



# MEMORANDUM

## Town of Nags Head

### Planning & Development Department

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To: Planning Board

From: Michael Zehner, Director of Planning & Development  
Kelly Wyatt, Deputy Planning Director

Date: July 19, 2021; **Updated September 16, 2021**

Subject: Consideration of a text amendment to the Unified Development Ordinance allowing temporary accommodations for outdoor dining

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**\*\*Updated content in bold underline, deleted material in ~~strikethrough~~\*\***

### OVERVIEW AND BACKGROUND

As previously relayed to the Planning Board, the Board of Commissioners discussed temporary outdoor dining at their meeting on May 5, 2021, indicating their support to allow for the continued issuance of Temporary Use Permits until November 28, 2021 should the declared state of emergency be lifted. The Board additionally asked Staff to work on a text amendment to allow temporary allowances for outdoor dining regardless of a declared state of emergency, a topic that the Board discussed in the later part of 2020 and earlier in 2021. Generally, the Board discussed the possibility of amending the UDO to allow outdoor dining on a temporary or seasonal basis in a more flexible and simplified manner, allowing this where parking was not reduced below that which is required and/or seating not increased in excess of available and required parking, or in excess of wastewater capacity.

**The Planning Board discussed this at their meeting on July 20, 2021. Ultimately, the Board and Staff agreed to continue the discussion and consideration of amendments. Points raised at the July 20 meeting for further consideration include the following, with relevant minutes of the meeting attached:**

- **Whether the duration of the temporary use permit should be longer, that 90 days may be too short of a duration.**
- **Whether the number of extensions should be limited.**
- **Whether the temporary use permit provides an option for restaurants to try before making a longer commitment.**
- **Should the temporary use permit allow parking areas to be used for seating, whether used for serviced dining or not?**
- **An alternative to the temporary use permit may be to allow outdoor dining as an accessory use with supplemental regulations; however, would this be harder to track and enforce?**
- **Whether a hybrid option, where only a temporary use permit would be required if parking area was used, would be an option.**
- **Whether the number of times that a temporary use permit is issued should be limited, with additional interest requiring a site plan review.**

## CODE CONSIDERATIONS

As noted in a preliminary discussion with the Planning Board, Staff believes that there may be an opportunity to address this allowance through the modification of the Temporary Use Permit provisions that were adopted in 2020. **To be clear, restaurants wishing to establish an allowance to provide regular or occasional serviced outdoor dining could include such a request as part of a site plan review application, or as part of a subsequent application; however, there is currently no mechanism within the UDO allowing a restaurant to occasionally implement serviced outdoor dining without a site plan review application or without a Temporary Use Permit.** At present, the issuance of a Temporary Use Permit for a temporary use or the temporary modification of a use is only eligible during a declared State of Emergency (or due to the impacts associated with a declared State of Emergency). Staff is of the opinion that the provisions could be easily modified to allow for Temporary Use Permits to be issued at all times, for limited durations, for limited use types (at least initially, outdoor dining), and subject to certain limitations (i.e. no reduction of parking, no occupancy in excess of wastewater capacity, etc.). The operative provisions contained in the UDO are as follows:

### ***4.11.5. Temporary Use Permit.***

In the event of an emergency declared by the Mayor pursuant to Chapter 14, Emergency Management, of the Nags Head Town Code and/or NCGS 166A-19.22, or owing to impacts associated with a declared emergency, the Mayor may authorize the Town Manager and UDO Administrator, jointly, or their designees, to allow for reasonable temporary accommodations in zoning regulations consistent with and furthering the purposes of the emergency declaration and in the interests of public health, safety, and welfare. Such accommodations shall be in the form of the issuance of a Temporary Use Permit.

***4.11.5.1. Applicability.*** Temporary accommodations eligible for the issuance of a Temporary Use Permit include:

- The allowance of uses on a temporary basis, pursuant to Section 6.4., and specifically Section 6.4.6.1.;
- The modification of uses on a temporary basis, pursuant to Section 6.4., and specifically Section 6.4.6.2.; and/or
- The waiving or varying of any applicable provision contained in Article 8, Article 9, or Article 10 of the UDO, except as limited by Section 4.11.5.2.

***4.11.5.2. Prohibited Activities.*** The following activities or accommodations are ineligible for the issuance of a Temporary Use Permit:

- The increase of floor area and/or the construction or installation of permanent structures or buildings;

- The reduction of existing parking by greater than twenty-five percent (25%);
- The elimination of required landscaping or trees;
- The installation of more than one (1) additional temporary sign, limited in size and location pursuant to Part III., Sign Regulations, of Article 10, or signage beyond that which is necessary to provide for traffic control or public notices;
- The elimination, modification, or installation of driveways, except as necessary in the opinion of the Town Manager and UDO Administrator to accommodate the safe and efficient circulation of vehicles;
- The commencement of any water-dependent uses or activities;
- Any activity or accommodation, in the opinion of the Town Manager and UDO Administrator, that would be contrary to the purposes of the emergency declaration and/or the interests of the public health, safety, and welfare; and/or
- Any activity or accommodation that would not comply with applicable local, State, or Federal laws and regulations.

