

Chapter 15 - OUTDOOR DINING IN THE PUBLIC RIGHT-OF-WAY

Prior history: Former Ch. 15, Outdoor Dining in the Public Rights-of-Way Permitted, was added by Ord. 3054-C.S., amended during 11-98 supplement and by Ord. 3128-C.S., 3364-C.S. and amended in its entirety by Ord. 3407-C.S.

Article 1. - Outdoor Dining Encroachment Permit Required. [\[3\]](#)

Footnotes:

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Editor's note— Ord. No. 3582-C.S., § 1, effective February 22, 2013, amended Article 1 in its entirety to read as herein set out. Formerly, article 1, §§ 4.15.101—4.15.109 pertained to similar subject matter, and derived from Ord. No. 34-07-C.S., § 1, effective May 25, 2006.

4-15.101 - Purpose.

This article establishes uniform regulations and operational standards for outdoor dining in the public right-of-way, primarily in the downtown area. These outdoor dining regulations are intended to ensure public safety and welfare, protect public property and promote the attractive use of public right-of-way, by regulating the location, height, design and use of outdoor dining barriers and fixtures. The purposes of these regulations are also to:

- (a) Assist property owners and tenants establishing outdoor dining areas in the public right-of-way;
- (b) Protect public safety and maintain accessibility of the sidewalk or street;
- (c) Encourage outdoor dining area designs that provide a good design relationship, spacing and location relative to other improvements in the public right-of-way;
- (d) Encourage new business development and facilitate the expansion of existing businesses in downtown Modesto;
- (e) Promote downtown Modesto as a vital and attractive pedestrian district;
- (f) Maintain meaningful public circulation;
- (g) Create a dynamic and lively atmosphere by encouraging attractive and functional designs for outdoor dining.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.102 - Outdoor dining defined.

Outdoor dining is defined as a permitted area within the public right-of-way consisting of tables and chairs for the consumption of food or beverages and which provides on-premises customer seating.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.103 - Outdoor dining encroachment permit required.

No owner or operator of a business establishment shall occupy any portion of a public sidewalk, court, plaza, alley or street with tables and chairs for outdoor dining without first obtaining a revocable encroachment permit in accordance with the provisions of this article.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.104 - Authority to issue outdoor dining encroachment permits.

The City Engineer, or his or her designated representative, is hereby authorized to issue outdoor dining encroachment permits to owners or operators of business establishments. The location and configuration of any outdoor dining area shall be subject to the approval of the City Engineer who shall consider public safety issues unique to the pedestrian and vehicular needs of a specific location. The City Engineer shall have the authority to deny any encroachment permit application if its issuance is determined to be detrimental to the public health, safety or general welfare. The decision of the City Engineer may be appealed to the City Manager or to a designee of the City Manager, pursuant to the provisions of Modesto Municipal Code Section 4-15.203(g). The decision of the City Manager or designated representative shall be final.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.105 - Application for outdoor dining encroachment permit.

- (a) An encroachment permit shall be required for all outdoor dining areas in the public right-of-way. An application shall be filed with the Community and Economic Development Department on a form provided by that department. Every owner or operator of a business establishment desiring to place tables and chairs in a public sidewalk, court, alley or street shall first submit an application for the issuance of an outdoor dining revocable encroachment permit to the Community and Economic Development Department.
- (b) The application shall be accompanied by a space-use plan showing the location, number and arrangement of the tables and chairs to be used, the location of the entrance to the establishment, and the location of any existing sidewalk obstructions in the proposed area to be occupied by the tables and chairs. Trees and/or tree wells, traffic signs, planters, lamp posts, fire hydrants, parking meters, benches, barriers delimiting the dining area and all similar obstacles shall constitute obstructions.
- (c) Each application for an outdoor dining encroachment permit shall be submitted in accordance with the following requirements:
 - (1) Application Fee. The amount of the application fee is in an amount as shall be set forth from time to time by resolution of the City Council. The application must be signed by the business owner. This fee includes costs for review of the application and insurance, as well as pre-inspection and post-inspection of the outdoor dining site. No application fee shall be assessed for existing permit holders unless a new/revised permit is required.
 - (2) Proof of Insurance. Each application shall be accompanied by proof of insurance, as set forth in Section 4-15.109 of this article.
 - (3) Business License. Applicant must submit a copy of applicant's City of Modesto business license with the outdoor dining encroachment permit application.
 - (4) Outdoor Dining Areas With Barriers. Establishments that serve alcoholic beverages in the outdoor dining area shall provide a physical barrier that meets the requirements of this chapter and of the Alcoholic Beverage Control Board.
 - (5) Barrier Removal Deposit. A removal deposit shall be submitted at the time of application where a fixed barrier is proposed. If, at the time of cessation of outdoor dining use and/or revocation of use permit, the barrier is removed by the business owner or other responsible party, any

