
Coates' Canons Blog: Sidewalk Dining: Some Questions and Answers

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Imagine a balmy autumn evening. You and your family or friends have plans to go out for dinner. The restaurant that you have in mind offers you the chance to grab a table outdoors on the sidewalk. Have you ever wondered about what arrangements are made by the restaurant and governmental agencies to make “eating out front” possible? Maybe not. But if you are curious about these arrangements, and are willing to read a rather long blog, then read on.

This past summer the General Assembly adopted legislation (Session Law 2013 – 266 (H 192)) that would permit local governments to enact sidewalk dining ordinances affecting sidewalks located within the right-of-way of North Carolina Department of Transportation (NCDOT) streets and highways. The act allows NCDOT to grant the administrative right to local governments to regulate sidewalk dining within their respective zoning jurisdictions according to standards set forth in the act. Below are a few questions that have arisen. Special thanks to Jill Moore and Michael Crowell, my colleagues at the School of Government, and John Nance from the North Carolina Department of Transportation for help in answering some of them.

(1) Haven't people been eating around tables on sidewalks in this state for years? Doesn't that mean cities have been regulating this activity for some time?

North Carolina cities have actively regulated sidewalk dining for decades. Wilmington adopted a sidewalk dining ordinance with respect to city-maintained streets in the early 1990s. It is also true that unapproved encroachments on North Carolina public sidewalks have occurred for a long time.



(2) Does that reflect the fact that in mid-size and larger cities many of the most attractive locations for sidewalk dining are situated along city-maintained streets rather than NCDOT roads and highways?

It does. However, it is also not uncommon for the business routes of U.S.-numbered highways and some state-numbered highways to wend their way through the downtown and central business areas of both small towns and larger cities. Restaurants may also be located along these routes on the fringe of town and in unincorporated areas.

(3) Is there is a difference between sidewalk dining and other forms of outdoor dining (e.g., patio dining)?

From a regulatory standpoint there is. Many restaurants provide outdoor dining or drinking areas that are located outdoors but on their own private property. These areas may be located in the front, side, or rear of the principal building. Outdoor dining and drinking areas must comply with applicable zoning, ABC laws, and public health regulations. Only when these areas encroach upon municipal street and NCDOT rights-of-way do specific sidewalk dining rules come into play. (For an unusual story concerning patio drinking see here.)

(4) What makes a restaurant location attractive for sidewalk dining?

The location probably needs to be adjacent to a curbed street with a paved sidewalk, although in less urban settings a picnic table could be set up to allow “sidewalk dining” with no sidewalk and no curb. Typically, the building the restaurant occupies will be built to the right-of-way line. Any sidewalk needs to be rather wide and also relatively wide in comparison to the adjacent street. In addition, the streetscape can be important. The sidewalk (and right-of-way area) needs to be inviting to pedestrians, and the surroundings need to be attractive. It also helps if table locations can be shaded, at least during certain times of the day, either because of the building location, the presence of trees, or a table umbrella.



(5) How wide does a sidewalk need to be in order for sidewalk dining to work?

Let's consider the standards in S.L. 2013 – 266 (H 192). New G.S. 136-27.4(a)(1) now provides that the tables, chairs, and other furnishings must be placed a minimum of six feet from any travel lane of a NCDOT street or highway. If on-street parking is offered adjacent to the dining area, then parked cars serve to provide this separation. (It is worth noting that sidewalk dining is not permitted adjacent to any highway for which the maximum posted speed limit is more than 45 miles per hour.) If on-street parking does not provide this buffer, then dining activity must be set back as much as six feet from the curb.

An unobstructed sidewalk space devoted to pedestrians passing by the restaurant must also be provided. The new legislation mandates that local governments require at least five feet of sidewalk if the right-of-way belongs to NCDOT, in part so that the area will be accessible for ADA purposes. Policies for city streets vary. Durham requires six feet of pedestrian space, Greensboro requires five, and Apex three. Greensboro, Asheville, and other cities require a barricade to be erected to separate pedestrians passing by from seated diners.

Sidewalks may need to be at least ten to twelve feet wide in order to provide adequate room. That estimate does not take into account planters, trees and tree grates, bicycle racks, street lights, ramps to serve the disabled, bus shelters, benches, power poles, trash containers, fire hydrants, and other street furniture.

As a result, many public sidewalks along both city streets and NCDOT highways are simply unsuitable for sidewalk dining.



(6) The new legislation allows food and beverages to be served from a “restaurant” abutting the NCDOT right-of-way. Under the new law are local governments free to define a “restaurant” as they wish? Or must they use the definition of a “restaurant” used in the alcoholic beverage control statutes or refer to definitions in the public health codes?

The ABC statutes (G.S. 18B-1000(6)) define a restaurant to be “an establishment substantially engaged in the business of preparing and serving meals.” In addition, the establishment’s gross receipts from food and nonalcoholic beverages must be not less than thirty percent (30) of the total gross receipts from food, nonalcoholic beverages, and alcoholic beverages. It must also have a kitchen and an inside dining area with seating for at least 36 people. Of course, a restaurant is not the only kind of food business that may qualify for various ABC permits. “Eating establishments” (defined in G.S. 18B-1000(2)), which include fast-food businesses, grills, and lunch counters, may qualify for various on-premises malt beverage and unfortified wine permits, but not mixed-drink permits. “Private clubs” qualify for a wide range of ABC permits, but some municipalities have been reluctant to extend municipal “sidewalk drinking” privileges to them because these clubs are often thought of as simply bars and taverns.

