

Regular Meeting Agenda Item 2A

Monday, February 03, 2014

SUBJECT: The City of Fresno has submitted an amendment to its municipal code relating to outdoor dining for review by the Fresno County ALUC for a finding of consistency with the Fresno County Airports Land Use Compatibility Policy Plan (ALUCPP).

STAFF CONTACT: Laural Fawcett
(559) 233.4148 x 223 lfawcett@fresnocog.org

For the purposes of this review, it is understood that this ordinance amendment applies to **existing developed** areas in the vicinity of the airports within the City of Fresno.

The Fresno Municipal Code amendment is to SECTION 1. Section 12-328 of Article 3, Chapter 12 adding an Outdoor Dining Ordinance that allows establishments including Restaurants, Taverns, Delicatessens, Ice Cream Stores, Cafeterias, Banquet Halls, Bakeries, Micro-breweries, and similar uses to expand use of certain areas within the applicant's property, without requiring approval by the local jurisdiction of a special plan or permit. Instead, an over-the-counter application shall be submitted to the Director of Development and Resource Management for approval.

BACKGROUND:

ALUCPP consistency reviews are required (California PUC 21676) for local government plans and projects that are adopted or approved. Any proposed change or variance to any regulation or ordinance must also be submitted for ALUC review, to determine if issues of noise, safety, airspace protection, or overflight are involved. All further actions, regulations and permits requiring local jurisdiction approval to either new or existing development within the airport influence or safety review area (AIA), must be reviewed by the ALUC for consistency with the ALUCPP.

RECOMMENDATION:

Staff recommends a finding of consistency based on the following:

In the case of this amendment to the zoning ordinance, as long as the "over-the-counter" application is processed and approved, it is considered to be within that existing use and therefore not subject to ALUC review, unless voluntarily submitted.

The amendment limits the expanded outdoor dining area to less than 749 square feet with a maximum of 49 people within that area, well within the standard safety guidelines for the ALUCPPs in City of Fresno for this type of existing use.

BILL NO. _____

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF FRESNO, CALIFORNIA, ADDING SECTION 12-328, REPEALING AND RESERVING SUBSECTION (M) OF SECTIONS 12-220.5 AND 12-231.5, AMENDING SUBSECTION (d) OF SECTION 13-219, AND AMENDING SECTION 9-2503 OF THE FRESNO MUNICIPAL CODE RELATING TO OUTDOOR DINING.

THE COUNCIL OF THE CITY OF FRESNO DOES ORDAIN AS FOLLOWS:

SECTION 1. Section 12-328 of Article 3, Chapter 12 of the Fresno Municipal Code is added to read:

SEC. 12-328. OUTDOOR DINING

- A. This Section shall be known as the "Outdoor Dining Ordinance."
- B. Purpose. The purpose of this Section is to allow for the expansion and use of certain outdoor dining areas, without requiring a special permit, to promote business, revitalization, and public safety.
- C. Definitions. For the purpose of this Section, "Outdoor Dining" shall refer to a delineated area within a parcel, including patios and similar areas, located outside of and adjacent to a building used for consuming food or beverages at a table with chairs, a portion of which must be within 20 feet of said building. "Outdoor Dining" shall not include food preparation areas.
- D. Applicability. This Section shall apply to Restaurants, Taverns, Delicatessens, Ice Cream Stores, Cafeterias, Banquet Halls, Bakeries, Micro-breweries and similar uses. This Section shall also apply to Nightclubs with dancing prohibited in the Outdoor Dining area.
- E. General Requirements for Outdoor Dining Areas.
 - 1. No site plan, conditional use permit, or amendment to an existing special permit is required for expansion into an Outdoor Dining area if the proposed use is existing and authorized for any portion of the applicant's property, use of the Outdoor Dining area does not obstruct vehicular circulation, and Outdoor Dining use is not

Date Adopted:
Date Approved
Effective Date:
City Attorney Approval: _____

Page 1 of 8

Ordinance No.

expressly prohibited by a condition of an existing special permit, approved parcel or tract map, or zoning action. Instead, an over-the-counter application shall be submitted to the Director for ministerial approval consistent with this Section prior to use of the Outdoor Dining area. The application shall include a scaled exhibit depicting the location of the Outdoor Dining area (including proposed structures and barriers, locations of tables and chairs, and existing structures on the parcel), be signed by one or more of the record owners of the parcel of property, and contain any other information required by the Director. The Director shall provide a copy of approved applications to the Police Department and Fire Department.

