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## **OUTDOOR DINING CONSUMER FACT SHEET**

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### **Introduction**

During the past two years, the COVID-19 safety guidelines have encouraged restaurants in the Commonwealth of Massachusetts to offer outdoor dining in order to assure compliance with social distancing requirements and to mitigate the risk of virus transmission. As a result, restaurants have sought to add additional outdoor or adjoining structures, fixtures, and wiring, both temporary and permanent in order to accommodate outdoor table service for patrons. It is anticipated that restaurant venues will continue to offer outdoor dining options, which may include a wide variety of separate or adjoining structures, both temporary and permanent.

Restaurant owners and consumers should be aware that the construction of outdoor structures and installation of wiring and plumbing may be regulated by the State Building Code, Fire Code, Electrical Code, Plumbing Code, or other specialized codes. Outdoor dining may also involve issues related to providing accessible routes and accessible tables and seating.

The Division of Occupational Licensure (“Division”) oversees several boards of licensure and registration that regulate issues related to these codes. Depending upon the issue involved, there may be processes for requesting variances and appeals from an order of a local or state official.

This fact sheet identifies some of the state requirements that may apply to outdoor dining and how restaurant owners can request a variance or appeal from the relevant board in some situations. Please be aware that this fact sheet only addresses state requirements as addressed by those boards at the Division of Occupational Licensure. Additional requirements may exist at the local level or by other state agencies and commissions. On February 10, 2021, the Division released a Joint Memorandum with the Department of Fire Services (“DFS”) addressing some of these common concerns, which is available [online](#).

### **What is Outdoor Table Service?**

Outdoor dining or table service includes, but is not limited to, service provided on a sidewalk, patio, deck, lawn, parking area, other outdoor space such as under awnings, table umbrellas, and temporary tents.



## **When Might a Restaurant Owner Need to Obtain a Building Permit?**

A restaurant owner seeking to add outdoor or adjoining structures to their business to facilitate outdoor table service may need to obtain a building permit. The erection of certain accessory structures or buildings related to outdoor dining may be governed by the State Building Code at 780 CMR.

For all properties not owned by the Commonwealth, the local building official will determine if a project requires a business permit. Restaurant owners are encouraged to reach out to their local building department to determine if a project requires a permit before beginning work on a project. If a building permit is required, the restaurant proprietor must obtain a permit from the local building department in the city or town where the restaurant is located before construction begins. (780 CMR 104 and 780 CMR 105.1).

Building officials also have the authority to grant a permit for temporary structures, such as tents, which conform to the building code, for a period not exceeding 180 days (780 CMR 108). Tent structures erected for this limited period will comply with the International Fire Code (IFC). (2015 IBC Section 3103.1). When evaluating temporary structures, building officials can also exercise their authority in 780 CMR 108 to grant, for demonstrated cause, extensions of this 180-day time period.

## **What if the Local Building Official Denies a Building Permit?**

If a building permit is denied, the restaurant owner may seek relief from the Building Code Appeals Board (“BCAB”), a three-member panel comprised of members of the Board of Building Regulations and Standards (“BBRS”) that hears appeals from decisions or orders of building officials pursuant to G.L. c. 143, §100. Even if a building permit is granted or under consideration, but the restaurant owner disagrees with certain conditions or Building Code requirements imposed by the building official or if the building official has failed to act on the permit application within 30 days per 780 CMR 105.3.1, the restaurant proprietor may also seek a variance from the BCAB.

The BCAB considers whether specific facts related to the proposed installation or property show a hardship that would not make it feasible for the restaurant to meet a Building Code requirement. For example, if the restaurant is unable to construct the required number of egresses, it may appeal to the BCAB to request a variance. Additionally, if the building official inspects the restaurant and, for example, notes that there are maximum capacity load issues, a restaurant owner may also need to request relief from the BCAB. The BCAB will apply the Building Code to the facts of each appeal and will issue a decision specific to each request. Those seeking to appeal a building permit denial, order, or failure to act should carefully review the BCAB information and appeals application forms online at: <https://www.mass.gov/lists/appeals-complaints>.

In order to assist the BCAB in evaluating the appeal, restaurant owners should provide as much information as possible related to the Building Code issues in its Appeal Application along with the required \$150.00 filing fee. The BCAB convenes hearings twice per month and during each hearing session, several appeal applications are typically heard by the panel.

For more information, the Appeal Application includes frequently asked questions about the appeals process, the BBRs, and how to file an application. The Appeal Application is available online at: <https://www.mass.gov/doc/application-for-variances-from-the-state-building-code/download>.

### **When Would a Plumbing Variance Be Required?**

Restaurants seeking to offer outdoor dining should also be aware of issues related to plumbing requirements and the regulation of portable heating. The Board of State Examiners of Plumbers and Gas Fitters (“Plumbing Board”) regulates the installation of portable heaters in structures (including tents) and mandates the minimum number of plumbing fixtures required for all buildings and structures.

When installing portable heaters, a restaurant must obtain a permit from a city or town and have a local gas or plumbing inspector perform an inspection. Additionally, restaurants must have the required number of plumbing fixtures and bathrooms as set forth in the Plumbing Code at 248 CMR. The Plumbing Board considers outdoor seating count towards the establishment’s total seating count with respect to how many fixtures and bathrooms are required by 248 CMR 10.10.

The Plumbing Board holds hearings for appeals of an inspector’s decision to resolve disagreements regarding code requirements. At its public meetings, the Plumbing Board has the authority to grant requests for variances from the Plumbing Code when compliance would cause a hardship or other unusual circumstances.

