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PRACTICE TEMPORARY USES



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Zoning for Temporary Land Uses: Balancing Economic Development with Community Character

By Patrick J. Sloan, AICP

Temporary land uses are in every community. Whether they take the form of a garage sale in a residential neighborhood, a farm stand in a rural area, or a sidewalk sale in a downtown (just to name a few), all communities face the same challenge: How can seemingly reasonable uses be permitted on a temporary basis while also ensuring that the zoning regulations protect public safety and the character of the area?

Temporary uses can be beneficial to local economic development and are often popular with the community. At the same time, reasonable regulations and review procedures are necessary to ensure that temporary land uses do not become permanent or jeopardize public health, safety, and welfare. In cases where it is beneficial for a temporary land use to become more frequent or permanent, the use should be regulated as an accessory or principal use.

Context is key. The regulations for a small produce stand on a farm will be much different than a farmers market downtown. This article will explore many common types of temporary uses, describe why reasonable zoning regulations and procedures are appropriate, and suggest best zoning practices to consider.

WHY HAVE TEMPORARY LAND-USE REGULATIONS?

Whenever communities adopt or enforce zoning regulations, they are frequently challenged with answering why certain zoning regulations exist. The same questions arise when a community regulates a temporary land use, especially if it is popular in the community. Therefore, before adopting or amending temporary-use regulations, first identify *why* regulations are being enacted. Because temporary land-use regulations must be rationally related to a legitimate government interest, it is helpful to start the process by identifying these interests. The following are some common government interests for regulating temporary uses, which can also function as intent statements in a zoning ordinance.

Reasonably allow land uses on a temporary basis that are not appropriate on a long-term/permanent basis. If a use is appropriate on a permanent basis, it belongs as a Principal Permitted Use or Special Land Use in its zoning district. However, because temporary uses, including seasonal uses, are generally not appropriate on a full-time basis, it is important to have reasonable regulations on their location, operations, and duration.

Maintain the health, safety, and welfare of the surrounding area and the greater community. While temporary uses can include fun and creative uses of property, they can also create nuisances for neighbors and the general public, promote overcrowding, and create unmanaged traffic congestion. Therefore, the community must consider what regulations to impose for traffic safety, adequate parking and accessibility, location of structures and uses, hours of operation, duration of the use, sanitation, lighting, and noise.

Provide predictable outcomes for applicants and the community. Public access to a community's zoning regulations is easier than ever and applicants will often review the ordinances before applying for a temporary use. Therefore, applicants will be better prepared to plan with confidence if the community has clear, accessible regulations in its ordinance.

Promote economic development. Because the duration of temporary land uses is, well, temporary, the regulations for them can be much more flexible than the regulations for permanent land uses. This allows the operators to be creative.

Allow reasonable accessory uses to a principal permitted use. Several principal permitted uses go hand in hand with compatible accessory uses. Examples include a garage sale in a residential neighborhood, outdoor dining for a restaurant, and a roadside stand on a farm. While a garage sale is assumed to be a permitted accessory use to residential property, ordinances are frequently silent on outdoor dining for restaurants and prohibit

outdoor dining as a result. Therefore, while having separate regulations for outdoor dining may be seen as overregulation by some, having no regulations is often interpreted as an outright prohibition.

Encourage the use of underused land. Whether they are located in a seldom used parking lot, an open field at a busy intersection, or a vacant storefront primed for new activity, permitting temporary land uses in underused spaces can be a catalyst for future activities and development.

STATE AND FEDERAL REGULATORY CONSIDERATIONS

Whether your state is a home-rule or a Dillon's Rule state, your state law likely has provisions for certain temporary land uses that preempt local control. Michigan and Ohio, for example, are home-rule states (i.e., each local municipality may plan and zone as it chooses, with certain limitations), and the laws of both states give municipalities broad discretion to regulate zoning and land use. At the same time, they have unique laws that preempt local regulations, which are outlined below.

The Michigan Fireworks Safety Act (P.A. 256 of 2011, as amended) prohibits a municipality from enacting or enforcing an ordinance, code, or regulation pertaining to or in any manner regulating the sale, display, storage, transportation, or distribution of fireworks regulated under the Act. However, the Michigan attorney general subsequently issued an opinion (Opinion #7266) that a local ordinance is not preempted by the state Act so long as the local ordinance does not prohibit fireworks vendors from undertaking their commercial operations in any way that other vendors may.