2. Use of the Outdoor Dining area shall be subject to the same hours of operation as the existing authorized use for the property.
3. No updated or additional security plan is required if alcoholic beverages are not consumed or otherwise used in the Outdoor Dining area. For any use involving alcoholic beverages in the Outdoor Dining area the following standards shall apply:
 - a. In addition to an application to operate an Outdoor Dining area where alcoholic beverages are proposed to be consumed, an applicant may also submit an over-the-counter application for ministerial approval to immediately operate an Outdoor Dining area where alcoholic beverages are not consumed or otherwise used. The most recently approved application governs to the extent it regulates the same Outdoor Dining area.
 - b. For any use involving alcoholic beverages in the Outdoor Dining area, a security plan, and any additional information as the Director may reasonably require to evaluate the application, shall be submitted to the Director for review and approval by the Police Department.
 - c. Upon consultation with the Police Department, the Director has discretion to deny any application involving alcoholic beverages in the Outdoor Dining area for either “good cause” as defined in Section 12-326(H)(1), or for any unlawful nuisance identified by Section 10-708. The Director shall send written notice and a summary of the grounds for the denial to an applicant not less than 10 days prior to the denial becoming final. Denials are without prejudice; an applicant may resolve the unlawful nuisance or activity constituting “good cause” and re-apply at any time.

- d. Prior to the decision becoming final, an applicant may file with the Director a written appeal of such denial, along with any argument and evidence as to why the use should not be denied or revoked. Failure to timely appeal shall be deemed a failure to exhaust administrative remedies. Upon receiving an appeal, the Director shall consider all evidence and argument, and may deny the application if there is credible evidence of a violation. Notice of the Director's final decision shall be in writing and sent to the applicant. If the Director determines there is not sufficient grounds for denial, the application shall be approved if otherwise consistent with this Code and applicable law.
4. Multiple Outdoor Dining areas may be used. The total Outdoor Dining area associated with each establishment is limited to 49 persons or 749 square feet, whichever is less, for an over-the-counter application. Additional Outdoor Dining area up to 3,000 square feet may be approved with a special permit consistent with the design guidelines of this Section.
5. The Outdoor Dining area must maintain and allow for at least four feet of available and usable travel space for all walkways, sidewalks, entrances and exits. The Outdoor Dining area must not obstruct direct access or egress from any entrance or exit. Travel space between the Outdoor Dining area and the building used for consuming food and beverages cannot cross an area where vehicular traffic is allowed, and a 10 foot visibility triangle must be maintained at all driveways and vehicular entrances. An Outdoor Dining area adjacent to a roadway or vehicular travel area must be located at least six feet from the edge of curb. If the Outdoor Dining area would cause the total building occupancy to exceed 49 people, the building must have at least two unobstructed exits consistent with the Building Code.
6. No additional parking is required when the Outdoor Dining area is less than 749 square feet. Any portion of the Outdoor Dining area 749 square feet or more shall be included as gross floor area for the purposes of calculating off-street parking requirements at the rate set for "Restaurant & Tavern" in Section 12-306(l)(2.2)(d) of this Code.
7. The acoustical analysis requirements of Section 12-326(F)(7) are not applicable if the total Outdoor Dining area is less than 749 square feet and is limited to 49 persons or less. Instead, use of the Outdoor Dining area shall comply with the Noise Ordinance per Article 1 of Chapter 10. If a qualifying Outdoor Dining area is proposed to be used after 10:00 p.m. and is located within 500 feet

of property planned for residential uses, excluding any portion that is planned to allow residential mixed uses, an acoustical analysis with a diagram of the Outdoor Dining area must be conducted to ensure compatibility with the Noise Ordinance. If an acoustical analysis shows compatibility, the qualifying Outdoor Dining area can be used after 10:00 p.m. for such time as the consumption of food and beverages is otherwise authorized for the property if consistent with the assumptions in the analysis to ensure compatibility. A copy of the acoustical analysis must be submitted to the Director, kept on the premises associated with the Outdoor Dining area, and promptly made available for inspection upon request by any person. Any expansion of the qualifying Outdoor Dining area will require an updated acoustical analysis before it can be used after 10:00 p.m. This Section does not authorize use of the Outdoor Dining area after 10:00 p.m. if the acoustical analysis does not show compatibility with the Noise Ordinance.

