



UNLISTED USE DETERMINATION: TEMPORARY OUTDOOR EXPANSION SPACE FOR RESTAURANTS & BARS

- Denver Zoning Code, DZC Section 12.4.6, Code Interpretations and Determination of Unlisted Uses
- Former Chapter 59, DZC Section 59-38(a)(10), Authority to Determine Unlisted Accessory Uses
- Ordinance No. 2020-0961, Authority to Allow COVID-19 Related Temporary Uses on Former Chapter 59 Zoned Lands, Effective October 15, 2020

Effective Date of Use Determination: May 18, 2020

Updated to Extend Allowed Use from September 7 to October 31, 2020: August 19, 2020

Updated to Extend Allowed Use from October 31, 2020 to October 31, 2021 and to permit Allowed Use on FC59 Zoned Lands: October 30, 2020

SUMMARY

As part of Denver’s focus on a safe and steady recovery from the COVID 19 pandemic, restaurants, bars, and other similar eligible businesses inside the City temporarily may expand existing or establish new outdoor spaces to provide food and beverage service for on-site consumption, while maintaining required social distancing and allowing for ease of contact tracing if necessary, once restaurants, bars, and other similar eligible businesses are allowed to open to ingress, egress, use and occupancy by members of the public. This includes public health safety protocols and protections for patrons, while creating opportunities to stimulate economic activity and recovery. Additional limitations are intended to balance economic recovery objectives with ensuring continued, enjoyable use of near-by residential properties.

This document explains only the zoning requirements for allowing the Temporary Outdoor Expansion Space for Restaurants & Bars (“Temporary Outdoor Space”). Other city agencies, including Excise & Licenses, Department of Transportation & Infrastructure, Department of Public Health & Environment, Denver Fire Department, and the Building division of CPD, have also issued requirements and conditions for the Temporary Outdoor Space. Eligible businesses should refer to www.denvergov.org/restaurantpermits for applicable city rules and guidelines, FAQs, as well as information how to apply for the program.

This is a new program created to meet a specific need for our community and it may evolve as the city learns more about the demand for and use of expanded outdoor spaces at restaurants, bars, and the like. Additionally, applicants are advised that the City and County of Denver operates under two different zoning codes, many businesses will have unique circumstances, requirements may differ based on the zoning code applicable to a specific property, and this document may not cover every issue and situation.

ELIGIBLE BUSINESSES

The following types of commercial businesses may be eligible to temporarily create a new outdoor space or temporarily expand their existing outdoor space (the related zoning-defined land use is provided in parenthesis):

1. Restaurants, bars, taverns, brewpubs, fast-food outlets, cafes, coffee shops, and similar retail businesses providing food and/or beverage services for on-site consumption. (Per Denver

Zoning Code or Former Chapter 59: "Eating and/or Drinking Establishments," "Brewpubs," and "Eating Places").

2. Breweries, wineries, or distilleries with existing indoor tasting rooms. (Per Denver Zoning Code or Former Chapter 59: these are specific types of "Manufacturing, Fabrication & Assembly – Light, Custom, General or Heavy" zoning uses).
3. Food trucks and other mobile retail food establishments are not eligible businesses.

PERMITTED ZONE DISTRICTS

The Temporary Outdoor Space may be established in the following zone districts under the city's two zoning codes:

1. **Denver Zoning Code:** Mixed-Use Commercial Zone Districts, I-A, I-B, and all PUD zone districts that allow an Eligible Business use. (See Denver Zoning Code, Division 13.3, for definition of "Mixed-Use Commercial Zone District" – www.denvergov.org/zoning)
2. **Former Chapter 59:** All B, MS, H, C-MU, R-MU, T-MU, PRV, Gateway, H, and I zone districts, and all PUD zone districts that allow an Eligible Business use.

A property's zone district can be looked up, by address, at the Denver Maps webpage:

www.denvergov.org/maps/map/zoning.