removal deposit will be refunded. The deposit will also be refunded if the encroachment use permit is denied. A removal deposit is not required for portable barriers. Existing permittees shall not be required to make a removal deposit unless a new/revised permit is required.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.106 - Issuance of outdoor dining encroachment permit.

- (a) No permit shall be issued until the permit applicant has paid the required application fee(s) associated with a one-time fee for the permit. The amount of the permit fee is in an amount as shall be set forth from time to time by resolution of the City Council.
- (b) No permit shall be issued until the applicant has complied with the Modesto Municipal Code and other applicable City standards as amended from time to time.
- (c) The permittee shall display a copy of the permit within the business establishment in an area clearly visible.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.107 - Indemnification for use of public property.

The permittee shall indemnify, defend and hold harmless the City, its officials, officers, agents and employees from any and all claims, causes of action, losses, injuries or damages arising directly or indirectly from the negligent acts, errors or omissions of the permit holder, its officers, agents, employees or anyone rendering services on its behalf. This indemnity shall include all reasonable costs and attorney's fees incurred in defending any action covered by this section.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.108 - Conditions and restrictions pertaining to outdoor dining encroachment permits.

- (a) Location, Dimensions and Design.
 - (1) Sidewalk Minimum Clear Path. The outdoor dining area shall leave a minimum of not less than five (5) consecutive feet of sidewalk width of clear continuous path measured from the curb line to ensure adequate space for pedestrian traffic on the adjacent sidewalk. The minimum width stated above must be free of all obstacles and obstructions for a clear path of travel. For the purpose of minimum clear path, traffic signs, trees, street furniture and all similar obstacles shall constitute obstructions. The specific requirements for this minimum clear path are set out on a diagram available to the applicant from the Community and Economic Development Department.
 - (2) Clear Zones. Outdoor dining areas on public sidewalks may not intrude on pedestrian clear zones at corners and thus must be set back a minimum of six (6) feet from any crosswalk.
 - (3) Curbs, Ramps and Driveways. The outdoor dining area must not interfere with curbs, ramps or driveways.
 - (4) Building Access. No element of the outdoor dining area may interfere with access to any building including all paths of travel or exit.
 - (5) Egress From Dining Establishment. A clear path of travel from the doors of the dining establishment to the sidewalk and street must be provided. The width of the clear path of travel shall be no smaller than the width of the dining establishment door(s) and no less than three (3) feet.

