



Office of the City Manager

CONSENT CALENDAR  
July 7, 2020

To: Honorable Mayor and Members of the City Council  
 From: Dee Williams-Ridley, City Manager  
 Submitted by: Timothy Burroughs, Director, Department of Planning and Development  
 Subject: Urgency Ordinance Allowing Temporary Outdoor Uses on Private Property

RECOMMENDATION

Adopt an urgency ordinance that creates Berkeley Municipal Code (BMC) Chapter 23E.18 [Temporary Outdoor Uses on Private Property] and BMC Section 23B.20.045 [Zoning Certificate for Temporary Outdoor Uses] to allow outdoor dining and commerce on private property without requiring a discretionary permit in order to safely support local businesses during the COVID-19 pandemic.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The COVID-19 pandemic, and the associated imperative to avoid close physical contact with others, especially indoors, is having devastating impacts on Berkeley businesses. On June 2, 2020, the Berkeley City Council adopted a referral to the City Manager to explore strategies to expand outdoor dining and commerce so that businesses will be able to comply with health guidelines and operate with sufficient capacity to remain solvent during the duration of the current public health emergency. At the meeting on June 16, 2020, the City Council adopted three urgency ordinances to permit outdoor dining, commerce, and associated amenities in the public right-of-way. This proposed urgency ordinance would facilitate the use of private outdoor space, such as parking lots, for additional commercial activity.

BACKGROUND

On March 3, 2020, the City of Berkeley declared a state of local emergency due to coronavirus (SARS-CoV-2), for which there is no known cure or vaccine. The pandemic has had a severe impact on local businesses, resulting in extreme revenue losses, layoffs and, in some cases, closures. In a survey conducted in April 2020, 561 Berkeley's businesses and arts organizations reported the following impacts of the pandemic on their operations:

- More than a quarter of respondents would expect to close permanently if they had to stay closed for 2 months.

- More than half of respondents would expect to close permanently if they had to stay closed for 3-4 months.
- More than two-fifths of respondents have either “Shifted to online sales or virtual services” or “Reduced salaries or staff hours.”
- More than two-fifths of respondents expect a revenue loss greater than 80% over the 3 months following when the coronavirus pandemic began impacting our community (approximately March 2020).

On June 2, 2020 the Berkeley City Council adopted the “Berkeley Safe Open Air Dining” proposal to “facilitate and expedite potential use of both public and private (parking lots, yards, setbacks, etc.) property for outdoor dining and other retail activities” and directed the City Manager “to implement or, where necessary, return to Council for approval any and all required temporary or permanent changes to, or suspensions of, Berkeley Municipal Code sections, fees, permitting requirements/timelines, and other rules and regulations.”

Since the outbreak of COVID-19 and subsequent health orders, cities around the world have taken steps to reimagine their use of public space for outdoor commerce and recreation including exercising, shopping, and dining, while ensuring adequate social distance to protect the public. Such initiatives recognize the vital role that small businesses and lively commercial districts play in cities. A creative approach, utilizing the public right of way, consistent with health and safety protocols, and best practices in accessibility and circulation, is necessary to ensure that our valued commercial districts are able to recover from this disaster, and that Berkeley’s small business community is once again able to thrive.

Complementing the expanded use of public space to stimulate commerce, temporary use of outdoor private property will allow local businesses to safely reopen with physical distancing. In Berkeley’s commercial corridors, where many commercial spaces are relatively small and narrow, it is often difficult for businesses to operate while observing health and safety measures indoors. Given existing indoor space and capacity constraints, additional outdoor area will better facilitate business operations while ensuring the observance of physical distancing requirements and other safety guidelines. For example, outdoor space that is often currently devoted to parking could be repurposed by restaurants for appropriately spaced seating and by retail stores as additional browsing space.

Temporary Outdoor Uses (as defined in the proposed ordinance) will include retail, food service establishments and group assembly uses in Commercial, Mixed Use Light Industrial, and Mixed Manufacturing districts. Due to businesses’ acute need to re-open, permits will be issued ministerially, i.e. as a Zoning Certificate.

Regulation in the urgency ordinance is compatible with the Zoning Ordinance. Existing and newly established businesses with valid Berkeley Business Licenses will be allowed

to operate outdoors on private property in the district in which their business currently operates. Temporary Outdoor Uses would be required to operate in compliance with State and County regulations, such as alcohol and food safety requirements, in addition to conforming to the operating standards set forth in the new ordinance, which are based on existing regulations. Operating standards are intended to ensure basic safety measures are in place and that neighboring businesses and residents are not unduly impacted by outdoor uses. Non-compliance with operating standards could result in a modification or revocation of the approval.

ENVIRONMENTAL SUSTAINABILITY

The activation of outdoor private space for commercial use will not require additional construction or development. There are no perceived detrimental impacts on the environment as a result of this allowing this temporary use.