CONDITIONS ON USE & ACTIVITY IN TEMPORARY OUTDOOR EXPANSION SPACE FOR RESTAURANTS AND BARS

The Temporary Outdoor Space shall comply with the following use- and activity-related guidelines:

1. **Associated with an Eligible Business.** The outdoor space must be associated with and used exclusively by an eligible business (see above for list of eligible businesses).
2. **Temporary Structures Allowed.** The outdoor space may be used only for placement of temporary tables, benches, chairs, shade devices, tents, pods, greenhouses, and other temporary enclosures that can be adequately vented and maintained per Public Health orders; the outdoor space may include temporary railings and other means of containment or separation. Please refer to the program guidelines for building permit requirements (e.g., electrical permit may be required for temporary lighting; building permit may be required for fences/walls over a certain height.)
3. **Hours of Operation.** Public use of the outdoor space shall cease by no later than 10 pm Sundays through Thursdays, and by no later than 11 pm on Fridays, Saturdays, and on Federal Holidays.
4. **Permitted Activities.** Permitted activities within the outdoor space are limited to only the following:
 - a. On-site retail service and consumption of food and/or drink (including alcoholic beverages with approved city license) to seated customers.
 - b. Designated areas for customer pick-up and carry-out of packaged food and/or drink prepared by the associated eligible business.
5. **Prohibited Activities.** The following activities are prohibited within the outdoor space to avoid congregating, shared patron use of equipment, or noise impacts:
 - a. Standing (non-seated) food or drink service and consumption.
 - b. Standing (non-seated) waiting or gathering areas.
 - c. Outdoor entertainment or amusement (e.g., viewing outdoor movies; yard games).

- d. Amplification of any sound or music, including but not limited to the use of amplifiers, speakers, or loudspeakers.
- 6. **Duration.** Any Temporary Outdoor Space intended for a permitted activity described in 4.a. above, cannot begin until the eligible business can open for occupancy by members of the public. The outdoor space must shut down for public use by no later than October 31, 2021 and must be removed in its entirety by no later than November 9, 2021. Additionally, if the state or City issues any new or amended public health orders before October 31, 2021 that prohibit this temporary outdoor expansion space, then the outdoor space must shut down.
- 7. **No Parking Required.** No vehicle or bicycle parking is required for establishment of a Temporary Outdoor Expansion Space for Restaurants & Bars.

PERMITTED LOCATION & PERMITTED OPERATOR OF TEMPORARY OUTDOOR EXPANSION SPACE FOR RESTAURANTS & BARS

Permitted Location of Temporary Outdoor Space – Options	Can the Outdoor Space be In a Parking Lot?	Permitted Operator of Temporary Outdoor Space	Owner or Landlord Consent Required?
1. Same Zone Lot: Private property only (not on public right-of-way) and on same zone lot that eligible business is located.	1. DZC and FC59 Zoned Properties: Yes, the temporary outdoor space may be located on all or some off-street parking spaces, regardless if those spaces are required by the zoning code or not.	The zone lot (property) owner or eligible business	Yes - Property owner consent is required if the eligible business is not the property owner
2. Different Zone Lot: Private property only (not on public right-of-way) and on a different zone lot than where eligible business is located	1. DZC-Zoned and FC59 Properties: Yes, the temporary outdoor space may be located entirely or partially off the zone that the eligible business is located on.	The zone lot (property) owner or eligible business whose primary use is located on a different zone lot	Yes - Property owner consent is required if the eligible business is not the property owner of the zone lot on which the temporary outdoor space is located.
3. Public right-of-way (sidewalks, tree lawn, on-street)	Zoning rules are <u>not applicable</u> if the outdoor space is located entirely on public right-of-way. If the outdoor space is partially on private property and partially on public right-of-way, please refer to the location options and guidelines above that will apply to the portion of the outdoor space located on private property. For outdoor spaces located entirely or partially in public right-of-way, please refer to applicable rules and guidelines found at: www.denvergov.org/restaurantpermits .		

