

## ARLINGTON COUNTY CODE

## Chapter 70

## ENCROACHMENTS INTO PUBLIC SPACES

**§ 70-1. Encroachment Ordinance.****§ 70-2. Definitions.****§ 70-3. General Requirements for all Encroachments and Outdoor Cafe Licenses.****§ 70-4. No Ordinance of Encroachment or License Necessary.****§ 70-5. Outdoor Cafés. License Required.****§ 70-6. Outdoor Café Licensing Fees****§ 70-7. Penalty.****§ 70-8. Effective Date.****§ 70-9. Conflicts.****§ 70-1. Encroachment Ordinance.**

A. *Rationale:* Streets, highways, roads, alleys, rights-of-way and real property interests dedicated to or conveyed for public use belong to the general public. No private individual or entity has a right to use public streets, highways, roads, alleys, rights-of-way and real property interests dedicated to or conveyed for public use for private purposes, or in any manner not permitted to the general public, without the consent of the County Board. Any such use constitutes the unlawful use of public property for private purposes and is a Class 4 Misdemeanor and a nuisance under state laws. The County Board is empowered to prevent, remove or require the removal of unlawful encroachments on such public streets, highways, roads, alleys, rights-of-way and property interests dedicated to or conveyed for public use. (Va. Code § 15.2 – 1800; § 15.2-2009; -2018; § 18.2-11)

B. *Purpose:* To authorize owners or occupants of property abutting any public street, highways, roads, alleys, rights-of-way and property interests dedicated to or conveyed for public use to construct, own and maintain structures in, upon and over such public property within the limitations and upon such terms and conditions as the County Board may proscribe by specific ordinance or as may be administratively approved in accordance with this Chapter. Any license or permission authorized pursuant to this Chapter is discretionary, and there is no guarantee that permission will be granted. Encroachments and licenses issued pursuant to this chapter may be revoked for noncompliance with the terms of the permit or license granted or for other reasons that affect the health, safety and welfare of the public.

C. *Authorization:* Unless provided herein or permitted by applicable law, it shall be unlawful to erect, construct, locate, maintain, use, obstruct or encroach, in, under, upon, or over any street, highway, road, alley, bridge, viaduct, subway, underpass or public easement, public right-of-way or Public Space, in a manner not permitted to the general public, without: 1) the enactment of an Ordinance of Encroachment by the County Board; 2) determination by the County Manager, or his/her designee, that an Ordinance of Encroachment or a License is not required in accordance with the provisions of this Chapter; or 3) the issuance of an Outdoor Café License by the County Manager, or his/her designee, in accordance with the provisions of this Chapter. (Va. Code §15.2-2009)

**§ 70-2. Definitions.**

- A. The following words and terms, when used in this Article shall have the following meanings:
1. *Owner* means the owner of real property with a building, structure or use which encroaches into a Public Space.
  2. *Applicant* means an Owner or occupant of real property requesting an Encroachment or an Outdoor Café Permit.

3. *License Holder* means an Owner or occupant of real property to whom the Outdoor Cafe License is issued.
4. *Awning* means an architectural projection that provides weather protection, identity or decoration and is partially or wholly supported by the building to which it is attached. An awning is comprised of a lightweight frame structure over which a covering is attached.
5. *Canopy* means a permanent structure or architectural projection of rigid construction over which a covering is attached that provides weather protection, identity or decoration. A canopy is permitted to be structurally independent or supported by attachment to a building on one or more sides.
6. *Architectural Feature* means a portion of a building, or permanent outside structure, including, but not limited to, a pediment, overhang, balcony, that is integrated into a building's structure.
7. *Building Code* means the Virginia Uniform Statewide Building Code, as amended.
8. *Building Official* means the Arlington County official who has the sole responsibility of interpreting and enforcing the Building Code.
9. *County Manager* means the County Manager of Arlington County, Virginia or his/her designee.
10. *Ordinance* means an Ordinance of Encroachment passed by the County Board.
11. *Outdoor Café* means an area that contains portable seating and tables, intended solely for the consumption of food and beverages that are also included in the standard menu of the restaurant, outside the exterior walls of a restaurant (excluding rooftops).
12. *Outdoor Café License* or *License* means an annual license issued consistent with this Chapter allowing encroachment of an Outdoor Café into a Public Space.
13. *Public Space* means public right-of-way, street, easement or other real property interest dedicated or conveyed for public use.
14. *Public Street, Highway or Road* means a public thoroughfare, 30 feet or more in width, including any public interest in land (e.g., fee or easement) dedicated or used for public street purposes; also includes public alleys, which are public thoroughfares, less than 30 feet in width, including any public interest in land (e.g., fee or easement) dedicated or used for public alley purposes.
15. *Zoning Administrator* means the Arlington County official who has the sole responsibility of interpreting and enforcing the Zoning Ordinance.
16. *Zoning Ordinance* means the Zoning Ordinance of Arlington County, Virginia, as amended.

