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**STAFF REPORT**

Date: November 11, 2020

To: TRPA Regional Plan Implementation Committee

From: TRPA Staff

Subject: Discussion and Possible Direction to Staff on Proposed Amendments to Chapters 2, 50, and 90 of the TRPA Code of Ordinances to Address Outdoor Dining and Outdoor Seating Uses

**Summary and Staff Recommendation:**

Staff will provide an informational update for discussion and possible direction on proposed amendments concerning outdoor dining and outdoor seating uses. This item is for informational purposes and no action is required.

**Summary:**

The attached proposal is a package of amendments to the TRPA Code of Ordinances relating to outdoor dining and outdoor seating. The amendments affect three Code of Ordinances chapters:

- 1) Chapter 2, *Applicability of the Code of Ordinances*  
Adding a new Qualified Exempt (QE) activity for outdoor dining and seating.
- 2) Chapter 50, *Allocation of New Development*  
Excluding outdoor seating, as defined by the Code, from the requirement for additional Commercial Floor Area (CFA); and excluding outdoor dining, as defined by the Code, from the same requirement when a restaurant is relocating indoor capacity to outdoor areas with no net increase in capacity.
- 3) Chapter 90, *Definitions*  
Defining new terms: *enclosed structural improvement, outdoor dining, and outdoor seating.*

**Background:**

The need for an ordinance addressing outdoor dining and seating arose from two fronts:

- 1) **Main Street Management Plan:**  
The Main Street Management Plan, which is set for review by the Governing Board today, calls for an ordinance to address outdoor dining/seating uses. Such an ordinance is needed, because the TRPA Code of Ordinances is presently silent on this topic. Outdoor dining and seating help to activate the street and promote a pedestrian-friendly environment. The Main Street Management Plan considers including increased outdoor dining and seating as part of its vision.

2) **COVID-19 Pandemic:**

Bars and restaurants have been adversely affected by the COVID-19 pandemic. While most of these uses have been allowed to reopen, they are either restricted to outdoor areas or their indoor capacity has been reduced by 50 to 75 percent. As a result, the demand to create new outdoor dining and outdoor seating areas has risen substantially.

This ordinance is an attempt to rapidly respond to both the Main Street Management Plan and the COVID-19 pandemic. The amendment is also scoped to fit within the parameters of the 2012 Regional Plan. Modifications that would increase coverage or result in increased growth were not included, as these would fall outside of the scope of the 2012 Regional Plan Environmental Impact Statement and would require substantial additional modeling and analysis to address potential water quality and capacity-related impacts.

As the Code of Ordinances does not presently address outdoor dining and outdoor seating uses, applicability of code standards depend on the nature and intensity of the use. Current conditions are summarized as follows:

1) **Permitting:**

Creation of new outdoor dining requires a TRPA permit, because it involves an increase in Commercial Floor Area. Creation of new outdoor seating would only require a TRPA permit if it results in additional coverage; otherwise it is exempt.

2) **Coverage:**

The use of outdoor dining or outdoor seating do not inherently create coverage. Installation of permanent improvements may result in coverage if they result in certain conditions (e.g. soil compaction, lack of infiltration, prevention of vegetation growth, etc.). Even when an improvement does not create coverage, an area (e.g. walking paths) could become compacted over time with continuous use.

3) **Commercial Floor Area:**

Outdoor dining is subject to growth control and requires CFA. Outdoor seating is not subject to growth control and does not require CFA.

**Amendment Description:**

The proposal does three things:

1) **Clarifies existing policy:**

Aside from those changes described below, the proposed ordinance would formalize TRPA's longstanding approach to outdoor dining and outdoor seating uses. These uses would need to comply with all applicable ordinance standards concerning coverage and growth management. No changes would be made to provisions concerning temporary activities or uses.