ZONING PERMITTING & ENFORCEMENT

A zoning permit is not required to establish a Temporary Outdoor Space. Other city permits and license approvals may still be required, including permits associated with use of the public right-of-way (sidewalks, tree lawns, on-street), and modifications to an existing restaurant or food business license.

The city’s **Zoning & Neighborhood Inspections Service (ZNIS)** team of inspectors will investigate zoning-related complaints received from the public or other city agencies about the location or operation of an outdoor space. If the inspector finds a violation of these guidelines, or any other

applicable provision of Denver’s zoning codes, the eligible business and property owner will be responsible for addressing the issue and for payment of any enforcement-related fines or penalties.

ZONING ADMINISTRATOR AUTHORITY, ANALYSIS, AND FINDINGS

LEGAL AUTHORITY FOR UNLISTED TEMPORARY USE DETERMINATION

DENVER ZONING CODE - GENERAL AUTHORIZATION TO DETERMINE UNLISTED USES

According to DZC, Section 12.4.6.1, the Zoning Administrator may determine whether a specific unlisted use, including unlisted temporary uses, “may be permitted in one or more zone districts, and type of use review is required.”

The Zoning Administrator is directed to:

1. Review and evaluate the application in light of this Code, the Comprehensive Plan, established administrative practices and past interpretations, the potential for establishing a precedent with the interpretation, and any other relevant policy and regulatory documents;
2. Review and evaluate the application with consideration of the general rules of interpretation specified in this Section 12.4.6.3.F, as applicable; and
3. Consult with the Manager, City Attorney, other agencies and staff, as necessary.”

DZC, Section 12.4.6.3.D.

In making a use determination, the Zoning Administrator may impose reasonable conditions on such use after consideration of, “at a minimum, the compatibility of the use within the zone districts in which the use may be permitted, the intensity of the use, the amount and configuration of physical space occupied by the use, and the potential for adverse impacts on adjacent properties.” DZC, Section 12.4.6.3.E.2. As part of the use determination, the Zoning Administrator must also determine which zoning permit use review procedure will apply, such as Informational Notice (“ZPIN”), Special Exception Review (“ZPSE”), or administrative review without notice or hearing (“ZP”). Determining the use review procedure “shall be based on consideration of the zoning procedure(s) applicable to similar land uses or subject matter, and/or the degree to which the zoning procedure may inform mitigation of possible adverse impacts” from the subject use. DZC, Section 12.4.6.3.E.3.

FORMER CHAPTER 59 – SPECIFIC AUTHORIZATION TO DETERMINE UNLISTED TEMPORARY USES

In response to the COVID-19 public health emergency, Denver City Ordinance No. 2020-0961, Section 1, authorizes the Zoning Administrator to permit any temporary use on FC59-zoned land that she is authorized to allow under the Denver Zoning Code. Prior to approving such temporary use, the Zoning Administrator must specifically find that the temporary use:

1. “preserves and promotes the public health, safety and welfare of the inhabitants of the city, and of the public generally, and encourages and facilitates the orderly growth and expansion of the city”; and

2. "is consistent with the subject Former Chapter 59 zone district(s) at issue"; and
3. "meets the requirements of Denver Zoning Code, Section 12.4.6.4.B."

Ord. 2020-0961, Section 2.

REVIEW CRITERIA & ANALYSIS

REVIEW CRITERIA

Denver Zoning Code, Section 12.4.6.4, specifies the criteria against which the Zoning Administrator must review all requests for determining whether an unlisted temporary should be allowed. The Zoning Administrator must find that the request satisfies all the relevant review criteria before permitting the unlisted use. If the Zoning Administrator cannot find the proposed use satisfies the review criteria, then the only regulatory path for permitting such use is to amend the text of the zoning code to specifically list and allow the use.

In sum, an unlisted use may only be permitted through the process established in DZC Section 12.4.6 if the determination is: "1. Consistent with the intent of this Code; and 2. Consistent with the intent of the subject Neighborhood Context and zone district(s), and with the intent of any specific Code provision(s) at issue." DZC, Section 12.4.6.4.A.