- (6) Barrier Height. Barriers shall maintain a minimum height of forty-two (42) inches and a maximum height of forty-eight (48) inches.
 - (7) Barrier Materials. Sectional fencing must be constructed of decorative metal (aluminum, steel or iron) and must be of a dark color (either painted or stained) to compliment downtown furnishings.
 - (8) Rope or Chain Barriers. Rope or chain barriers are permitted. The rope or chain must have a minimum diameter of one inch. Vertical support posts must be constructed of wood or metal.
- (b) Dining Areas Without Barriers or With Portable Barriers.
- (1) Outdoor dining areas without fixed barriers shall use portable barriers and/or portable fixtures (i.e. chairs, planters, table, etc.) that do not have any permanent or temporary attachments to buildings, sidewalks or other improvements.
 - (2) Portable barriers and fixtures shall not be allowed in the outdoor dining area more than sixty (60) minutes prior to business opening or more than sixty (60) minutes following close of business.
- (c) Dining Areas With Fixed Barriers.
- (1) Fixtures (i.e. chairs, planters, table, etc.) may remain in the outdoor dining area during non-business hours only if bolted or secured so as to prevent removal from the premises and to also ensure public safety.
 - (2) Upon discontinuation of use of the outdoor dining area or the adjacent associated business, any and all items used to secure the tables and chairs (bolts, screws, etc.) shall be removed from the sidewalk and the sidewalk shall be repaired subject to the satisfaction of the City Engineer.
 - (3) Fences and other barriers shall not be attached to the building.
- (d) Fixtures in Dining Areas.
- (1) Permitted fixtures must be contained within the approved dining area and shall be limited to tables, chairs, landscape planters, umbrellas, heaters and menu boards.
- (e) Landscape Planters.
- (1) Planters may be used in addition to or in place of other barrier designs.
 - (2) Planters shall not exceed a height of thirty-two (32) inches. Plants shall not exceed a height of seventy-two (72) inches (six (6) feet) above the sidewalk.
 - (3) Planters shall contain plant materials in healthy condition.
 - (4) Planters shall have a self-contained watering reservoir system that prevents any leakage onto the sidewalk.
 - (5) Debris or litter caused by landscape planters shall be maintained or cleaned by the encroachment permit holder or property owner.
- (f) Signage.
- (1) All signage in the outdoor dining area shall conform to Title 10 of the Modesto Municipal Code.
- (g) Maintenance and Operational Standards.
- (1) Lighting. Adequate lighting must be provided by the operator to ensure safety of customers and pedestrians. Lighting shall be maintained in good working order.
 - (2) Litter and Debris. The outdoor dining area must remain clear of litter, food scraps, soiled utensils and dishes at all times. The permittee shall maintain the tables and chairs in the permitted outdoor dining area in a clean condition at all times. No debris shall be swept, washed or blown into the sidewalk, gutter or street.

- (3) Pedestrian Access. It is the responsibility of the permittee to keep this sidewalk pedestrian zone clear and unimpeded for pedestrian movement. Movable items, like barriers, chairs or tables shall be positioned in accordance with the approved space-use plan at all times (outdoor dining occurs).
- (4) Code Compliance. Outdoor dining areas must conform to and comply with all relevant regulations in this Code and all applicable building laws, fire and life safety laws including State laws and regulations.
- (h) Permit Not Deed or Easement. Permission to encroach upon a portion of a public sidewalk with tables and chairs granted through issuance of an outdoor dining encroachment permit under this chapter shall not constitute a deed or grant of an easement by the City.
- (i) Exceptions. All businesses with a valid outdoor dining permit at the time of Council's final adoption of the ordinance codified in this chapter are exempt from the requirements of Sections 4-15.107(a), (b) and (c), but shall maintain existing permitted conditions including, but not limited to, the height, length, width, and placement of presently installed barriers. Said business will remain exempt until:
 - (1) A total or partial change of ownership for any reason;
 - (2) The business ceases to do business in its current location.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.109 - Insurance.

- (a) Each outdoor dining permittee shall provide evidence of insurance coverage as approved by the City's Risk Manager. The permittee shall obtain and maintain in force comprehensive general liability, broad form property damage and blanket contractual liability insurance in a combined single limit amount, per claim and aggregate, of at least one million dollars (\$1,000,000.00) covering the property and the permitted area on which the outdoor dining will be located.
- (b) The City of Modesto, its elected and appointed officials, officers, agents and employees shall be named as additional insureds on this policy. An endorsement must be issued as part of the policy reflecting compliance with this requirement.
- (c) A certificate of insurance shall contain provisions prohibiting cancellations, modifications, or lapse without thirty (30) days prior written notice to City. Said insurance shall apply as primary insurance and shall stipulate that any insurance maintained by the City shall be in excess of the permit holder's insurance and shall not contribute with it.
- (d) All new and existing permits must comply with these insurance requirements.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

4-15.110 - Outdoor dining encroachment permit annual renewal.

