough intends to approve outdoor dining as herein provided;

NOW, THEREFORE, BE IT ORDAINED BY THE BOROUGH COUNCIL, THE GOVERNING BODY OF THE BOROUGH OF AVALON in the County of Cape May and State of New Jersey as follows:

SECTION 1. Chapter 26 of the Code of the Borough of Avalon (Subdivision and Site Plan Review) Section 26-7.15 is hereby amended and supplemented, and shall hereafter read as follows:

§ 26-7.15 Outdoor Dining.

[Ord. No. 603-2008 § 26-7.15; Ord. No. 611-2009]

This entire section and all of its subparts are hereby stricken and repealed, and this Section shall now read and provide as hereinafter provided.

§ 26-7.15 Outdoor Dining.

§ 26-7.15-1 Factual Findings and Purpose

Borough Council hereby finds and determines that:

- a. Currently, outdoor dining is restricted by the Zoning Ordinance to only the B -1 business district. To include in other areas would require a zoning variance and site plan approval.
- b. At the advent of the COVID-19 Pandemic, the Borough developed the *AVALON TEMPORARY EMERGENCY RECOVERY PLAN* or TERP. This allowed restaurants, which had been closed and permitted to re-open but with capacity and distancing restrictions in place, to utilize outdoor dining to recover economically to some degree. Thus included, subject to some limitations, the use of the sidewalk and other areas of the Borough right-of-way (ROW).
- c. Outdoor dining proved successful and was very favorably received by operators and patrons alike. The NJ Division of Alcoholic Beverage Control, through a series of Special Rulings, allowed ABC licensed premises, with the consent of the municipality by zoning or otherwise, to sell alcohol for consumption on-premises in areas that were not then or previously included as part of the licensed premises. The Borough approved those actions and developed an outdoor dining permit. The ABC Special Rulings are now scheduled to expire November 30, 2024.
- d. For ABC (Alcoholic Beverage Control) licensed food establishments to continue serving alcoholic beverages outdoors after November 30, 2024, the licensee must file a place-to-place application to expand the designated licensed area to include the outside portions being used for outdoor dining.
- e. This amended ordinance would:
 - Authorize outdoor dining in all zoning districts and without the necessity of site plan review and approval;
 - Require applicants to obtain an Outdoor Dining Permit which would be valid for 5 years from date of issuance. A new application would be required if the property is sold or transferred or if there is any change in the outside dining area.

- Require that outdoor dining be confined to the deeded property with no use of the sidewalk or ROW provided, however, that special circumstances will authorize dining on the boardwalk at the fishing pier for reasons stated. See § 26-7.15-6.
 - Establish the procedure for obtaining such an Outdoor Dining Permit as well as the requirements for issuance of the Outdoor Dining Permit.
 - Establish regulations for the erection of temporary structures (e.g. tents) for outdoor dining.
 - Specifies that the Borough reserves the right to amend or rescind the outdoor dining ordinance when and if determined necessary to do so and that no person acquires any property or vested right in the outdoor dining privilege but that same remains subject to the Borough's exercise of its police power.
- f. The purpose of this subsection is to promote the concept of outdoor dining which enhances the relaxed atmosphere and truly showcases the beautiful downtown business district and other areas of the Borough by allowing people to enjoy the ambiance of such areas and to provide a mechanism to permit food service establishments to offer outdoor dining without the time and expense of formal site plan review in accordance with the requirements of this subsection.
- g. Previously, (as noted in subsection a hereof) the Zoning Ordinance restricted outdoor dining to the B-1 (Business) Zoning District only. As a result of the COVID-19 pandemic, the Borough permitted outdoor dining even in the Borough right-of-way pursuant to the Avalon Temporary Emergency Response Plan (TERP or Avalon TERP) since indoor dining was prohibited or capacity restricted. Outdoor dining was so favorably received by both operators and patrons that the Borough has determined to permit same for all food service establishments without regard to Zoning District and without having to apply for formal site plan approval but subject to the regulations imposed by this subsection.
- h. It is the intention of the Borough, however, to monitor and review the use of outdoor dining facilities after the adoption of this subsection to determine its full impact upon the Borough and its citizens and visitors.

§ 26-7.15-2 No Grant of Property Right

The future regulation of outdoor dining shall be regulated by Ordinances which may be adopted, or amended from time to time under the general police power vested in the Borough and as deemed necessary for the public good and any such ordinances shall not require referral to this Board as a land use ordinance.