RATIONALE FOR RECOMMENDATION

Outdoor commercial uses are already allowed in the public right-of-way during this public health emergency. Outdoor private space can be leveraged to accommodate local businesses, comply with Public Health directives, mitigate the effects of the pandemic and provide additional outdoor spaces for commercial activity.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

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Attachments:

1: Ordinance to Adopt BMC Chapter 23E.18 [Temporary Outdoor Uses on Private Property] and BMC Section 23B.20.045 [Zoning Certificate for Temporary Outdoor Uses]

ORDINANCE NO. -N.S.

ADOPT BMC CHAPTER 23E.18 [TEMPORARY OUTDOOR USES ON PRIVATE PROPERTY] AND BMC SECTION 23B.20.045 [ZONING CERTIFICATE FOR TEMPORARY OUTDOOR USES]

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 23E.18 is adopted to read as follows:

**BMC Chapter 23E.18 Temporary Outdoor Uses on Private Property**

Sections:

- 23E.18.010 Purpose
- 23E.18.020 Definitions
- 23E.18.030 Applicability
- 23E.18.040 Requirements
- 23E.18.050 Operating Standards
- 23E.18.060 Remedies

**23E.18.010 Purpose**

The purpose of this chapter is:

- A. To relax regulation on private property to support existing or new legally established commercial businesses during the locally declared state of emergency related to COVID-19.
- B. To expand customer access to commercial businesses during the locally declared state of emergency related to COVID-19.
- C. To establish requirements and operating standards associated with relaxed regulation during the locally declared state of emergency related to COVID-19.

**23E.18.020 Definitions**

The definitions set forth in this Section shall govern the meaning of the following terms as used in this Chapter:

- A. Temporary Outdoor Use – An allowable temporary use on private property conducted by a legally established Retail, Food Service Establishment or General Assembly business in the same zoning district as it currently operates.

- B. Temporary Fixtures and Structures – Physical equipment necessary to safely conduct business outdoors.

**23E.18.030 Applicability**

- A. Regulation in this Chapter is valid during and up to 90 days after the locally declared state of emergency related to COVID-19.
- B. Regulation in this Chapter applies to existing and new commercial businesses with a valid City of Berkeley Business License.
- C. Regulation in this Chapter applies to private property in the Commercial zoning districts, the Mixed Use Light-Industrial (MU-LI) district, and the Mixed Manufacturing (MM) district.
- D. The following commercial businesses are not eligible to obtain a Zoning Certification for Temporary Outdoor Use:
  - 1. Delivery-Only (Cannabis) Retailers
  - 2. Liquor Stores / Wine Shops
  - 3. Adult-oriented Businesses
  - 4. Smoke Shops
  - 5. Firearm/Munitions Businesses

**23E.18.040 Requirement**

- A. Legally established businesses in the following Use categories may conduct business outdoors on private property with a Zoning Certificate for Temporary Outdoor Use
  - 1. Retail, except those listed in Section 23E.18.030 [Applicability]
  - 2. Food Service Establishments
  - 3. Alcoholic Beverage Service (Incidental to Food Service)
  - 4. Assembly Uses
  - 5. Entertainment
- B. Temporary Outdoor Uses may be conducted on private property at the address listed on a business's City of Berkeley business license.
- C. Temporary Outdoor Uses may be conducted on private property at an address other than that listed on a business's City of Berkeley business license if the following conditions are met:
  - 1. The property is used for commercial purposes, is a vacant lot, or is a vacant building in a Commercial zoning district, the MU-LI district or the MM district.

2. Temporary Outdoor Uses shall be conducted in the same Zoning District where the business legally operates.
- D. The operator of the Temporary Outdoor Use has the permission of and assurance of the property owner to maintain compliance with Section 23E.18.050 [Operating Standards].
- E. An application for a Zoning Certificate for a Temporary Outdoor Use must be accompanied by site plan, business description and operational plan that certifies compliance with Section 23E.18.050 [Operating Standards]

### **23E.18.050 Operating Standards**

A Zoning Certificate does not constitute permission to operate under the orders of the State and local Health Officers unless businesses comply with the following regulations:

- A. Businesses shall comply with State and local regulations for normal business operations in addition to State regulations for outdoor operations.
- B. Businesses shall follow the [City of Berkeley's COVID-19 Public Health Officer Orders](#).
- C. Businesses shall comply with [Americans with Disabilities Act \(ADA\)](#) requirements and Berkeley Building Code (BMC Chapter 19.28).
- D. Temporary Outdoor Uses shall maintain a 10-foot setback adjacent to property in a Residential District in order to reduce impacts from allowable noise, odor, smoke and light.
- E. Food Service Establishments with incidental alcoholic beverage service must comply with all applicable regulations of the [California Department of Alcohol Beverage Control](#) and obtain a [COVID-19 temporary catering authorization](#).
- F. Sanitation
  1. Businesses shall provide garbage, recycling and compost services in accordance with the Alameda County Mandatory Recycling Ordinance.
  2. Food service establishments shall provide restrooms and sanitation during hours of operation.
  3. Food service establishments shall comply with Berkeley's Single Use Foodware and Litter Reduction Ordinance effective July 1, 2020.
- G. Operating Hours for Temporary Outdoor Uses shall be limited to 9am to 9pm. Hours of operation include the time that the business is open for customer access to the departure of the last patron. These limitations do not apply to the delivery, maintenance, security, product preparation and other pre-opening activities, and, cleanup, shutdown, and other post-closure activities which do not involve presence of customers.