Annual Renewal Fee. An annual, non-refundable renewal fee shall be assessed for the costs of reviewing compliance, maintenance and insurance. The amount of the renewal fee is in an amount as shall be set forth from time to time by resolution of the City Council.

(Ord. No. 3582-C.S., § 1, effective 2-22-13)

Article 2. - Alcoholic Beverage Restrictions Applicable to Outdoor Dining Areas.

4-15.201 - Alcoholic Beverage Restrictions.

The service of alcoholic beverages in an outdoor dining area shall be limited to a "bona fide public eating place" as defined by the California Business and Professions Code. Bona fide public eating places are licensed premises that are maintained in good faith and used for the regular service of meals to patrons. The premises must have suitable kitchen facilities and supply an assortment of foods commonly ordered at various hours of the day. Each of the following standards apply to outdoor dining areas which provide alcoholic beverage service:

- (a) Barriers. The outdoor dining area must be clearly and physically separated from pedestrian traffic. All barriers, railings or fences placed around the dining area shall be in place during hours of operation to clearly define the area. The spacing, if any, between barriers, railings, fences or planters must prevent pedestrian traffic through them.
- (b) Written Notice. The business operator shall post a written notice to customers that drinking or carrying an open container of alcohol is prohibited outside the outdoor dining area.
- (c) State Licensure. The outdoor dining area operation must be duly licensed by the State Department of Alcoholic Beverage Control. The City of Modesto requirements and restrictions for the service of alcoholic beverages in outdoor dining areas shall not be less than those required by the State Department of Alcoholic Beverage Control.
- (d) Exits. Any and all exits from the bona fide public eating place to be used for the service of alcoholic beverages to the outdoor dining area must be included in the outdoor dining encroachment permit issued pursuant to this chapter.
- (e) The service of alcoholic beverages shall be restricted solely to on-premise consumption by customers within the outdoor dining area.
- (f) Outdoor dining areas shall not be used primarily for alcoholic beverage consumption, and the opportunity to order food from the dining establishment's menu shall be made available at all times when alcohol is served.
- (g) Police Department approval is required for alcohol sales after midnight in outdoor dining areas.

(Ord. 3407-C.S., § 1, effective 5-25-06; Ord. No. 3582-C.S., § 1, effective 2-22-13)

Article 3. - Suspension, Revocation and Penalties.

4-15.301 - Suspension/Revocation.

An outdoor dining encroachment permit shall be subject to suspension or revocation by the Public Works Director. A permit may be suspended or revoked if any of the permit requirements or terms and conditions contained in this chapter are violated. A permit may be suspended or revoked if necessary to preserve and protect the health and welfare of the public.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.302 - Termination of Insurance.

The outdoor dining encroachment permit shall be automatically suspended upon the termination of the insurance required under Section 4-15.108 of this chapter. Even upon termination of the insurance required under Section 4-15.109, permittee shall indemnify the City of Modesto as set forth in Section 4-15.107 of this Code.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.303 - Report to ABC.

The City of Modesto will notify the State Department of Alcoholic Beverage Control of any suspension or revocation of an outdoor dining encroachment permit granted under this chapter.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.304 - Suspension Limit.

Permits may be suspended for a period up to twelve (12) months depending upon the history and severity of violations.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.305 - Notice of Revocation or Suspension.

Prior to revoking or suspending an outdoor dining permit, the Public Works Director, or designated representative, will serve the permittee with a written notice stating the proposed grounds for the suspension or revocation and the effective date of the suspension or revocation. This notice will be sent by certified mail, return receipt requested, and/or hand delivered to the permittee or a managing employee. The notice shall provide the permit holder with information on the appeal process.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.306 - Appeal of Revocation or Suspension.