### **§ 70-3. General Requirements for all Encroachments and Outdoor Cafe Licenses.**

A. *Application.* All Owners/Applicants seeking an Ordinance of Encroachment, administrative approval of any encroachment not requiring an Ordinance of Encroachment or an Outdoor Café License shall prepare and submit an application for such Ordinance, administrative approval of an encroachment or Outdoor Café License on forms, and with supporting information, as determined by the County Manager or his/her designee.

B. *Application Fee.* At the time of application for an Ordinance of Encroachment, an administrative approval of an encroachment not requiring an Ordinance of Encroachment or an Outdoor Café License, the Owner/Applicant shall pay the County a non-refundable fee of One Hundred and fifty dollars (\$150.00). The Outdoor Café License application fee shall be paid only once at the time of the initial application or amendment application, as long as all of the Owners/Applicants and areas of use remain the same year to year.

C. *General Requirements.* In addition to any other requirements imposed by the County Code, including, but not limited to the Zoning Ordinance, Chapter 22, or any applicable federal, state or local Ordinance(s) or statutes, including the Building Code, the Owner/Applicant agrees to the following requirements for all Ordinances or Outdoor Café Licenses (“*General Requirements*”):

1. *Maintenance of area of encroachment.* The Owner/Applicant shall, at their sole cost and expense, continuously and, at all times, promptly maintain any structure and the area of encroachment designated in the License or in the Ordinance for the same, including, if applicable, snow and ice removal.
2. *Liability insurance.* The Owner/Applicant shall obtain and maintain a policy of general liability insurance, acceptable to the County, in the amount of Two-million dollars (\$2,000,000), or such other amount required by the County Risk Manager, which shall insure the County, as an additional named insured, against all claims, demands, suits and related costs, including attorneys’ fees, arising from any bodily injury or property damage which may occur as a result of the encroachment or the License. Such insurance coverage shall be maintained in full force and effect continuously, and at all times, throughout the term of the License or ordinance, and any renewal or extension thereof, and for one (1) year thereafter. The Owner/Applicant shall furnish the County with a certificate of insurance indicating that the insurance is prepaid for a one-year policy period as part of an application for an encroachment or Outdoor Café License.
3. *Indemnification.* The Owner/Applicant shall indemnify, and hold harmless, the County Board of Arlington County, Virginia and all County officials, officers, employees, and agents from and against any and all claims, negligence, damages, costs and expenses arising out of the permission for the encroachment or the issuance of an Outdoor Café License.
4. *Sovereign Immunity.* The authorization granted by an ordinance of encroachment or an Outdoor Café License is not intended to constitute, and shall not be deemed to be, a waiver of sovereign immunity by or on behalf of the County or any of its officers or employees.
5. *Damage to property.* The County shall not be responsible for damage to the private property encroaching into the Public Space or the private personal or real property adjacent thereto during repair, maintenance or replacement of the improvements and facilities in the Public Space or any public facilities or utilities in the general area of the encroachment.
6. *Temporary removal of encroachment.* In the event of an emergency, such as utility work or infrastructure repair, in the general area of an encroachment, or damage to a structure or area of encroachment, the County may, by written notice delivered to the Owner/License Holder, require the Owner/License Holder, at their sole cost and expense, to remove or repair the structure or area of encroachment within twenty-four (24) hours of delivery of said notice. If the item or area of encroachment is not removed or repaired within twenty-four (24) hours of delivery of said notice, the County shall have the right, at the expense of the Owner/License Holder, to remove or repair the item or area of encroachment and shall not be liable for any loss or damage to the encroaching structure or area that may occur as the result of such removal. In no event, shall the County be responsible for replacing such removed structure or area of encroachment.