Accordingly, The Borough of Avalon reserves the right to amend, terminate, or repeal this subsection under the municipal land use ordinances or otherwise, and consequently, no property rights are granted to, nor acquired by any persons(s) or entities by virtue of this subsection. All person or entities are hereby given express notice that any expenditures of funds in reliance on the provisions of this subsection are at their sole risk of loss in the event this subsection is amended, terminated, or repealed.

§ 26-7.15-3 Applicable to All Food Service Establishments

This subsection applies to all food service establishments in the Borough. Any food service establishment previously granted site plan approval shall be subject to this ordinance which is intended to supersede any prior site plan approval.

§ 26-7.15-4 Procedure for Approval of Outdoor Dining

- a. Any food service establishments for which this subsection is applicable must make application to the Avalon Borough Zoning officer **in accordance with the procedure hereafter established**. The application shall be on prescribed forms and be filled out completely and submitted with the zoning permit application and include the following information:
 - 1.** Scaled layout of proposed tables, chairs, and low barriers, showing dimensions of tables, chairs and overall area as related to building façade, sidewalk, existing poles, paper boxes, trees, or other sidewalk installations. The survey must be prepared by a licensed engineer or surveyor and shall be drawn to scale.

- 2.** A detailed narrative and plan of relevant information describing method of service, proposed hours of service outdoors and method of litter control and trash handling of outdoor service.
- 3.** Photographs or diagrams of tables, chairs, umbrellas, etc. should be utilized showing style, design, materials, size, and colors.
- 4.** In processing applications, the Borough Zoning Officer shall confer as necessary with the Police and Fire Departments, Code Enforcement Officer, Zoning and Planning Department, Borough Clerk and or Borough Engineer and shall use as criteria for decision making the following parameters:
 - (a)** Pedestrian safety;
 - (b)** Vehicular safety;
 - (c)** Public safety;
 - (d)** Acceptability of the management plan for cleanup, litter control and trash handling;
 - (e)** Impact on existing landscaping;
 - (f)** Any potential interference with police or fire safety access.
- 5.** For 2024 through November 30, 2024, an applicant previously approved for outdoor dining pursuant to the Avalon TERP shall be permitted to have outdoor dining to the same extent as permitted in 2023 provided, however, that no table or chairs for dining patrons shall be located with eight (8) feet of the curb line.

b. PROCEDURE:

1. The application must be submitted on prescribed forms provided by the Borough.
2. For 2025, and for all permit renewals thereafter, an application for outdoor dining must be submitted to the Zoning Officer not later than April 30 or at least 60 days prior to the time when outdoor dining first commences at the location.

Thereafter, the application for outdoor dining must be submitted to the Zoning Officer not later than April 30 in the year when the existing outdoor dining permit is scheduled to expire. The permit for outdoor dining on the boardwalk is issued annually and the complete application must be filed by March 1 of each year for which a permit is sought.
3. If approved, the approval shall be evidenced by a permit which shall be issued by the Zoning Officer and which shall be valid for five (5) years from the date of issuance.
4. Any change proposed in the outdoor dining configuration must be the subject of a revised application to be filed with the Zoning Official detailing with specificity the proposed change, and any approval on such modified plan will be valid for five (5) years from the date of issuance.
5. In the event that the property is sold, assigned, or transferred, a new application shall be filed with the Zoning Official by the new owner, tenant, or operator (collectively "OWNER") as the case may be and, upon issuance, shall be valid for five (5) years from the date of issuance. If the new owner does not propose any changes in the outdoor dining arrangement, the new owner may resubmit the existing plan and the permit will be based on such plan then currently in existence.
6. The applicant must provide evidence of compliance with the Business Registration and Compulsory Insurance and Business Registration Ordinance (ORD 854-2023 as mandated by P.L. 2022, c.92 – Avalon Borough Code Section 10-19 et seq.)

§ 26-7.15-5 Use of Borough Right of Way

Dining in the right-of-way which was previously allowed-pursuant to the Avalon Temporary Emergency Recovery Plan (TERP) for the duration of the COVID-19 Pandemic only, shall terminate December 1, 2024 and shall be prohibited thereafter, notwithstanding any other law, rule, regulation, Gubernatorial or Mayoral Executive Order to the contrary. Special rules shall apply to food service establishments on the Avalon Boardwalk as herein provided.