A written notice requesting an appeal to the City Manager shall be filed with the City Clerk not later than five (5) days after receipt of the notice of proposed suspension or revocation. Failure to file a notice of appeal within the five (5) day period waives the permittee's right to appeal and the Public Work Director's proposal will become final. If a timely notice of appeal is filed, the City Manager, or a designated representative, will set the matter for hearing no later than ten (10) days after receipt of the appeal notice by the City Clerk. The permittee may appeal the decision of the City Manager in writing to the City Council as set forth in Chapter 4 of Title 1 of this Code.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.307 - Penalties for Violations.

- (a) Citations. The City of Modesto may issue administrative citations for violations of this chapter pursuant to Sections 1-6.401 through 1-6.509 of this Code.
- (b) Appeals. A permittee may appeal any citation issued pursuant to the procedure set forth in Section 1-6.405 of this Code. The appeal hearing will be set and conducted as set forth in Section 1-6.501 et seq. of this Code.
- (c) Administrative Remedies. The City of Modesto may utilize any of the administrative remedies set forth in Chapter 6 of Title 1 of this Code as enforcement remedies for violation of this chapter.

(Ord. 3407-C.S., § 1, effective 5-25-06)

Article 4. - Failure to Obtain Encroachment Permit.

4-15.401 - Removal of Tables and Chairs.

- (a) Any tables and chairs placed in or upon the public sidewalk or right-of-way without a validly issued outdoor dining encroachment permit may be seized and removed pursuant to this section. Locations without permits must obtain a permit immediately or remove tables until compliance occurs.
- (b) The owner or operator of the business establishment shall be given ten (10) business days in which to remedy the violation. If the responsible party does not apply for and obtain an outdoor dining encroachment permit within the time prescribed, the City may seize and remove the tables and chairs.
- (c) Any other provisions of this chapter notwithstanding, if tables and chairs are placed in the public right-of-way and pose an immediate and serious danger to persons or property, the City may seize such tables and chairs without prior notice to the responsible party if it is impractical to remedy the danger by moving the tables and chairs to another point on the sidewalk or public right-of-way. The responsible party shall be notified promptly of such seizure.
- (d) All tables and chairs seized pursuant to this section shall be retained by the City and may be recovered as provided herein.
- (e) The person responsible for such tables and chairs shall pay an impound fee covering the actual costs of transporting and storing the outdoor dining tables and chairs before the seized property is returned.
- (f) If the responsible party contends the seizure was not authorized by this chapter, then an appeal hearing pursuant to Modesto Municipal Code Section 1-6.501 et seq. will be held. The decision of the hearing officer shall be final.

(Ord. 3407-C.S., § 1, effective 5-25-06)

Article 5. - Business Closure, Business Transfer and Other Operational Changes Impacting the Outdoor Dining Encroachment Permit.

4-15.501 - Business Closure.

When the business possessing an outdoor dining encroachment permit closes, the permittee must provide the City the following within the timelines designated:

- (a) **Written Notification.** Permittees must provide the City with written notification of the business closure within thirty (30) days prior to the anticipated closure date. Said notification shall include a schedule for removal of barriers and other outdoor dining fixtures.
- (b) **Removal of Barriers and Fixtures.** Permittees shall have thirty (30) days from the date of business closure to remove all barriers and other outdoor dining fixtures. Permittees shall notify the City for final inspection once all barriers and fixtures are removed. Failure to remove barriers within the thirty (30) day period and/or failure to maintain insurance, may result in the City taking action to remove the barriers and fixtures. Expenses incurred shall be billable to the permit holder and/or deducted from the deposit.