7. *Removal of encroachment.* If the County determines that the encroachment or an Outdoor Café License is inconsistent with the public health, safety or welfare, subsequent development plans or policies or zoning ordinance requirements, or an Outdoor Café License terminates, is discontinued or expires, the Owner/License Holder shall, at their sole cost and expense, remove the encroachment and fully restore the area of the encroachment to its pre-encroachment condition. In such case, the County may provide the Owner/License Holder with written notice of the need to remove the encroachment at least ten (10) days prior to the date on which the removal must be completed. If the Owner/License Holder fails to remove the encroachment within the time specified, the County shall have the right to remove the encroachment, at the sole expense of the Owner/License Holder, and the County shall not be liable for any loss or damage to the encroaching structure that may occur as a result of such removal.

**§ 70-4. No Ordinance of Encroachment or License Necessary.**

The following features located in, under, upon or over a Public Space (“*Allowed Encroachments*”) are permitted without a License or an Ordinance of Encroachment provided that such Allowed Encroachments are: 1) not located in, under, upon or over an area of a Public Street, Highway or Road; 2) meet the following requirements; and 3) a plan depicting such Allowed Encroachments has been submitted and approved by the County Board in a site plan or use permit process or by the County Manager in an administrative process (“*Approved Plan*”). All of the *General Requirements* for Ordinances and Licenses in § 70-3 above, except for the requirement of liability insurance, shall apply to Allowed Encroachments.

- A. *Canopies and awnings*, provided that such Canopy or Awning:
  1. Is not located above any public utility vault or public utility line;
  2. Is suspended from the face of a building or structure;
  3. Has no ground supports and is fully removable;
  4. Maintains a clearance of at least ten (10) feet, or as provided by the Building Code, whichever is greater, above a Public Space to the lowest edge of the Canopy or Awning;
  5. Extends no more than six (6) feet horizontally into or over the adjoining Public Space;
  6. Maintains any clear walkway area required by all federal, state or County laws or regulations, including, but not limited to, the Zoning Ordinance, the Building Code and applicable site plan or use permit ordinance;
  7. Contains no permanent fixtures such as, among other things, fans, heaters or sprinklers;
  8. Extends from the face of the building to the outer edge of the canopy or awning, no more than six (6) feet overall;
  9. Extends into the Public Space no further than to a point that is five (5) feet behind the back of curb; and
  10. Meets all applicable provisions of the Zoning Ordinance and the Building Code, if such canopy or awning incorporates a sign.
- B. *Projecting Signs*, provided they:
  1. Are permitted under the Zoning Ordinance, the Building Code and any applicable federal, state or County laws or regulations;
  2. Project no more than forty-two (42) inches into the Public Space;

3. Located at least ten (10) feet above the finished grade beneath such sign; and
  4. Do not interfere with access to a public utility vault or public utility line.
- C. *Architectural Features*, provided they:
1. Are attached to the face of a building or structure;
  2. Have no ground supports;
  3. Maintain a clearance of at least sixteen and one half (16 1/2) feet above the Public Space to the lowest edge of the architectural feature;
  4. Extend no more than four (4) feet into or over the adjoining Public Space;
  5. Maintain any clear walkway area required by all federal, state or County laws or regulations, including, but not limited to, the Zoning Ordinance, the Building Code and applicable site plan or use permit ordinance;
  6. Extend from the face of the building to the outer edge of the architectural feature, no more than four (4) feet overall;
  7. Extend into a Public Space no further than to a point that is five (5) feet behind the back of curb; and
  8. Do not interfere with access to a public utility vault or public utility line.
- D. *Stoops and Stairs*, provided they:
1. Are attached to the face of a building or structure;
  2. Extend no more than four (4) feet into or over the adjoining Public Space;
  3. Maintain any clear walkway area required by the Zoning Ordinance, Building Code and any applicable federal, state or County laws or regulations;
  4. Extend from the face of the building to the outer edge of the stoop or stairway, no more than four (4) feet overall;
  5. Maintain a clear space of a minimum of six (6) feet between the Stoops/Stairs and the back of curb; and
  6. Do not interfere with access to a public utility vault or public utility line.
- E. *Planters, fencing, tables, chairs, benches and other similar items*, provided they are removable and are not affixed to the ground in any manner.
- F. *Bicycle Racks, Street Furniture*, provided their placement has been approved on an Approved Plan.
- G. *Ordinance Required.* An ordinance of encroachment enacted by the County Board is required for all canopies, awnings, projecting signs, architectural features, stoops/stairs, planters, fencing, tables, chairs, benches and other similar items that do not meet the standards set forth above in this § 70-4.