In addition, the Zoning Administrator must find that the "proposed use has a character and impact that are similar in nature, function, and duration to the other uses permitted in the zone district(s)" by assessing all relevant characteristics of the proposed use, including without limitation:

"The type, size, and typical massing of buildings and structures associated with the unlisted use;

"Transportation requirements, including the modal split for people and freight, by volume type and characteristics of traffic generation to and from the site;

"Parking requirements, turnover and generation, ratio of the number of spaces required per unit area or activity;

"The amount and nature of any external effects generated on the premises, including but not limited to noise, smoke, odor, glare, vibration, radiation and fumes;

"The type and extent of impacts on adjacent properties created by the proposed use in comparison to impacts from other uses permitted in the zone district."

DZC, Section 12.4.6.4.B.1.

With the passage of Ordinance 2020-0961, the Zoning Administrator may allow the same unlisted temporary use that meets all the above DZC criteria on lands retaining their zoning designation under FC59. Ord. No. 2020-0961, Secs. 1-3.

ANALYSIS

The unlisted use is described as temporary outdoor space that expands the premises of a previously permitted eating place, eating and drinking establishment or brewery, winery or distillery, and allows for on-site food/beverage service and consumption by patrons in seats. The duration of the Temporary Outdoor Space is limited and will last until October 31, 2021. Activities within the temporary outdoor space will follow city-established public health guidelines and limitations to ensure safe, social distancing and the ability to provide ease of contact tracing, if needed.

The unlisted use would be allowed in any Mixed Use Commercial Zone District, as defined in DZC Article 13, Industrial zone, and in any PUD zone district that allows an eligible business as described above. Under FC59, the unlisted use would be allowed in all business, mixed-use, and industrial zone districts, and in any PUD zone district that allows an eligible business as described above. As a temporary use, the Temporary Outdoor Space would be located either on the same zone lot as the eligible business or on a near-by zone lot (not necessarily abutting). As a temporary use, the proposed temporary use could be sited in a private parking lot, even if the use occupies parking spaces otherwise required by code for a primary use.

Consistency with Zoning Code Intent: The Temporary Outdoor Space is consistent with the DZC's stated general intent to "to implement Denver's Comprehensive Plan and guide orderly development of the City that preserves and promotes the public health, safety, prosperity, and welfare of its inhabitants." DZC, §1.1.1. The Temporary Outdoor Space is also consistent with FC59's stated general intent "to preserve and promote the public health, safety and welfare of the inhabitants of the city...and to encourage and facilitate the orderly growth and expansion of the city." FC59, Sec. 59-1. It is also consistent with the Denver Zoning Code's more specific stated intent to: "guide Denver's prosperous and sustainable future by...[p]roviding clear regulations and processes that result in predictable, efficient, and coordinated review processes." DZC, §1.1.2.

The Temporary Outdoor Space is intended to support the economic health and development of the City during this time of COVID-19 by providing clear regulations to permit commercial eating/drinking service and consumption that still protects the public health. This is a creative alternative that supports the continued prosperity of Denver during a public health emergency where the alternative could be continued closure of Denver's many restaurants, bars, and similar businesses to dine-in services.

Consistent with the Intent of the Subject Neighborhood Context and Zone District(s): The Temporary Outdoor Space will be allowed in all business, mixed-use, and campus zone districts under both DZC and FC59, where the general intent is to promote the establishment and operation of a wide variety of commercial, retail, and residential land uses, and to enhance a pedestrian-oriented street environment. See, for example, DZC, Division 5.1, and §§5.2.3-5, and similar provisions throughout DZC; and FC59, Secs. 59-271 and 59-301. Allowing the temporary use will provide a realistic option to safely operate eating and drinking places during the COVID-19 emergency and provide a safe alternative to otherwise strictly controlled or limited indoor dine-in operations in existing restaurants and bars. Activating the street with the Temporary Outdoor Space, and allowing the reopening of many existing commercial uses, are expected outcomes consistent with the intent for all neighborhood contexts and zone districts affected by this determination.