2) **Establishes a Qualified Exemption (QE):**

The proposed ordinance allows establishment of new outdoor dining and outdoor seating under a QE, as long as specified criteria are met. The criteria include the following:

- A valid BMP certificate or approved plans and schedule for installation of BMPs.
- No resulting additional coverage or additional Commercial Floor Area.

- Located on existing verified coverage, unless infeasible.
- Meets all applicable state and local regulations.

Outdoor dining/seating uses could be established in non-covered areas in Land Capability Districts 4-7 in limited circumstances. All existing hard and soft covered areas would have to be first exhausted. Then, preference goes to gravel areas associated with BMPs before lawn areas and other ornamental landscaped areas could be used. The operator remains responsible to ensure that operations do not inadvertently result in coverage. Should activities result in coverage during any given year, the operator would be responsible to restore or revegetate by October 15.

3) Allows restaurants to shift existing capacity outdoors without triggering additional Commercial Floor Area or TRPA permits:

Under this provision, a restaurant or bar could move some of its existing capacity, as permitted under local building and fire codes, to outdoor areas without the need for additional Commercial Floor Area. To qualify, there would need to be a corresponding reduction in indoor capacity so that the net restaurant capacity is not increased.

Along with the amendment, staff plans to prepare a guidance manual. The manual will help bar and restaurant owners prepare the required notice for Qualified Exempt activities. While the manual itself is not regulatory, it helps to explain the meaning of the code language and the QE process and to provide general guidance.

Environmental Review:

This draft code amendment has been reviewed under an Initial Environmental Checklist (IEC) pursuant to Chapter 3: *Environmental Documentation*, of the TRPA Code of Ordinances and Article VI of the Rules of Procedure. The IEC, which tiers from the Regional Plan Update Environmental Impact Statement, finds that the proposed amendments would not result in significant effects on the environment (see Attachment C for link to Draft IEC).

Regional Plan Compliance:

The proposed amendments to the Code of Ordinances are consistent with all applicable goals and policies in the Regional Plan.

Contact Information:

For questions regarding this agenda item, please contact Michael Conger, AICP, Senior Planner, at (775) 589-5221 or [mconger@trpa.org](mailto:mconger@trpa.org).

Attachments:

- A. Draft Adopting Ordinance
  - Exhibit 1: Code Amendments
- B. Proposed Amendments in Context
- C. Links to Other Documentation

Attachment A

Draft Adopting Ordinance

TAHOE REGIONAL PLANNING AGENCY  
ORDINANCE 2020-

AN AMENDMENT TO ORDINANCE NO. 87-9, AS PREVIOUSLY AMENDED, TO AMEND THE TRPA CODE OF ORDINANCES, CHAPTERS 2, 50, AND 90 REGARDING OUTDOOR DINING AND OUTDOOR SEATING USES, AND OTHER MATTER PROPERLY RELATED THERETO

The Governing Board of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00    Findings

- 1.10 It is desirable to amend TRPA Ordinance 87-9 by amending the TRPA Code of Ordinances to further implement the Regional Plan pursuant to Article VI (a) and other applicable provisions of the Tahoe Regional Planning Compact.
- 1.20 The TRPA Code of Ordinances amendments were the subject of an Initial Environmental Checklist (IEC), which was processed in accordance with Chapter 3: *Environmental Documentation* of the TRPA Code of Ordinances and Article VI of the Rules of Procedure. The TRPA Code of Ordinances amendments have been determined not to have a significant effect on the environment and are therefore exempt from the requirement of an Environmental Impact Statement (EIS) pursuant to Article VII of the Compact.
- 1.30 The Advisory Planning Commission (APC) and the Governing Board have each conducted a noticed public hearing on the proposed TRPA Code of Ordinances amendments. The APC has recommended Governing Board adoption of the necessary findings and adopting ordinance. At these hearings, oral testimony and documentary evidence were received and considered.
- 1.40 The Governing Board finds that the TRPA Code of Ordinances amendments adopted hereby will continue to implement the Regional Plan, as amended, in a manner that achieves and maintains the adopted environmental threshold carrying capacities as required by Article V(c) of the Compact.
- 1.50 Prior to the adoption of this ordinance, the Governing Board made the findings required by Section 4.5 of the TRPA Code of Ordinances, and Article V(g) of the Compact.
- 1.60 Each of the foregoing findings is supported by substantial evidence in the record.