§ 26-7.15-6 FOOD SERVICE ESTABLISHMENTS LOCATED ON THE AVALON BOARDWALK

- (a) Those food service establishments which are located on the Avalon Boardwalk shall be permitted to engage in outdoor dining on the deeded portion of the property to the same extent and subject to the sale rules and regulations as all other restaurants and eating establishments as set forth in § 26-7.15.4(Procedure for Approval of Outdoor Dining).
- (b) The food service establishment located on the Avalon Boardwalk at 32nd Street that is part of the privately owned Avalon Fishing Pier, which had the privilege of outdoor dining during the COVID-19 Pandemic pursuant to the Avalon Emergency Response Program or TERP, and which does not have any exterior property, shall be allowed to continue outdoor dining, on a year-to-year basis commencing in 2024 utilizing the last plan approved by the Borough under the TERP. Thereafter, this privilege must be renewed annually by March 1. Such privilege is conditioned upon the following:
- (1) The applicant must have liability insurance in effect at the time of the application with the following limits of coverage:
- General liability insurance with a minimum of one million (\$1,000,000.00) dollars combined single limit bodily injury and property damage or split limit of one million/one million (\$1,000,000.00/\$1,000,000.00) dollars bodily injury liability and one hundred thousand (\$100,000.00) dollars property damage liability.
 - The Borough of Avalon must be named as an additional insured. It is not sufficient to merely name the Borough as a “certificate holder”.

In the event that the food service operator is a tenant and not the property owner, then the insurance requirement shall be applicable to both the property owner and the food service operator.

The Borough reserves the right to revoke the privilege hereby granted or to refuse to renew the annual license for any reason in the sole judgment and discretion of the Borough.

Special consideration is extended to this property to place tables and chairs in Borough property and/or the Borough right-of-way to the exclusion of all other dining properties due to the following considerations:

- i. There is no area or space within the deeded property to provide space for outdoor dining;
- ii. The unique location of this property on the Avalon Boardwalk overlooking the ocean and beach has proven to be an attraction for the public while providing a public service;
- iii. Past usage of the designated area for outside dining – while located on Borough property or in the Borough right-of-way – has not resulted in any interference with public access to the Boardwalk nor has it created any public safety issues or hazards;
- iv. The outdoor dining will only be approved on a yearly basis and the approval may be rescinded when it is determined that it no longer serves the public interest or interferes with the public use of the Boardwalk or creates any other undesirable or dangerous conditions.

§ 26-7.15-7 Other regulations

Each applicant shall also abide by the following regulations:

- (a) Hours of operation for outdoor dining shall not exceed those of the primary use nor exceed the hours of interior operations.
- (b) Food service establishments shall not be permitted to play music or have sound amplification in the outdoor dining area. No public address system shall be permitted.
- (c) No outdoor lighting shall be permitted except small self-powered table lighting, other than approved signs and light fixtures.
- (d) Low barriers of temporary nature may be placed at the edge of seating area during business hours so long as there is no interference with public safety or pedestrian movement patterns. Nothing is to be placed beyond the restaurant food service establishment's property line so as to infringe on the adjacent property owner or the public right-of-way.
- (e) There shall be no outside cooking or food preparation of any kind unless otherwise authorized by the Board.
- (f) Food purchased for consumption at an outdoor café may not be sold from a permanent or temporary area, which is located outside. Food service will be provided from inside the eatery.
- (g) All restaurants, including those holding licenses issued by the Alcoholic Beverage Control Division, which intend to utilize any outdoor enclosed facility ("facility") such as a tent for outdoor dining during winter weather conditions must obtain any permits from the Borough which are required under the New Jersey Uniform Construction Code ("UCC") or the New Jersey Uniform Fire Code or other law or regulation in effect. A UCC Permit shall be required for any electrical equipment, electrical wiring, or mechanical equipment that would otherwise require a permit. Permitting for tents, canopies, or other temporary structures shall be in accordance with the International Fire Code, New Jersey Edition then in effect (N.J.A.C. 5:70-3, Chapter 31, Tents and Other Membrane Structures. No such facility may be located in the public right-of-way and must be restricted to deeded portions of the property. Such facilities that are less than 120 square feet may be erected without a UCC Permit. Facilities that are or exceed 120 square feet shall obtain all required permits and are subject to inspection.
- (h) For purposes of this Subsection, the following terms shall have the meaning indicated:
 - 1) the term "alcoholic beverage license holder" or "ABC license holder" shall mean those licensees who are licensed for the sale and service of alcoholic beverages for on-premises consumption, including those licensed under the hotel exception and club licenses, (hereafter collectively referred to as "ABC Licensed Establishments") but excluding holders of ABC distribution licenses.
 - 2) The term "outdoor dining with alcohol" shall mean a restaurant or dining establishment which is also an ABC license holder and engages in outdoor dining with the sale, service, and on-premises consumption of alcoholic beverages.
 - 3) Every restaurant or dining establishment is authorized to engage in outdoor dining upon compliance with this Chapter and Section and upon obtaining an Outdoor Dining Permit from the Borough. This includes restaurants and dining establishments that are ABC license holders and subject to the following conditions:

- i. Those ABC Licensed Establishments that have heretofore engaged in outdoor dining with alcohol under a Covid-19 Permit issued by Special Ruling of the Division of Alcoholic Beverage Control and scheduled to expire on November 30, 2024 (ABC Administrative Order 2022-04)¹ shall be required to file a place-to-place application with the Borough to include those outside areas intended for dining with alcohol. This place-to-place application is in addition to the required Outdoor Dining Permit. Subsequent to November 30, 2024, those ABC Licensed Establishments, engaged in outdoor dining and sales of alcoholic beverages may do so only in those areas which have been expressly designated as part of the licensed premises.
- ii. Those ABC Licensed Establishments with an exterior area currently included as part of the licensed premises and intending to continue such areas as part of the licensed premises in annual renewals must also apply for an receive an Outdoor Dining Permit from the Borough in accordance with this Chapter and Section.

SECTION 2. REFERRAL; NOTICE TO ADJOINING MUNICIPALITIES AND COUNTY PLANNING BOARD; REQUIREMENT FOR FILING ADOPTED ORDINANCE.

- A. This Ordinance shall be subject to review and recommendation by the Avalon Planning and Zoning Board in accordance with N.J.S.A. 40:55D-26. The Cape May County Planning Board and adjoining municipalities shall be provided notice of this proposed ordinance in accordance with N.J.S.A. 40: 27-6.10 and N.J.S.A. 40:55D-15a.
- B. Upon adoption, this Ordinance shall not become effective until a certified copy of same is filed with the Cape May County Planning Board in accordance with N.J.S.A. 40:55D-16.

SECTION 3. REPEALER. All Ordinances or parts of Ordinances which are in conflict or inconsistent herewith are hereby repealed to the extent of such inconsistency or conflict only.

SECTION 4 SEVERABILITY. If any section, paragraph, subdivision, subsection, clause, or provision of this Ordinance shall be adjudged invalid, such adjudication shall apply only to the section, paragraph, subdivision, subsection, clause, or provision declared invalid and the remainder of this Ordinance shall remain in full force and effect and shall be enforceable.

SECTION 5: EFFECTIVE DATE: This Ordinance shall take effect December 1, 2024 upon final adoption and publication as required by law and, in accordance with Section 2 hereof.

¹ Outdoor dining, including the service and consumption of alcoholic beverages, was allowed on a temporary basis in exterior areas not specifically included as part of the licensed premises under the "Extension of Covid-19 Expansion of Premise Permits". commonly known as the Covid-19 Permit, without requiring a place-to-place transfer application. The Special Ruling is now scheduled to expire on November 30, 2024 and such establishments will now be required to file a place-to-place transfer to continue with such outdoor sales of food and alcoholic beverages. Since the Covid-19 Permit, issued pursuant to Special Ruling No. 2020-10, will now expire on November 30, 2024, all such license holders are encouraged to file the necessary place-to-place application concurrently with the 2024 renewal of the ABC license.

NOTICE OF PENDING ORDINANCE

The Ordinance published herewith was introduced and passed on first reading of the Municipal Council of the Borough of Avalon on February 28, 2024. It will be further considered for second reading, public hearing and final adoption at a meeting of said Council to be held on the 27th day of March, 2024 in the Meeting Room of the Municipal Building, Avalon, New Jersey at 4:00 p.m. and during the week prior to and up to and including the date of such meeting, copies of said Ordinance will be made available at the Clerk's Office in said Municipal Building to the members of the general public who shall request the same.

C. DANIELLE NOLLETT
Borough Clerk