Character and Impact of Proposed Use Compared to Other Uses Permitted in Zone Districts: In all mixed-use, business, and commercial zones, accessory outdoor eating/serving areas are allowed in conjunction with permitted eating places and eating and drinking establishments. Similarly, accessory outdoor tasting areas are allowed in conjunction with permitted breweries/wineries/distilleries in all DZC-zoned mixed use commercial zones. The Temporary Outdoor Space use is similar in nature and function (an outdoor space for food/drink service and on-site consumption), but – unlike the listed accessory outdoor uses allowed that are permanent – is only temporary in duration (allowed until October 31, 2021). The Temporary Outdoor Space will not require any additional parking spaces beyond those already provided for the primary business, which is the same requirement as for the listed outdoor accessory uses.

As a proposed temporary use, the Temporary Outdoor Space is also similar in nature, function, and duration to other listed temporary uses allowed in most business and commercial zone districts under both zoning codes. Several permitted and listed temporary uses, including temporary outdoor retail sales or seasonal sales and construction-related offices, may continue for an entire season of the year (e.g., a farmer’s market can operate from April 1 to October 31) or of a longer duration than the Temporary Outdoor Space (e.g., a construction building yard or temporary office). Here, the Temporary Outdoor Space would operate only until October 31, 2021, and would be limited in intensity both by the mandate for continued social distancing and a night-time curfew of 10 pm weekdays, and 11 pm weekend days and holidays.

ZONING ADMINISTRATOR FINDINGS & FINAL USE DETERMINATION

Based on the details of and stated objectives for the City’s proposal to allow temporary extended outdoor space for restaurants, bars, and similar businesses, and on the analysis above, I find that that the proposed unlisted use may be allowed under the respective zoning codes as follows:

1. **Denver Zoning Code** – the Temporary Outdoor Expansion Space for Restaurants & Bars may be allowed as an unlisted temporary use, per DZC, §12.4.6.
2. **Former Chapter 59** – the Temporary Outdoor Expansion Space for Restaurants & Bars may be allowed as an unlisted temporary use, per Ordinance 2020-0961.

The Zoning Administrator may attach reasonable conditions to the allowance of an unlisted use. Accordingly, the following conditions shall attach to the allowance for a Temporary Outdoor Expansion Space for Restaurants & Bars:

1. **Eligible Businesses / Zoning Land Uses:**
 - a. Per Denver Zoning Code or Former Chapter 59, primary uses legally established and permitted as **“Eating and/or Drinking Establishments,” “Brewpubs,” or “Eating Places”**. This includes businesses commonly referred to as restaurants, bars, taverns, brewpubs, fast-food outlets, cafes, coffee shops, and similar retail businesses providing food and/or beverage services for on-site consumption.
 - b. Per Denver Zoning Code or Former Chapter 59: primary uses legally established and permitted as a “Manufacturing, Fabrication & Assembly – Light, Custom, General or Heavy” zoning use, and more specifically as a **brewery, winery, or distillery**.
 - c. Food trucks and other “mobile retail food establishments” are not eligible businesses.

2. **Permitted Zone Districts:** A Temporary Outdoor Space may be established in the following zone districts under the city's two zoning codes:
 - a. **Denver Zoning Code:** Mixed-Use Commercial Zone Districts, I-A, I-B, and all PUD zone districts that allow an Eligible Business use. (See Denver Zoning Code, Division 13.3, for definition of "Mixed-Use Commercial Zone District" – www.denvergov.org/zoning).
 - b. **Former Chapter 59:** All B, MS, H, C-MU, R-MU, T-MU, PRV, Gateway, H, and I zone districts, and all PUD zone districts that allow an Eligible Business use.