8. Barriers around Outdoor Dining areas are not required, but are allowed subject to this Code if not more than four feet in height and maintain at least 50% transparency to the outdoor elements. Barriers cannot block or enclose existing ingress or egress to a structure absent prior authorization from the Building Official or designee. Barriers can be permanent or temporary, and may include moveable stanchions and similar items. All barriers must have at least one direct exit made by either providing a gap in the barrier, or with a door or gate that swings in the direction of egress travel equipped with panic hardware and having an operating force of no more than five pounds, or as otherwise required by accessibility regulations. An Outdoor Dining area, where alcoholic beverages are consumed, must comply with barrier requirements as may be established by the California Department of Alcoholic Beverage Control.
9. Allowed furnishings may include tables, chairs, umbrellas, landscape pots, wait stations, planters, benches, waste receptacles, and similar items that help to define pedestrian and other use of the outdoor dining areas. Materials must be of wood, metal, stone, terra cotta, cast stone, hand-sculpted concrete, a solid surfacing material, or recycled plastic. Plastic resin furnishings are prohibited unless made of commercial-grade materials; chain linked fencing is prohibited. No signs shall be affixed to or supported by the furnishings or fixtures except as authorized by the Sign Ordinance. Permanent fencing, barriers, lighting, heating, cooling or other fixtures are allowed with a building permit consistent with Chapter 11 (Building Permits and Regulations). Individual table umbrellas may be used; roof coverings, canopies, tents or similar items are prohibited except

with a building permit and subject to approval by the Fire Department. Furnishings such as tables and chairs, and fixtures such as portable heaters, shall not be stored in such a way as to be visible from the street for more than 72 hours. Furnishings and fixtures ready for use may remain in the outdoor dining area at all times even if visible from the street.

10. Outdoor Dining shall comply with all applicable federal, state or local laws, including Section 12-405(B)(9) (Installation of Outdoor Electric Lighting Fixtures), Article 5 of Chapter 10 (Fire Prevention), and Chapter 11 (Building Permits and Regulations) of this Code. In addition to any other remedies authorized by law, including citation, the City may revoke the approval following the process set forth in Section 12-405(E).
- F. Use of City of Fresno Property. Use of City of Fresno street easement or right-of-way, for Outdoor Dining purposes may be approved at the discretion of the Director after consultation with the Department of Public Works, subject to the following requirements in addition to those found in Subsection E except as noted:
1. No rent shall be charged for use of the encroachment area.
 2. No additional parking shall be required for use of the encroachment area for Outdoor Dining; the parking requirements of Subsection E are not applicable to this Subsection F.
 3. No updated security plan is required for use of the encroachment area, except an Outdoor Dining area involving alcoholic beverages shall comply with Subsection E(3) of this Section.
 4. Semi-permanent structures, facilities, fixtures or buildings are allowed, but are not required. Such semi-permanent items in the Outdoor Dining area shall be subject to this Code and require a street work permit. Permanent structures are not allowed.
 5. The total Outdoor Dining area associated with each establishment is limited to 49 persons or 749 square feet, whichever is less.
 6. A valid encroachment permit is required by Section 13-219. Consistent with Section 13-219, an applicant shall be required by the permit or covenant to maintain the encroachment area free of any nuisance in fact or in law, and shall conduct activities in full compliance with all applicable federal, state, and local laws. The applicant shall also be solely responsible for operation, maintenance and repair of the encroachment area, and shall provide bonding, indemnification and maintain insurance

acceptable to the City of Fresno. Applicant shall further agree the encroachment on the City of Fresno's property is a non-exclusive, revocable use. The City of Fresno, in its sole discretion, may revoke the encroachment permit upon determination by the Chief Administrative Officer, or designee, the use of any portion of the encroachment area is required for any municipal or public utility purpose, or is detrimental to or not in furtherance of the public health, safety, welfare and interest. The encroachment permit may also be revoked upon determination by the Chief Administrative Officer, or designee, the applicant has failed to comply with one or more of the terms, conditions, or restrictions of the permit and/or covenant. The revocation of an encroachment permit issued under this Section is not subject to Section 12-405(E). These terms, conditions and restrictions in the permit or covenant shall be recorded and run with the land.