**§ 70-5. Outdoor Cafés. License Required.**

A. *License for Certain Outdoor Cafés.* Outdoor Cafés located over, under, upon, and within a Public Space, otherwise allowed by the Zoning Ordinance and the Building Code, may be permitted by an annual Outdoor Café License in accordance with the requirements of this Chapter, provided that:

1. There are no elements permanently affixed to the real property, including, among other items, a canopy or awning, fences, tables and chairs, or heating or cooling elements, associated with the Outdoor Café; however, low fences or low barriers (less than three (3) feet tall) that are within and along the Outdoor Café area shall be permitted to be affixed to the ground so long as they are removable and upon removal, the area where the fence or barrier is affixed can be capped or filled in a manner resulting in a surface that is flush with the surface of the Public Space;
2. The proposed Outdoor Café does not interfere with public infrastructure or public or private utilities located nearby or below the area upon which the Outdoor Café is to be located;
3. The proposed Outdoor Café complies with all conditions and applicable provisions of the Zoning Ordinance, any applicable use permit or certificate of occupancy and the Building Code, including, among other items, clear sidewalk space, and size requirements, and all federal, state or County laws or regulations; and
4. The proposed Outdoor Café shall not be located within any fire lanes, bicycle or vehicle travel ways, loading dock areas, transit stops or emergency vehicle access areas; and
5. The Applicant, along with the written consent of the owner of the property upon which an Outdoor Café is located, submits an initial application and thereafter, an annual renewal application, along with an annual fee for the use of the Public Space in the amount specified by the County Board in an approved fee schedule.

B. *Administrative Outdoor Café License process.*

1. An Applicant for an Outdoor Café License, with the written consent of the property owner upon which an Outdoor Café is located, shall file an application with the County Manager on such forms, with such supplemental information as determined by the County Manager, and subject to such procedures as the County Manager may establish for the purpose.
2. The application shall include a plan (“Outdoor Café Plan”) depicting the following:
  - a. The area of the proposed Outdoor Café, with dimensions, to scale, showing the layout for the Outdoor Café area;
  - b. The existing and proposed conditions in the proposed Outdoor Café area or areas adjacent thereto, including, but not limited to:
    - i. The sidewalk and sidewalk width from building face to curb;
    - ii. All streetscape features, including, but not limited to:
      - a. the location and dimensions of tree wells;
      - b. locations of lamp posts, traffic and parking signs, signal poles, trash receptacles, benches, and other sidewalk features or obstructions;
    - iii. The design, location, size and space of the Outdoor Café area, chairs, tables, barriers, fences, post holes, umbrellas and other facilities to be located within the Outdoor Café area;
    - iv. The location of County real property interests in the area of the proposed Outdoor Café area, including any historic preservation easements;

- v. The deed book and page number or instrument number whereby the County real property interests were created;
- vi. Any applicable special districts created by the County;
- vii. Whether any of the proposed features of the Outdoor Café area are permanently affixed to the ground or moveable, including, if applicable, whether any fences or barriers are affixed to the ground in any manner, and if so, whether upon removal, any areas where the fences or barriers are affixed may be capped flush with the Public Space; and
- viii. Such additional information as the County Manager shall require.

3. The County Manager shall review the application with appropriate County staff to determine, among other things, whether the proposed Outdoor Café estab/ishment, and any encroachment into the Public Space, will be reasonable, appropriate to the location, and promote pedestrian and retail friendly vitality and that there is adequate space remaining within the Public Space to facilitate safe circulation of pedestrian traffic.
4. The County Manager may approve, approve with conditions, or deny the application. The approved Outdoor Café License shall be posted at the restaurant premises, and the approved Outdoor Café Plan shall be available on site at all times.
5. No material change to the approved Outdoor Café Plan shall be made without prior written approval by the County Manager and a new or amended Outdoor Café license.
6. The Outdoor Café License shall be valid only through June 30 of the following calendar year and shall thereafter be renewed on an annual basis. The applicant must comply with the requirements of this Chapter which pertain to all encroachments.
7. The Applicant and Owner shall be bound by the conditions of an Outdoor Café License and the requirements of this Chapter. Failure to comply with the conditions and requirements of this Chapter may result in termination or revocation of an Outdoor Café License.

