



Office of the City Manager

PUBLIC HEARING

July 28, 2020

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Jordan Klein, Interim Director, Department of Planning and Development

Subject: Amendment of Urgency Ordinance for Outdoor Commerce on Private Property

RECOMMENDATION

Conduct a public hearing and, upon conclusion, adopt amendments to the Urgency Ordinance (Number 7,725-N.S.) amending Berkeley's Zoning Ordinance, Chapter 23E.18 and Section 23B.20.045, to allow additional categories of commerce and establish additional operating criteria for outdoor activities on private property.

FISCAL IMPACTS OF RECOMMENDATION

May result in increased sales and employment tax revenues due to additional commercial activity compared to the status quo.

CURRENT SITUATION AND ITS EFFECTS

On July 7, 2020, City Council adopted an Urgency Ordinance adding Chapter 23E.18 and Section 23B.20.045 to provide a non-discretionary approval process (Zoning Certificate/Business License) to establish outdoor commerce on private property, subject to certain objective criteria and nuisance provisions. For more information on adoption of the Urgency Ordinance, refer to the July 7, 2020 City Council report (see *Attachment 2*).

At that hearing, Councilmembers asked whether additional business activities could be considered for inclusion in the program, and what restrictions would be appropriate for those categories of uses. Examples included manufacturing, salons, and other uses. Equity considerations and broad risk reduction strategies were also raised as considerations. Concern was also expressed about internally inconsistent lists of allowable activities. This report provides recommendations for amendments that satisfy Council inquiries.

BACKGROUND

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.

On July 7, 2020, the Berkeley City Council adopted an ordinance (see Attachment 1) pursuant to the City Charter to allow outdoor commercial activity on private property without discretionary zoning approval for certain uses in specified districts subject to objective operating criteria and nuisance provisions. The ordinance focused on outdoor retail and dining, assuming that most such businesses would be located along established commercial corridors where a parking lot or patio could be repurposed for customer access and would not result in unusual difficulties maintaining physical distance if proper protocols are followed. The ordinance also allowed outdoor assembly (e.g. classes, exercise, and religious assembly). The ordinance also applied in the MU-LI (Mixed Use Light Industrial) and MM (Mixed Manufacturing) zoning districts, where similar uses are allowed.

ENVIRONMENTAL SUSTAINABILITY

None.

RATIONALE FOR RECOMMENDATION

The proposed amendments to the urgency ordinance include additional uses and criteria based on the existing orders of the California Governor and the City Health Officer, including a list of allowable activities and criteria. The following links are to the most recent orders.

<https://covid19.ca.gov/stay-home-except-for-essential-needs/>

https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/COB-health-order-n20-10-phased-reopening.pdf

https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/COB-health-order-n20-07-shelter-in-place-appendix-c-additional-businesses-permitted.pdf

Future orders may influence the pace of reopening and the allowable activities and criteria. Therefore, staff recommends that the Council incorporate those future orders by reference to maintain compliance with expansions or contractions in allowable activities. Overall, it is expected that businesses that are able to adjust to outdoor activity will take the opportunity, and thus will be better able to maintain their economic viability and employment base, but others will be limited by space and operational constraints. Therefore, the ordinance also allows businesses to share space in order to facilitate outdoor markets, use of vacant or underutilized space, and cost sharing.

ALTERNATIVE ACTIONS CONSIDERED

Council may consider other allowable used and criteria for outdoor commerce on private property.

CONTACT PERSON

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Attachments:

- 1: Ordinance 7,725-N.S. (not submitted with report)
- 2: Proposed Amendments
- 3: Governor's Order (linked in body of report)
- 4: Health Officer's Order and Appendices (linked in body of report)
- 5: Public Hearing Notice

ORDINANCE NO. -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 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 ~~all~~the Commercial zoning districts, the Mixed Use Light-Industrial (MU-LI) district, the Manufacturing (M) 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 Requirements

- A. Legally established businesses ~~in the following Use categories 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.
 - ~~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:
 - 1. On private property at the address listed on a business’s City of Berkeley business license, and/or
 - ~~6. business license.~~

~~7. 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:~~

~~8.2. 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.~~

~~a. Temporary Outdoor Uses shall be conducted in the same Zoning District where the business legally operates.~~

~~C.~~ The operator of the Temporary Outdoor Use ~~has~~ must have the written permission of and assurance of the property owner to maintain compliance with Section 23E.18.050 [Operating Standards].

~~B.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 ~~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 Governor's Executive Orders Public Health Orders and the City of Berkeley Public Health Orders, including Appendices. 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.D.~~

~~F.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.

~~G.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.

H.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.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.

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

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

H.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.

H.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 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 COVOD-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 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.

**NOTICE OF PUBLIC HEARING
BERKELEY CITY COUNCIL**

Amendment of Urgency Ordinance for Outdoor Commerce on Private Property

The hearing will be held on July 28, 2020 at 6:00 p.m. The hearing will be held via videoconference pursuant to Governor’s Executive Order N-29-20.

A copy of the agenda material for this hearing will be available on the City’s website at www.CityofBerkeley.info as of July 16, 2020. **Once posted, the agenda for this meeting will include a link for public participation using Zoom video technology.**

For further information, please contact Jordan Klein, Interim Director, Planning and Development Department at 510-981-7534.

Written comments should be mailed directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, or emailed to council@cityofberkeley.info in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at 981-6900 or clerk@cityofberkeley.info for further information.

Posted: July 16, 2020

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I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City’s website, on July 16, 2020.

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Mark Numainville, City Clerk