More information about this process is available online at: <https://www.mass.gov/how-to/submit-a-variance-request-to-the-board-of-state-examiners-of-plumbers-and-gas-fitters>. The Plumbing Board meets monthly and requests for variances must be made at least two weeks prior to a scheduled board meeting. Restaurant owners requesting relief from the Plumbing Board must completely fill out the required form, notify the local Board of Health and the Local Plumbing Inspector, and submit a \$86.00 filing fee.

### **When Would a Variance from the Architectural Access Board Be Required?**

The Architectural Access Board (AAB) enforces regulations to ensure that public buildings, including restaurants, are accessible to, functional for, and are safe for use by persons with disabilities. The AAB regulations at 521 CMR 17.00 set forth the requirements for restaurants, which include floor space and height clearances and other requirements related to accessibility. Other pertinent sections of 521 CMR, such as ramps, curb cuts, and walkways, may also apply to outdoor dining operations. Additional information about the requirements of 521 CMR, the Americans with Disabilities Act (ADA), and its associated Architectural Design Standards (ADADS) relate to outdoor table service may be found in the Massachusetts Office on Disability’s Outdoor Dining Fact Sheet for Accessibility Considerations, available at <https://www.mass.gov/doc/outdoor-dining-fact-sheet/download>.

During the COVID-19 state of emergency, the AAB granted variances to cities, sidewalk cafés, and restaurants related to issues of accessibility in 521 CMR. If a proposed outdoor dining space does not meet these requirements, a restaurant owner may request a variance or additional time to comply. The AAB reviews variances based upon the standard of impracticability at 521 CMR 4.1 and applicants must show that compliance is either technologically infeasible or would result in an excessive and unreasonable cost without any substantial benefit for persons with

disabilities. A detailed guide to requesting a variance or more time to comply from the AAB is available at <https://www.mass.gov/guides/applying-for-an-aab-variance>.

Once the AAB receives a complete application, it allows for a 14-day waiting period to allow comment from interested parties, including local disability associations. Following the waiting period, the case will be heard in administrative review and a decision is normally issued within three to five weeks from the date of initial application. An adjudicatory hearing process may follow the administrative decision if a party is dissatisfied with the result.

### **Additional Issues Related to Installation of Electrical Wire and Fixtures**

If a restaurant provides outdoor dining, Electrical Code concerns may arise if an electrical fixture, such as a generator, light, or other electrically powered equipment is installed. Plugging a fixture with a factory-installed electrical cord that is listed and labeled for the intended purpose into a pre-installed electrical outlet is not a fixture. The local wiring inspector shall accept electrically powered equipment listed and labeled for the designated use that is installed in accordance with the manufacturer's instructions. The wiring inspector may also decide on the approval of unlisted or unlabeled equipment and material and grant special permission for the installation in accordance with the rules and articles of the Electrical Code.

Any installation of electrical wiring, and fixtures must be in compliance with the Massachusetts Electrical Code, 527 CMR 12.00. The Electrical Code, which is promulgated by the Board of Fire Prevention Regulations ("BFPR"), applies to all installations, repairs, and maintenance of electrical wiring and electrical fixtures used for light, heat, and power. The BFPR's Electrical Code Interpretation Committee regularly meets to hear requests for interpretation of the Electrical Code and may be consulted if a restaurant owner has a question related to the installation of wires and fixtures.

There are no variances from Electrical Code requirements. However, the Board of Electricians' Appeals conducts formal hearings in matters of dispute based upon decisions rendered by local wiring inspectors pursuant to M.G.L. c. 143, §3P. Appeals requests must be made within ten days of an inspector's decision and an appeals form may be found at: <https://www.mass.gov/doc/appeal-of-an-inspectors-decision-2>. Restaurant owners requesting relief from the Board of Electricians' Appeals must completely fill out the required form, notify the local wiring inspector, and submit a \$86.00 filing fee.

### **What About Local Requirements for Outdoor Dining in a Municipality?**

Please be aware that restaurant proprietors may also be required seek approval from local officials who enforce municipal ordinances and bylaws with respect to health and sanitation, zoning, or restrictions about what can be installed on sidewalks or public ways. For more information about local requirements that may also apply to outdoor dining or table service, please contact the municipal official in your city or town. Municipal officials should collaborate with each other and with restaurant proprietors to ensure everyone understands the local and state requirements. Cooperation between officials and restaurant owners can help to resolve potential issues and avoid unnecessary delays if a permit is required.

**For More Information:**

If a restaurant or dining establishment is seeking assistance with state permitting questions related to outdoor dining as described above and you have questions or concerns, please do not hesitate to contact:

- **Division of Occupational Licensure - Office of Public Safety and Inspection:** (617) 826-5236 or [OPSI-info@mass.gov](mailto:OPSI-info@mass.gov).
- **District State Building Inspectors:** <https://www.mass.gov/doc/state-inspector-districts-0/download>.
- **Board of State Examiners of Plumbers and Gas Fitters:** (617) 701-8798 or [Plumbingboard@mass.gov](mailto:Plumbingboard@mass.gov).
- **Board of Fire Prevention Regulations - Electrical Interpretations Committee:** (978) 567-3301 or [MaryAnn.E.Smith@mass.gov](mailto:MaryAnn.E.Smith@mass.gov).
- **Architectural Access Board:** (617) 727-0660 or [william.joyce@mass.gov](mailto:william.joyce@mass.gov).
- **Board of State Examiners of Electricians:** (617) 701-8786 or [electricians.board@mass.gov](mailto:electricians.board@mass.gov).

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