**4.11.5.3. Duration and Extension.** Temporary Use Permits shall be issued with an expiration date, not to exceed ninety (90) days from the date of issuance. Generally, at the discretion of the Town Manager and UDO Administrator, such temporary use permits shall expire upon the termination of the declaration of emergency, the end of the circumstances under or impacts associated with the declaration causing the need for the accommodations, or upon the timeframe set by the Mayor, whichever is later. Upon expiration, all temporary accommodations shall cease or otherwise be considered violations of the UDO, as applicable. Subject to the same limitations and discretion, the expiration date of a Temporary Use Permit may be extended, with such requests submitted no later than ten (10) business days prior to the pending expiration date.

**6.4.6. Uses or Modification of Uses with Temporary Use Permit.**

As authorized under and limited by Section 4.11.5., uses may be temporarily permitted or modified on a temporary basis, subject to a Temporary Use Permit, as follows:

**6.4.6.1. Temporary Use.** Any use identified in Section 6.6, Table of Uses and Activities, may be temporarily permitted pursuant to Section 4.11.5. in any zoning district, except that uses not identified as Residential or Residential - Group in Section 6.6. may not be permitted in the Residential

Districts or Special Districts identified in Table 6-1, Zoning Districts Established, unless otherwise permitted or allowed with a conditional use permit within such districts.

**6.4.6.2. Temporary Modification of Use.** Any use identified in Section 6.6., Table of Uses and Activities, as requiring a conditional use permit or being subject to supplemental regulations outlined in Article 7, Supplemental Regulations, may be temporarily modified pursuant to Section 4.11.5. in manner that would not be in compliance with any issued conditional use permit and/or supplemental standards, as applicable.

## **POLICY CONSIDERATIONS**

The Town's Comprehensive Plan does include at least one action, as follows, supportive of increasing opportunities for outdoor dining:

- **LU-2c** Focus on activating the front of commercial structures along the NC 12 corridor with uses that blend the private sphere of the business with the public sphere of the sidewalk and street. This can be accomplished through outdoor seating or dining.

## **STAFF RECOMMENDATION**

Staff is of the opinion that providing temporary accommodations for outdoor dining, with limits, is supported by the Comprehensive Plan, and Staff is of the opinion that an associated amendment is consistent with the Town's adopted Comprehensive Plan and is reasonable and in the public interest, and recommends adoption of the following amendments:

- Amendment of Section 4.11.5. and subsections, as follows:

### **4.11.5. Temporary Use Permit.**

Temporary use permits may be issued in the following circumstances:

4.11.5.1. To allow for temporary outdoor dining that qualifies as customer service area in association with a restaurant use, or to allow for the temporary use of parking areas for outdoor dining; such allowance shall not preclude similar requests being made pursuant and subject to Section 4.11.5.2. Such allowance shall not reduce parking. As part of such requests, parking shall not be reduced below that which is required for the use, nor increase seating/occupancy increased in excess of required parking or wastewater capacity. Such permits shall be issued jointly by the Town Manager and UDO Administrator, and shall be issued with an expiration date, not to exceed ninety (90) one hundred eighty (180) days from the date of issuance. Extensions shall not be authorized, and no new temporary use permit shall be issued for thirty (30) days upon expiration. Extensions of the originally granted temporary use permit shall be authorized, except that no temporary use permit shall be effective for greater than two hundred ten (210) consecutive days.

**Restaurant uses shall not be eligible for the issuance of a temporary use permit pursuant to this Section, where a temporary use permit pursuant to this Section was effective for the same site in each of the two (2) preceding calendar years; or**

**4.11.5.2.** In the event of an emergency declared by the Mayor pursuant to Chapter 14, Emergency Management , of the Nags Head Town Code and/or NCGS 166A- 19.22, or owing to impacts associated with a declared emergency, the Mayor may authorize the Town Manager and UDO Administrator, jointly, or their designees, to allow for reasonable temporary accommodations in zoning regulations consistent with and furthering the purposes of the emergency declaration and in the interests of public health, safety, and welfare. Such accommodations shall be in the form of the issuance of a Temporary Use Permit.

**4.11.5.2.1.** Applicability. Temporary accommodations eligible for the issuance of a Temporary Use Permit include:

- The allowance of uses on a temporary basis, pursuant to Section 6.4., and specifically Section 6.4.6.1.;
- The modification of uses on a temporary basis, pursuant to Section 6.4., and specifically Section 6.4.6.2.; and/or
- The waiving or varying of any applicable provision contained in Article 8, Article 9, or Article 10 of the UDO, except as limited by Section 4.11.5.2.