- (c) Maintenance of Insurance. Permittees shall continue to maintain valid insurance until such time as all barriers and outdoor dining fixtures are removed and the City has performed a site inspection.
- (d) Removal Deposit Refund. Once notified all barriers and outdoor dining fixtures are removed, the City will perform a final inspection. If said removal occurs within the thirty (30) day timeline allowed pursuant to Section 4-15.206, the permittee will be refunded the removal deposit, if any, provided for in Section 4-15.104 of this article.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.502 - Transfer of Ownership.

When a business possessing an outdoor dining encroachment permit is transferred from one owner to another, the permittee must provide the City with the following within the timelines established:

- (a) Written Notification. Permittees must provide the City with written notification of a business transfer within forty-five (45) days prior to the anticipated transfer date.
- (b) Maintenance of Insurance. Permittees shall continue to maintain valid insurance during the transition time from one owner to the next.
- (c) Permit Not Transferable. The outdoor dining encroachment permit is not transferable. The new business owner shall be responsible for applying for and obtaining a new outdoor dining encroachment permit in accordance with the provisions of Article 1 of this chapter.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.503 - Other Operational Changes.

When the business possessing an outdoor dining encroachment permit makes operational changes impacting the permit, including but not limited to, remodeling, expanding, changing hours of operation, obtaining a license to serve alcoholic beverages, etc., the permittee must provide the City with the following within the timelines established.

- (a) Written Notification. Permittees must provide the City with written notification of operational changes impacting the outdoor dining encroachment permit. Said notification must be made as soon as practicable, but not less than thirty (30) days prior to commencement of the operational change.
- (b) Maintenance of Insurance. Permittees shall continue to maintain valid insurance during the period when operational changes are being made, even if the outdoor dining use is temporarily suspended.
- (c) New or Amended Permit. Dependent upon the nature of the operational change, a new or amended outdoor dining encroachment permit may be required. The determination of the type of permit required shall be made by the Public Works Director or his or her designated representative.
- (d) Timeline. Permittees making operational changes shall have ninety (90) days to complete said changes and obtain a new or amended outdoor dining encroachment permit, where said permit is deemed necessary by the Public Works Director or his or her designated representative. Permittees unable to meet this timeline requirement must notify the Public Works Director in writing and request an extension to a date certain. The Public Works Director may, at his or her sole discretion, grant or deny the extension request.

(Ord. 3407-C.S., § 1, effective 5-25-06)

Article 6. - Protest and Appeal Process.

4-15.601 - Protest Issuance of Permit.

Upon application for an outdoor dining permit, the City will serve the property owners adjacent to the applicant's business with notice of application for an outdoor dining permit. The adjacent property owners may protest the issuance of said permit by checking the appropriate box on the notice and returning it to the Public Works Director within ten (10) business days of receipt of the City's notice of application. The Public Works Director will meet with all those protesting said application and consider the grounds for protest in reaching a final decision on the application.

(Ord. 3407-C.S., § 1, effective 5-25-06)

Article 7. - Miscellaneous.

4-15.701 - Severability.

It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this chapter are severable, and if any phrase, clause, sentence, paragraph, or section of this chapter shall be declared unconstitutional or otherwise invalid by the valid judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs, and sections of this chapter, since the same would have been enacted by the City Council without the incorporation in this chapter of any such invalid phrase, clause, sentence, paragraph, or section.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.702 - Violation—Penalty.

- (a) Except as otherwise specifically provided, violation of any of the provisions contained in this chapter shall constitute a misdemeanor.
- (b) In the event that any provisions of this chapter are violated by a firm or corporation, the officer or officers, or the person or persons responsible for the violation shall be subject to the penalty provided above.
- (c) Violation of any of the provisions of this chapter may be remedied by injunction or other civil proceedings commenced in the name of the City of Modesto by the City Attorney.

(Ord. 3407-C.S., § 1, effective 5-25-06)

4-15.703 - Americans With Disabilities Act.

Any person or entity receiving a permit hereunder shall fully comply with all the requirements of the Americans With Disabilities Act as currently existing or as may be hereafter amended.

(Ord. 3407-C.S., § 1, effective 5-25-06)