

ORDINANCE NO. 7,730-N.S.

AMENDING URGENCY ORDINANCE NO. 7,725-N.S. ADOPTED JULY 7, 2020 TO INCLUDE ADDITIONAL ALLOWABLE COMMERCIAL ACTIVITIES AND TO INCLUDE ADDITIONAL OPERATIONAL CRITERIA ON PRIVATE PROPERTY WITHOUT REQUIRING A DISCRETIONARY PERMIT IN ORDER TO SAFELY SUPPORT LOCAL BUSINESSES DURING THE COVID-19 PANDEMIC

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

Section 1. That Berkeley Municipal Code Chapter 23E.18 is readopted 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 businesses during the locally declared state of emergency related to COVID-19.
- B. To expand customer access to 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 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 businesses with a valid City of Berkeley Business License.
- C. Regulation in this Chapter applies to private property in all Commercial zoning districts, the Mixed Use Light-Industrial (MU-LI) district, the Manufacturing (M) district, and the Mixed Manufacturing (MM) district.
- D. The following 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 Requirements

- A. Legally established businesses authorized by the Governor’s Executive Orders and Public Health Orders and the Public Health Orders of the City Health Officer, including appendices, to conduct outdoor business may conduct business outdoors on private property with a Zoning Certificate for Temporary Outdoor Use subject to compliance with the Executive Orders and Public Health Orders and other guidance related to phased reopening in Berkeley.
- B. Temporary Outdoor Uses may be conducted:
 - 1. On private property at the address listed on a business’s City of Berkeley business license, and/or
 - 2. On private property at an address other than that listed on a business’s City of Berkeley business license if the property is used solely for commercial purposes, is a vacant lot, or is a vacant building, and/or
 - 3. As a new stand-alone outdoor business, subject to obtaining a City of Berkeley Business License for the temporary location.
- C. The operator of the Temporary Outdoor Use must have the written permission of the property owner.
- D. An application for a Zoning Certificate for a Temporary Outdoor Use must be accompanied by a 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 unless businesses comply with the following regulations:

- A. Businesses shall comply with State and local regulations for normal business operations, including previously-imposed conditions of approval related to hours of operation and other conditions of approval not in conflict with the allowances in this ordinance, in addition to State regulations for outdoor operations.
- B. Businesses shall follow the Governor's Executive Orders Public Health Orders and the City of Berkeley Public Health Orders, including Appendices.
- 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.
- 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 9 a.m. to 9 p.m. 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. Non-residential 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, as applicable.

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. 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, as more fully set forth below.

Section 3. 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 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 4. 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.

At a regular meeting of the Council of the City of Berkeley held on July 28, 2020, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Davila, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, and Arreguin.

Noes: None.

Absent: None.