Section 2.00    TRPA Code of Ordinances Amendments

Ordinance 87-9, as previously amended, is hereby amended by amending the TRPA Code of Ordinances, as set forth in Exhibit 1.

Section 3.00    Interpretation and Severability

The provisions of this ordinance amending the TRPA Code of Ordinances adopted hereby shall be liberally construed to affect their purposes. If any section, clause, provision or portion thereof is declared unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance and the amendments to the Regional Plan Package shall not be affected thereby. For this purpose, the provisions of this ordinance and the amendments to the Regional Plan Package are hereby declared respectively severable.

Section 4.00    Effective Date

The provisions of this ordinance amending the TRPA Code of Ordinances shall become effective on \_\_\_\_\_

PASSED AND ADOPTED by the Governing Board of the Tahoe Regional Planning Agency at a regular meeting held on \_\_\_\_\_, 2020, by the following vote:

Ayes:

Nays:

Abstentions:

Absent:

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William Yeates, Chair  
Tahoe Regional Planning Agency,  
Governing Board

Exhibit 1 to Attachment A

Code Amendments

**EXHIBIT 1**

**CODE AMENDEMENT**

Text to be deleted shown in ~~red with strikeout~~.

Text to be added shown in blue with underline.

- 
- (1) Add a new Subparagraph A.12 to Subsection 2.3.6, *Qualified Exempt Activities*, to read as follows:

## **CHAPTER 2: APPLICABILITY OF THE CODE OF ORDINANCES**

### **2.3. EXEMPT ACTIVITIES**

#### **2.3.6. Qualified Exempt Activities**

##### **A. General Activities**

1. The general activities listed below are qualified exempt.

##### **12. Outdoor Dining and Outdoor Seating Areas**

The creation or expansion of outdoor dining areas associated with a legally established eating or drinking place, or the creation or expansion of accessory outdoor seating areas, where all of the following criteria are met:

a. The site has a BMP certificate in good standing from TRPA; or an approved BMP retrofit plan and compliance schedule as set forth in Chapter 60: Water Quality.

b. The use will occur in areas of existing verified coverage unless the use itself and related improvements cannot feasibly be accommodated in areas of existing coverage. Improvements shall be located on the following surfaces, in the order of preference, until all such areas are exhausted:

(i) Hard land coverage;

(ii) Soft land coverage;

(iii) Gravel associated with a BMP;

(iv) Mulched landscaped areas; and

(v) Lawns.

Use of areas without existing land coverage shall be limited to Land Capability Districts 4 through 7, and shall only occur when these areas are dry and any snow has naturally melted.

- c. The placement of improvements and the operation of the use shall not result in the creation of additional land coverage.
- d. The operator shall obtain all necessary state and local permits and entitlements before commencing the use.
- e. The use shall not result in the creation of additional Commercial Floor Area. See Subparagraph 50.6.1.B.2.
- f. Development within scenic highway corridors shall meet the siting criteria established in Subparagraph 66.2.4.C

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- (2) Add new Subparagraphs B.2.h and B.2.i to Subsection 50.6.1, *Requirement for Allocation* and modify Subparagraph B.2.f to read as follows:

## CHAPTER 50: ALLOCATION OF DEVELOPMENT

### 1. 50.6. ALLOCATION OF ADDITIONAL COMMERCIAL FLOOR AREA

TRPA shall allocate the development of additional commercial floor area as follows:

#### 50.6.1. Requirement of Allocation

##### B. "Additional" Commercial Floor Area

2. Additional commercial floor area excludes the following:

- f. The construction of floor area associated with a publicly owned assembly and entertainment facility with a fire-rated capacity of less than 1,100 people; **and**
- g. New commercial floor area permitted by TRPA prior to February 24, 2010, provided that:
  - (i) Application is made to TRPA prior to the expiration of the permit, as determined in subsection 2.2.4, to reissue a permit for a project for which an allocation was assigned;

- (ii) All permit conditions, fees, securities, building and site design conditions of approval, plan revisions, and other requirements of the original permit are updated to meet the requirements of the Code and all other applicable TRPA ordinances, rules, or regulations at the time of permit re-issuance; and
  - (iii) This subparagraph g has not previously been used in relation to the same project;.
- h. Creation or expansion of outdoor seating areas that do not include enclosed structural improvements; and
  - i. The relocation of a legally established eating and drinking place's dining capacity to outdoor dining areas when such use does not result in a net increase in the permitted dining capacity.
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- (3) Add new definitions for new terms, *enclosed structural improvement*, *outdoor dining*, and *outdoor seating*, to Section 90.2, *Other Terms Defined*, to read as follows:

## CHAPTER 90: DEFINITIONS

### 90.2. OTHER TERMS DEFINED

#### Enclosed Structural Improvement

A structure, including a deck or gazebo, that is enclosed by walls, removable partitions, screens, canvas, drapery, or similar materials on more than two sides.

#### Outdoor Dining

The commercial use of an outside area by an eating or drinking place for the same activities that occur within the establishment. An unenclosed facility not served by waitstaff and where no commercial transactions occur is instead "Outdoor Seating."

#### Outdoor Seating

The non-commercial use of unenclosed outdoor areas for seating, picnicking, or informal consumption of food brought from home or obtained from a nearby business. Commercial dining in outdoor or enclosed areas is "Outdoor Dining."

Attachment B

Proposed Amendments in Context

## **Outdoor Dining**

### **Proposed Amendments in Context**

#### **ELEMENT 1: DEFINITIONS**

**Background:** TRPA treats the outdoor use of seating/dining areas differently depending upon whether there is commercial activity occurring. This distinction is uncodified but is based on interpretation of existing language. Specifically, the distinction originates from the Code's definition of *Commercial Floor Area* (CFA):

"The gross square footage of floor area within the outer wall of a commercial building, not including stairwells and airshafts. The square footage of other facilities relating to such building, including but not limited to decks that are designated for commercial use under a permit, shall be considered commercial floor area..." (emphasis added)

Based on this definition, TRPA has administered outdoor dining uses under two code interpretations (November 1987 and April 1996), addressing partially enclosed commercial structures and outdoor dining, respectively. Under these interpretations, CFA is required when:

- An outdoor area is used for commercial purposes (e.g. a deck served by waitstaff); or
- A structure associated with a bar or restaurant is enclosed on more than two sides

Because the distinction in use is not specifically written in the code, there is some confusion among the public and partner agencies about when CFA and TRPA permits are required.

**Purpose:** Clarify existing policy by creating new terms to correspond with the distinction in commercial use.

**Action:** Define three distinct terms, *Enclosed Structural Improvement*, *Outdoor Dining* and *Outdoor Seating*, as these terms are later used in proposed language for Chapters 2 and 50 of the Code of Ordinances.

## **CHAPTER 90: DEFINITIONS**

### **90.2. OTHER TERMS DEFINED**

For definitions of uses see Section 21.4 (List of Primary Uses), and Section 81.5.

#### **Enclosed Structural Improvement**

A structure, including a deck or gazebo, that is enclosed by walls, removable partitions, screens, canvas, drapery, or similar materials on more than two sides.

### Outdoor Dining

The commercial use of an outside area by an eating or drinking place for the same activities that occur within the establishment. Unenclosed facilities that are not served by waitstaff and where no commercial transactions occur are instead considered "Outdoor Seating."