A property's zone district can be looked up, by address, at the Denver Maps webpage:

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3. **Conditions on Use & Activity in Temporary Outdoor Expansion Space for Restaurants & Bars:** The Temporary Outdoor Space shall comply with the following use- and activity-related guidelines:
 - a. **Associated with an Eligible Business.** The Temporary Outdoor Space must be associated with and used exclusively by an eligible business (see above for list of eligible businesses).
 - b. **Temporary Structures Allowed.** The Temporary Outdoor Space may be used only for placement of temporary tables, benches, chairs, shade devices, tents, pods, greenhouses, and other temporary enclosures that can be adequately vented and maintained per Public Health orders; the outdoor space may include temporary railings and other means of containment or separation. Please refer to the program guidelines for building permit requirements (e.g., electrical permit may be required for temporary lighting; building permit may be required for fences/walls over a certain height.)
 - c. **Hours of Operation.** Public use of the outdoor space shall cease by no later than 10 pm Sundays through Thursdays, and by no later than 11 pm on Fridays, Saturdays, and on Federal Holidays.
 - d. **Permitted Activities.** Permitted activities within the outdoor space are limited to only the following:
 - i. On-site retail service and consumption of food and/or drink (including alcoholic beverages with approved city license) to seated customers.
 - ii. Designated areas for customer pick-up and carry-out of packaged food and/or drink prepared by the associated eligible business.
 - e. **Prohibited Activities.** The following activities are prohibited within the outdoor space to avoid congregating, shared patron use of equipment, or noise impacts:
 - i. Standing (non-seated) food or drink service and consumption.
 - ii. Standing (non-seated) waiting or gathering areas.
 - iii. Outdoor entertainment or amusement (e.g., viewing outdoor movies; yard games).
 - iv. Amplification of any sound or music, including but not limited to the use of amplifiers, speakers, or loudspeakers.
 - f. **Duration.** Any outdoor space intended for an eligible business cannot begin until the eligible business can open for occupancy by members of the public. The outdoor space must shut down for public use by no later than October 31, 2021 and must be removed in its entirety by no later than November 9, 2021. Additionally, if the state or city issues

any new or amended public health orders that prohibit this temporary outdoor expansion space, then the outdoor space must shut down.

- g. **No Parking Required.** No vehicle or bicycle parking is required for establishment of a Temporary Outdoor Space.

4. Permitted Location & Operator of Temporary Outdoor Expansion Space for Restaurants & Bars:

Permitted Location of Temporary Outdoor Space – Options	Can the Outdoor Space be In a Parking Lot?	Permitted Operator of Outdoor Space	Owner or Landlord Consent Required?
<p>1. Same Zone Lot: Private property only (not on public right-of-way) and on same zone lot that eligible business is located.</p>	<p>1. DZC and FC59 Zoned Properties: Yes, the temporary outdoor space may be located on all or some off-street parking spaces, regardless if those spaces are required by the zoning code or not.</p>	<p>The zone lot (property) owner or eligible business</p>	<p>Yes - Property owner consent is required if the eligible business is not the property owner</p>
<p>2. Different Zone Lot: Private property only (not on public right-of-way) and on a different zone lot than where eligible business is located –only allowed on lands zoned under Denver Zoning Code</p>	<p>1. DZC and FC59 Zoned Properties: Yes, the temporary outdoor space may be located entirely or partially on a different zone lot than the zone lot housing the eligible business.</p>	<p>The zone lot (property) owner or eligible business whose primary use is located on a different zone lot</p>	<p>Yes - Property owner consent is required if the eligible business is not the property owner of the zone lot on which the temporary outdoor space is located.</p>
<p>3. Public right-of-way (sidewalks, tree lawn, on-street)</p>	<p>Zoning rules are <u>not applicable</u> if the outdoor space is located entirely on public right-of-way. If the outdoor space is partially on private property and partially on public right-of-way, please refer to the location options and guidelines above that will apply to the portion of the outdoor space located on private property. For outdoor spaces located entirely or partially in public right-of-way, please refer to applicable rules and guidelines found at: www.denvergov.org/restaurantpermits.</p>		

5. Use Review / Permit Requirements: A Zoning Permit is not required.

Approved by:



Tina Axelrad, CPD Zoning Administrator

Date: May 18, 2020 / Updated August 19, 2020/Updated and Amended October 30, 2020