H. Safety:

1. If Temporary Outdoor Uses are located within an active parking lot, businesses shall provide temporary barriers to separate vehicle traffic from pedestrians and commercial activity.
2. If Temporary Outdoor Uses fully occupy a parking lot, businesses shall provide temporary barriers to prevent vehicle traffic from entering the parking lot.

I. Parking and loading requirements on private property are temporarily suspended if a Temporary Outdoor Use displaces areas designated for these purposes.

J. Permits issued pursuant to this Section shall be posted in plain view within the commercial establishment for which the permit has been issued.

K. Other Impacts

1. Temporary Outdoor Uses shall be conducted in a manner that protects the residential character of surrounding neighborhoods from adverse impacts, including, but not limited to commercial noise and offensive odors.
2. Smoking shall be prohibited in areas designated for Temporary Outdoor Uses as set forth in BMC Section 12.70.030 [Locations where smoking is prohibited].
3. Temporary outdoor lighting fixtures must be oriented in a manner to direct the light away from adjacent parcels.

L. Temporary Fixtures and Structures

1. Temporary Fixtures and Structures intended to support Temporary Outdoor Uses must be identified on a site plan and show compliance with Section 23E.18.050 [Operating Standards]
2. Movable fixtures such as tables/chairs, umbrellas, heaters, generators, trucks and trailers shall be stored in a secure place on private property when not in use.
3. Fixed structures such as semi-permanent tents, shipping containers, portable sinks and toilets, shall occupy no more than 50% of the outdoor space dedicated to a Temporary Outdoor Use in order to allow for appropriate social distancing
4. The location, type and operation of Temporary Fixtures and Structures must comply with the requirements of and be inspected by the Building and Safety Division, Health Department, Fire Department, Police Department and/or Public Works Department for safety.

### **23E.18.060 Remedies**

- A. A Zoning Certificate for Temporary Outdoor Use may be revoked for non-compliance with any conditions designated herein and the Zoning Officer may issue a cease and desist order immediately.
- B. A Temporary Outdoor Use that meets the nuisance criteria set forth in Section 23B.64.020 [Nuisances Defined] shall be considered a public nuisance and is subject to abatement as set forth in Chapter 23B.64 [Nuisance Abatement].

Section 2. That Berkeley Municipal Code Section 23B.20.045 is adopted to read as follows:

#### **BMC Section 23B. 20.045 Zoning Certificates for Temporary Outdoor Uses**

- A. Zoning Certificates for Temporary Outdoor Uses shall be required for businesses that are not normally permitted to operate outdoors, but are allowed to operate outdoors on private property during the locally declared state of emergency related to COVID-19 and for 90 days after the emergency is lifted.
- B. Zoning Certificates for Temporary Outdoor Uses are subject to the requirements of Chapter 23B.20 [Zoning Conformance Review]

Section 3 This Ordinance is adopted as an urgency ordinance pursuant to the Charter of the City of Berkeley, Article XIV, Section 93 and shall be effective immediately. The City Council finds and determines that the adoption of this Ordinance as an urgency ordinance is necessary for the immediate preservation of the public peace, health and safety of the residents of the City of Berkeley.

#### Section 4. Findings

- a. In December 2019, an outbreak respiratory illness due to a novel coronavirus (COVID–19), was first identified in Wuhan City, Hubei Province, China, and has spread outside of China, across the world, including the United States.
- b. COVID-19 presents a public health concern that requires extraordinary protective measures and vigilance.
- c. The Center for Disease Control (“CDC”) activated its Emergency Response System to provide ongoing support for the response to COVID–19 on January 23, 2020.
- d. A national emergency was declared on March 13 to assist with combating COVID-19.
- e. Governor Gavin Newsom declared a state of emergency in California to “prevent, hinder, or delay appropriate actions to prevent and mitigation the effects of the COVID-19” on March 14.

- f. Between March 16, 2020 and June 19, 2020, Berkeley's Public Health Officer issued a series of health orders placing prohibitions on indoor activities and severe limitations on commercial business operations.
- g. In an effort to support businesses during the shelter in place orders, the City of Berkeley is establishing a Temporary Outdoor Use for commercial activities on private property to provide businesses with an option to operate safely and remain solvent during the duration of the public health emergency.
- h. In an effort to protect customers and employees of commercial businesses, the City of Berkeley is establishing a Temporary Outdoor Use for commercial activities on private properties to allow businesses to operate in compliance with health guidelines and reduce risks of viral transmission.
- i. For these reasons, there is a current and immediate threat to the public health, safety, and welfare, and that failure to adopt the proposed amendments to the Zoning Ordinance would exacerbate that threat to public health, safety, and welfare.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