### Outdoor Seating

The non-commercial use of unenclosed outdoor areas for seating, picnicking, or informal consumption of food brought from home or obtained from a nearby business. Commercial dining in outdoor or enclosed areas is instead considered "Outdoor Dining."

## ELEMENT 2: QUALIFIED EXEMPTION

**Background:** Creation of outdoor dining/seating areas triggers the need for a TRPA permit if it creates new coverage or requires additional Commercial Floor Area. A grey area exists where new outdoor eating areas would consist solely of small moveable objects and where intensive use may result in soil compaction and therefore new coverage. Such use is presently unregulated in the TRPA Code of Ordinances.

**Purpose:** Create a process so that TRPA can track new outdoor dining and outdoor seating proposals to ensure that they:

- (1) Are located on sites with valid BMP certificates or has an approved plan and schedule to have BMPs installed;
- (2) Occur in areas of existing coverage except in limited circumstances;
- (3) Will not unintentionally result in additional coverage or a need for additional Commercial Floor Area; and
- (4) Will not be visually inconsistent with scenic corridors.

**Action:** Add a new Subparagraph A.12 to Subsection 2.3.6 (*Qualified Exempt Activities*), establishing a new qualified exemption for certain outdoor dining and outdoor seating projects:

## CHAPTER 2: APPLICABILITY OF THE CODE OF ORDINANCES

### 2.3. EXEMPT ACTIVITIES

#### 2.3.6. Qualified Exempt Activities

The activities listed below are not subject to review and approval by TRPA, provided the applicant certifies on a TRPA-qualified exempt form that the activity fits within one or more of the following categories and the activity shall not result in the creation of additional land coverage or relocation of existing land coverage, and will comply with all restrictions set forth below. The statement shall be filed with TRPA for all qualified exempt activities at least three working days, before the activity commences and shall be made under penalty of perjury.

**A. General Activities**

The general activities listed below are qualified exempt.

**12. Outdoor Dining and Outdoor Seating Areas**

The creation or expansion of outdoor dining areas associated with a legally established eating or drinking place, or the creation or expansion of accessory outdoor seating areas, where all of the following criteria are met:

- a. The site has a BMP certificate in good standing from TRPA; or an approved BMP retrofit plan and compliance schedule as set forth in Chapter 60: Water Quality.
- b. The use will occur in areas of existing verified coverage unless the use itself and related improvements cannot feasibly be accommodated in areas of existing coverage. Improvements shall be located on the following surfaces, in the order of preference, until all such areas are exhausted:
  - (i) Hard land coverage;
  - (ii) Soft land coverage;
  - (iii) Gravel associated with a BMP;
  - (iv) Mulched landscaped areas; and
  - (v) Lawns

Use of areas without existing land coverage shall be limited to Land Capability Districts 4 through 7, and shall only occur when these areas are dry and any snow has naturally melted.

- c. The placement of improvements and the operation of the use shall not result in the creation of additional land coverage.
- d. The operator shall obtain all necessary state and local permits and entitlements before commencing the use.
- e. The use shall not result in the creation of additional Commercial Floor Area. See Subparagraph 50.6.1.B.2.
- f. Development within scenic highway corridors shall meet the siting criteria established in Subparagraph 66.2.4.C

**ELEMENT 3: ADDITIONAL COMMERCIAL FLOOR AREA EXCLUSION**

**Background:** As discussed in Element 1, additional Commercial Floor Area (CFA) is only required for "floor area within the outer wall of a commercial building" and other facilities such as decks that

are primarily used for commercial enterprise. With respect to outdoor bar/restaurant use, Element 1 would define these uses as *outdoor dining*. *Outdoor seating*, in contrast, does not involve commercial activities or enclosed structures and does not require CFA.