C. *License Fees for Outdoor Cafés.* In addition to the Outdoor Café License application fee required by § 70-3.B. above, an annual license fee, established per § 70-6., below, shall be paid annually for each Outdoor Café License. The annual Outdoor Café license fee shall be due and payable on or before July 1 of each year, commencing on July 1 following the approval of the Outdoor Café License.

D. *Not transferrable.* An Outdoor Café License issued under this Chapter is not transferrable to a License Holder different from the License Holder to whom the License is issued.

E. *Standards for Outdoor Café.* In addition to all applicable County, state and federal laws and regulations, all Outdoor Cafés shall:

1. Meet the applicable requirements of the Zoning Ordinance, the Building Code and any applicable use permit or certificate of occupancy issued by the County.
2. Provide adequate pedestrian traffic areas and emergency access around Outdoor Café areas as determined by the Zoning Administrator or Building Official.
3. Be kept sanitary, neat and clean at all times and free from accumulation of food, litter, snow, ice and other potentially dangerous or unsanitary matter.
4. Unless otherwise permitted by this Chapter, not include tents or awnings within the Outdoor Café area. Table umbrellas are permitted if the umbrellas are completely

contained within the Outdoor Café area, even when fully extended, as long as the lowest dimension of the umbrellas maintains a minimum vertical clearance of six feet (6'), eight inches (8") above the sidewalk to allow for patron and server circulation.

5. Unless otherwise permitted by the Zoning Ordinance, not include signs within the Outdoor Café area.
  6. Include only improvements (including, furnishings and equipment that are designed and constructed so they are readily removeable without damage to the surface of the Public Space.
  7. Not include holes placed within the Public Space surfaces, except that fences and barriers within, but surrounding the approved Outdoor Café area, may be affixed to the surface of the Public Space so long as such fences and barriers are removable and when removed the holes are filled or capped and the area of the Public Space is level and flush.
- F. *Additional Requirements for Outdoor Cafés.*
1. Upon discontinuance, revocation, expiration or other termination of a License, all fencing or barriers shall be removed and any holes in the Public Space shall be filled or capped.
  2. The County Manager may, on a case-by-case basis, require adjustments to the layout, dimensions, or distance from the property line of any Outdoor Café area.
  3. The Applicant shall comply with such additional reasonable terms as the County Manager may include in the License.

#### **§ 70-6. Outdoor Café Licensing Fees**

The cost of the Outdoor Café Licensing, including the cost of review and approval of Outdoor Café Plans and an Outdoor Café license fee, shall be non-refundable. The Outdoor Café license fee shall be paid by the Owner/Applicant in accordance with the Arlington County Outdoor Café License Fee Schedule adopted by the County Board.

#### **§ 70-7. Penalty.**

Any person, firm or corporation, encroaching into a Public Space, or using a Public Space for an Outdoor Café, in violation of any provision of this chapter shall be guilty of a Class 4 misdemeanor, and, upon conviction thereof, shall be punished by a fine as provided by law for misdemeanors. Where there is a continuing violation of this chapter from day to day each violation shall constitute a separate offense.

#### **§ 70-8. Effective Date.**

The Effective Date of this Chapter shall be September 1, 2023; provided, however, existing Outdoor Cafés with allowed use by Special Exception Site Plan Ordinance shall have until July 1, 2024 to comply with the requirements of § 70-5. of this Chapter and existing Outdoor Cafes with allowed use by Use Permit shall have until the next date of County Board review or earlier termination of their existing Use Permit to comply with the requirements of §70-5. of this Chapter.

#### **§ 70-9. Conflicts.**

Where any part of this Chapter imposes a greater or lesser restriction than other existing agreements or provisions of law or ordinance, the provisions which are more restrictive shall control.

Should any section or provision of this Chapter be decided by the Courts to be invalid, such decision shall not affect the validity of the Chapter as a whole, or any part thereof other than the part so held to be invalid.