There is also a definition of “restaurant” in the part of the public health statutes that addresses smoking. G.S. 130A-492 defines a “restaurant” as a “food or lodging establishment that prepares food or drink as regulated by the Commission [for Public Health] pursuant to [the food and lodging sanitation laws].” It includes all establishments serving food and drink that hold an ABC permit (G.S. 130A-248(a)), but it includes an exemption for “private clubs.”

Just what “restaurants” are affected by the new sidewalk dining law may depend on the interpretation of the new G.S. 136-27.4(b)(1). It provides that a city may enact an ordinance applicable to NCDOT rights-of-way “consistent with, but not necessarily limited to, the requirements of this section.” This language could be interpreted to allow local governments to choose their own definitions of eligible restaurants that may sponsor sidewalk dining along NCDOT routes. In any event it seems clear that the way a “restaurant” is defined for purposes of Session Law 2013 -266 (H 192) will affect not only the type of establishment that can take advantage of NCDOT-authorized sidewalk dining, but the nature of the alcoholic beverages and food that may be served in association with it as well.

(7) I thought local governments were allowed to pass “open container” ordinances that applied to people on public streets. Haven’t a considerable number of North Carolina cities done so? Aren’t these ordinances inconsistent with sidewalk dining involving the serving and consumption of alcohol?

“Open container” ordinances (authorized by G.S. 18B-300(c)), which regulate the consumption or possession of beer and ordinary wine on public streets can be inconsistent with sidewalk dining. Some localities have failed to notice this potential inconsistency in their enthusiasm to encourage downtown revitalization with sidewalk dining. But open container ordinances can also be amended to exclude the type of beer and wine drinking that is allowed in connection with approved sidewalk dining.

In addition, G.S. 18B-301(f)(1), a provision in a state statute, makes unlawful the consumption of fortified wine, spirituous

liquor, or mixed beverages on “any public road, street, highway, or sidewalk.” But an implied exception to this provision would appear to be the on-premises consumption of those drinks that are subject to an on-premises ABC permit for fortified wine, spirituous liquor, or mixed beverages. Restaurant owners will want to ensure that the “premises” that is the subject of the applicable ABC permit includes all areas, both inside and outdoor, where mixed drinks will be served. This approach is also consistent with existing municipal sidewalk dining ordinances that emphasize the connection between the restaurant business in the building and the activity on the sidewalk.



(8) Am I allowed to smoke if I am dining on a sidewalk?

The answer may vary from place to place. State law bans smoking in the enclosed areas of restaurants and bars (G.S. 130A-496). An area is enclosed if it has a roof or overhead covering, plus walls or side coverings on all sides or all sides but one (G.S. 130A-492). However, the state law does not prohibit smoking in areas that are not enclosed. It is unlikely that a sidewalk dining area will be enclosed; thus it is unlikely that the state law smoking ban will apply to these areas.

It is also possible that a local regulation may prohibit smoking on sidewalks, and that the prohibition would apply to the sidewalk dining area. Local governments may adopt ordinances or board of health rules prohibiting smoking on “local government grounds” (G.S. 130A-498). These “grounds” include outdoor areas that the local government owns, leases, or occupies (G.S. 130A-492(6)), a definition that appears broad enough to include streets and sidewalks. A few local governments in North Carolina have exercised this authority to prohibit smoking on public sidewalks.

It is also important to remember that the operator of the restaurant may choose to prohibit smoking in the sidewalk dining area that the operator controls.

(9) It seems like mixing private restaurant clients with members of the general public in a public sidewalk area could result in certain unforeseen problems. If something goes wrong, who will be liable?

This question cannot be answered in the abstract. S.L. 2013 – 266 (H 192) does, however, require the restaurant operator that wishes to take advantage of the legislation to provide liability insurance that serves to protect both the North Carolina Department of Transportation and the local government and to shield the operator from liability.

One interesting side-note is that in ordinances that apply to city streets, both Raleigh and Fayetteville prohibit panhandling activity directed at sidewalk diners.

(10) Suppose that I represent a local government that has had a sidewalk dining ordinance in effect for some time. It applies to NCDOT rights-of-way as well as the rights-of-way of certain city streets. Can we continue to apply our present ordinance to NCDOT rights-of-way?

Section 3 of the new law provides that it “shall not preempt or override local ordinances currently in place.” It is unclear what legal effect this provision has. Before this legislation was adopted, local governments probably lacked authority to regulate sidewalk dining in NCDOT rights-of-way. Nonetheless it seems likely that the sidewalk dining ordinances that local governments will adopt in the future for NCDOT streets and roads will strongly resemble the ordinances that have applied to city streets in the past.

(11) If my local government is interested in allowing sidewalk dining along NCDOT routes, how do I proceed?

Local governments will need to enter into an encroachment agreement with NCDOT before adopting a local ordinance. Copies of a standard agreement will be available from NCDOT division engineer offices or online.

So, in closing, go ahead and try outdoor dining once more. If you do so after reading this blog, maybe you will also have a better appreciation of the arrangements that make it all possible.

Links

- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H192v5.pdf
- canons.sog.unc.edu/wp-content/uploads/2013/09/Sidewalk-Dining-2.jpeg
- www.dailytarheel.com/article/2013/09/steel-string-brewery-raises-money-to-install-an-outside-patio
- canons.sog.unc.edu/wp-content/uploads/2013/09/Sidewalk-Dining-4.jpg
- canons.sog.unc.edu/wp-content/uploads/2013/09/Sidewalk-Dining-6.jpg
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=18B-1000
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=130A-492
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- canons.sog.unc.edu/wp-content/uploads/2013/09/Sidewalk-Dining-7.jpg
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=130A-496
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