**4.11.5.2.2.** Prohibited Activities. The following activities or accommodations are ineligible for the issuance of a Temporary Use Permit:

- The increase of floor area and/or the construction or installation of permanent structures or buildings;
- The reduction of existing parking by greater than twenty-five percent (25%);
- The elimination of required landscaping or trees;
- The installation of more than one (1) additional temporary sign, limited in size and location pursuant to Part III., Sign Regulations, of Article 10, or signage beyond that which is necessary to provide for traffic control or public notices;
- The elimination, modification, or installation of driveways, except as necessary in the opinion of the Town Manager and UDO

Administrator to accommodate the safe and efficient circulation of vehicles;

- The commencement of any water-dependent uses or activities;
- Any activity or accommodation, in the opinion of the Town Manager and UDO Administrator, that would be contrary to the purposes of the emergency declaration and/or the interests of the public health, safety, and welfare; and/or
- Any activity or accommodation that would not comply with applicable local, State, or Federal laws and regulations.

**4.11.5.2.3.** Duration and Extension. Temporary Use Permits shall be issued with an expiration date, not to exceed ninety (90) days from the date of issuance. Generally, at the discretion of the Town Manager and UDO Administrator, such temporary use permits shall expire upon the termination of the declaration of emergency, the end of the circumstances under or impacts associated with the declaration causing the need for the accommodations, or upon the timeframe set by the Mayor, whichever is later. Upon expiration, all temporary accommodations shall cease or otherwise be considered violations of the UDO, as applicable. Subject to the same limitations and discretion, the expiration date of a Temporary Use Permit may be extended, with such requests submitted no later than ten (10) business days prior to the pending expiration date.

- Amendment of Section 6.4.6. and subsections, as follows:

**6.4.6. Uses or Modification of Uses with Temporary Use Permit.**

As authorized under and limited by Section 4.11.5., uses may be temporarily permitted or modified on a temporary basis, or temporary outdoor dining may be allowed. subject to a Temporary Use Permit, as follows:

**6.4.6.1.** Temporary Use. Any use identified in Section 6.6, Table of Uses and Activities, may be temporarily permitted pursuant to Section 4.11.5.2. in any zoning district, except that uses not identified as Residential or Residential - Group in Section 6.6. may not be permitted in the Residential Districts or Special Districts identified in Table 6-1, Zoning Districts Established, unless otherwise permitted or allowed with a conditional use permit within such districts.

**6.4.6.2.** Temporary Modification of Use. Any use identified in Section 6.6., Table of Uses and Activities, as requiring a conditional use permit or being subject to supplemental regulations outlined in Article 7, Supplemental Regulations, may be temporarily modified pursuant to Section 4.11.5.2. in manner that would not be in compliance with any issued conditional use permit and/or supplemental standards, as applicable.

**6.4.6.3. Temporary Outdoor Dining. Any existing restaurant use may provide temporary outdoor dining qualifying as customer service area, or make use of parking areas, pursuant to 4.11.5.1.**

With regard to the Planning Board's review and action, Staff recommends consideration of the following UDO provisions:

*3.5.3. Action by the Planning Board.*

*3.5.3.1. Every proposed amendment, UDO text amendment or zoning map amendment, shall be referred to the Planning Board for its recommendation and report. The Board of Commissioners is not bound by the recommendations, if any, of the Planning Board.*

*3.5.3.2. Prior to the consideration by the Board of Commissioners of a proposed UDO text amendment or zoning map amendment, the Planning Board shall advise and comment on whether the proposed amendment is consistent with the Comprehensive Plan. The Planning Board shall provide a written recommendation, certified by the UDO Administrator, to the Board of Commissioners that addresses plan consistency and other matters as deemed appropriate by the Planning Board, but a comment by the Planning Board that a proposed amendment is inconsistent with the Comprehensive Plan shall not preclude consideration or approval of the proposed amendment by the Board of Commissioners.*

*3.5.3.3. Members of the Planning Board shall not vote on recommendations regarding any UDO text amendment or zoning map amendment where the outcome of the mater being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member.*

Pursuant to Section 3.5.4.2. of the UDO, the Board of Commissioners may proceed to vote on the proposed ordinance, refer it to a committee for further study, or take any other action consistent with its usual rules of procedure. Prior to voting to adopt or reject the proposed text amendment, the Board should adopt a statement approving the amendment and describing the amendment's consistency with the Town's adopted Comprehensive Plan and explaining why the action taken is reasonable and in the public interest, a statement rejecting the amendment and describing its inconsistency with the adopted Comprehensive Plan and explaining why the action taken is reasonable and in the public interest, or a statement approving the amendment and containing at least all of the following:

- A declaration that the approval is also deemed an amendment to the Comprehensive Plan. The Board of Commissioners shall not require any additional request or application for amendment to the Comprehensive Plan.
- An explanation of the change in conditions the Board of Commissioners took into account in amending the UDO to meet the development needs of the community.

- Why the action was reasonable and in the public interest.

**Attachments:** *None*