7. Use of the encroachment area shall not cause the encroachment area, or adjacent property or right-of-way to become out of compliance with any applicable federal, state or local law including Chapter 11 of this Code.
 8. Outdoor Dining in the encroachment area shall leave available and usable travel space as required by Subsection E(5) of this Section.
- G. Termination. No vested or any other property right is created by the approval of this Section or by any use, or construction of any structures, facilities, fixtures, or buildings, authorized by this Section. Should the City of Fresno repeal or amend this Section, no claim for loss of property rights or due process of any kind shall be maintained against the City of Fresno.
- H. Severability. If any subsection, sentence, clause, or phrase of this Section is, for any reason, held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Section. The Council hereby declares that it would have passed this Section, and each subsection, clause or phrase thereof, regardless if any one or more subsections, sentences, clauses and phrases be declared unconstitutional.

SECTION 2. Subsection (d) of Section 13-219 of Article 2, Chapter 13 of the Fresno Municipal Code is amended to read:

(d) The Director shall revoke any encroachment permit upon determining that the applicant has failed to comply with one or more of the terms, conditions, or restrictions incorporated in the permit or the covenant and shall order the removal of all structures from the encroachment area. [This Subsection shall not apply to Subsection 12-328(F) of the Outdoor Dining Ordinance.]

SECTION 3. Subsection (M) of Section 12-220.5, Article 2, Chapter 12 of the Fresno Municipal Code is repealed and reserved.

SECTION 4. Subsection (M) of Section 12-231.5, Article 2, Chapter 12 of the Fresno Municipal Code is repealed and reserved.

SECTION 5. Subsection Section 9-2503, Article 25, Chapter 12 of the Fresno Municipal Code is amended to read:

SEC. 9-2503. DRINKING ON STREET OR PLAYGROUND.

(a) No person shall drink any beer, wine or other intoxicating beverage on any street, sidewalk, pedestrian mall, alley, highway, playground, parking lot open to the general public or other lot open to the general public.

(b) Subsection (a) of this section shall not be deemed to make punishable an act or acts which are prohibited by any statute of the State of California.

(c) Subsection (a) of this section shall not apply to any person in an encroachment area posted pursuant to subsection (d) of this section during business hours of the permittee restaurant.

(d) The operator of any restaurant which serves any beer, wine, or other intoxicating beverage for consumption in an area operated for restaurant purposes on any street, sidewalk, or pedestrian mall pursuant to an encroachment permit ~~issued by the Council~~ shall post and maintain signs in or adjacent to the encroachment area reasonably calculated to give notice of the limits of the area and the exception contained in subsection (c) of this section. The number, content, physical features, and locations of such signs shall be only as approved by the Police Chief. The external boundaries of any encroachment area in which intoxicating beverages may be consumed shall be clearly ~~designated by a painted line~~ [delineated consistent with the limits of the area depicted] in the signs.

(e) Subsection (a) of this section shall only apply to a parking lot or other lot open to the general public if:

(1) Pursuant to the property owner's written request, the Police Chief has determined that the lot is open to the general public, and

(2) The owner or operator has posted in a conspicuous place at each entrance to the lot a notice, approved by the Police Chief, to the effect that the lot is subject to the provisions of this section.

(f) Notwithstanding subsection (a) of this section, the Parks and Recreation Director [in consultation with the Police Chief,] may authorize the consumption of alcoholic beverages during an event of limited duration held in a mall area as defined in Section 14-1801(f) of this Code ~~and conducted by an organization when the event is for the benefit of a nonprofit organization, a charitable purpose, or the city.~~

SECTION 6. This ordinance shall become effective and in full force and effect at 12:01 a.m. on the thirty-first day after its passage.

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.
CITY OF FRESNO)

I, YVONNE SPENCE, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Council of the City of Fresno, at a regular meeting held on the ____ day of _____, 2014.

AYES :
NOES :
ABSENT :
ABSTAIN :

Mayor Approval : _____, 2014
Mayor Approval/No Return: _____, 2014
Mayor Veto: _____, 2014
Council Override _____, 2014

YVONNE SPENCE, CMC
City Clerk

BY: _____
Deputy

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

BY: _____
SHANNON L. CHAFFIN
Senior Deputy City Attorney

SLC:cg[63779cg/ORD]01.16.14