In response to the 2020 COVID-19 pandemic, restaurants in the Tahoe Basin have been restricted in their indoor dining capacity. As a result, many restaurants have sought to expand and create new outdoor dining areas. If these areas involve waitstaff service or enclosed structures, additional CFA is presently required. This is the case even when net capacity is not being increased. There is a desire to change this to accommodate public health directives.

- Purpose:** (1) Reaffirm the existing practice of exempting non-commercial, unenclosed areas (*outdoor seating*) from additional CFA; and  
(2) Create a new exemption allowing restaurants to shift existing capacity outdoors when there is no net increase in overall capacity.

**Action:** Add a new Subparagraphs B.2.h and B.2.i to Subsection 50.6.1 (*Requirement of Allocation*), excluding certain activities from additional Commercial Floor Area:

## CHAPTER 50: ALLOCATION OF DEVELOPMENT

### 50.6. ALLOCATION OF ADDITIONAL COMMERCIAL FLOOR AREA

TRPA shall allocate the development of additional commercial floor area as follows:

#### 50.6.1. Requirement of Allocation

No person shall construct a project or commence a use that creates additional commercial floor area without first receiving an allocation approved by TRPA or obtaining necessary development rights pursuant to Chapter 51: Banking, Conversion, and Transfer of Development Rights. In order to construct the project or commence the use, the recipient shall comply with all other applicable provisions of this Code.

#### B. "Additional" Commercial Floor Area

Commercial floor area is considered "additional" if it is to be created pursuant to a TRPA approval issued on or after January 1, 1987.

2. Additional commercial floor area excludes the following:

- a. Changes in commercial use that do not involve any increase in commercial floor area;
- b. Additions to, or expansions of, legally existing commercial floor area of 500 square feet or five percent of the existing commercial floor area, whichever is less; provided:
  - (i) The existing structure and any subsequent additions or expansions physically exist and were completed at least one year prior to an application pursuant to this subparagraph;

- (ii) The exempt addition or expansion is not applied for or built in conjunction with any other addition or expansion;
  - (iii) There is no change in use;
  - (iv) Any increase in traffic is insignificant as defined in Section 66.2: Traffic and Air Quality Mitigation Program;
  - (v) The exempt addition or expansion occurs within a single project area; and
  - (vi) The exempt addition or expansion does not occur within the same project area more frequently than once every ten years;
- c. The relocation, replacement, or reconstruction on the same parcel of commercial floor area that either existed as of January 1, 1987, or that contains floor area allocated and approved pursuant to this Code;
  - d. The replacement, reconstruction, or relocation of commercial floor area legally existing as of January 1, 1987, pursuant to a TRPA-approved redevelopment plan;
  - e. The TRPA-approved transfer of legally existing commercial floor area;
  - f. The construction of floor area associated with a publicly owned assembly and entertainment facility with a fire-rated capacity of less than 1,100 people; **and**
  - g. New commercial floor area permitted by TRPA prior to February 24, 2010, provided that:
    - (i) Application is made to TRPA prior to the expiration of the permit, as determined in subsection 2.2.4, to reissue a permit for a project for which an allocation was assigned;
    - (ii) All permit conditions, fees, securities, building and site design conditions of approval, plan revisions, and other requirements of the original permit are updated to meet the requirements of the Code and all other applicable TRPA ordinances, rules, or regulations at the time of permit re-issuance; and
    - (iii) This subparagraph g has not previously been used in relation to the same project;.
- h. [Creation or expansion of outdoor seating areas that do not include enclosed structural improvements; and](#)
  - i. [The relocation of a legally established eating and drinking place's dining capacity to outdoor dining areas when such use does not result in a net increase in the permitted dining capacity.](#)

Attachment C

Links to Other Documentation

ATTACHMENT C

Links to Other Documentation

- [Draft Findings / Rationale](#)
- [Draft Initial Environmental Checklist](#)
- [Compliance Measures](#)
- [Summary of Feedback Received](#)
- [Outline for Guidance Manual](#)