The Michigan Right to Farm Act (P.A. 93 of 1981, as amended) permits farms to have a farm market by right, subject to certain restrictions. State restrictions include locating the farm market on the property owned or controlled by the producer of the products for sale, requiring at least 50 percent of the products for sale to be produced by the farm

market owner, and allowing the farm market to operate seasonally or year-round (see Michigan Department of Agriculture and Rural Development Generally Accepted Agricultural and Management Practices for Farm Markets). In Michigan, municipalities retain zoning control for buildings, parking (though the state permits vegetative parking surfaces), ingress and egress, and signage. In this case, communities in Michigan must be aware of state regulations for farm stands so they can determine whether additional local regulations are necessary. A small seasonal farm stand may require little or no regulation; on the other hand, a year-round farm market may require a more defined parking area and permits for any structures.

The Ohio Revised Code permits a qualifying farm in a township or county to operate an agritourism use, which includes agriculturally related educational, entertainment, historical, cultural, or recreational activities. On a qualifying farm, townships and counties may regulate the size and setbacks of agritourism structures, size of required agritourism parking areas, and ingress or egress, where such regulation is necessary to protect public health and safety.

To ensure that zoning regulations are not in conflict with state law, all communities are encouraged to review their state land-use laws and consult their municipal attorneys when proposing any new regulations.

Federal Considerations for Local Signage

In the 2015 U.S. Supreme Court decision in *Reed v. Town of Gilbert, Arizona*, the Town of Gilbert's sign ordinance was declared unconstitutional because it regulated a church's temporary directional signs differently than other noncommercial signs based on the content of the sign. Many communities have definitions and standards for signs based on the content of the message, including garage sale signs, special event signs, and agricultural sales signs. If a community's ordinance makes distinctions based on the speaker or the message, the community should work with its municipal attorney to amend the ordinance to comply with *Reed* and other applicable federal court cases related to signage (e.g., *Central Hudson v. Public*

Services Commission of New York, Metromedia, Inc. v. City of San Diego, etc.). There are many content-neutral ordinance strategies that communities can use to ensure that adequate signage is permitted.

POPULAR TYPES OF TEMPORARY LAND USES

The following are descriptions of some common temporary land-use types, including factors that communities should consider when determining how to regulate each type. For uses not mentioned below, consider the scope of that use, how it benefits the community, and what best practices a community can implement to ensure that it does not negatively impact neighbors or the public.

Garage/Yard Sales and Seasonal Sales

Garage and yard sales are typically incidental to a residential use and, if done not more than three or four weekends per year, will usually have no impact on the neighbors. As such, garage sales require little regulation. Typical regulations for garage sales limit the use to a maximum number of days per calendar year and don't require a permit or a parking plan. However, if certain residential properties are continually holding garage sales, this eventually becomes a zoning violation (i.e., an unpermitted commercial use in a residential zone).

Seasonal sales stands are an excellent way to promote commerce and encourage the suitable use of property. Underused commercial sites (e.g., a dying mall) are often excellent locations to sell seasonal items such as flowers, fireworks, produce, and Christmas trees. Regulations for these large-scale commercial uses should be different than, say, a home owner selling pumpkins during Halloween season.



Carrie Leitner, McKenna

➡ A mobile hot dog vendor operates on a public sidewalk in downtown Grand Rapids, Michigan, during the ArtPrize competition event in 2011.

Farm/Roadside Stands and Farmers Markets

A farm stand is an accessory use of a farm where products from the farm are sold. A farm stand is both an opportunity for farms to sell products directly to consumers and an opportunity for consumers to buy fresh produce or value-added products not typically sold in retail stores. In many cases, the revenue generated from a farm stand can be essential to the sustainability of the farm as a whole. Although farm stands are commonly located on the farm from which most of the products are grown, communities should consider allowing off-site farm stands in a more visible and accessible site in the agricultural zoning district. Many communities with regulations for farm stands have a minimum percentage (e.g., 50 percent) of for-sale products that must be produced on or by the affiliated farm. Generally, the parking surface of a farm stand can be vegetated or gravel, but grading should be required when necessary to maintain the integrity of the parking surface. Because farms can often provide products for most or all of the year, communities should consider allowing farm stands to operate year-round where appropriate.

Unlike a farm stand, which is generally located on the farm where the products were grown (or in a more advantageous site in the agricultural zoning district), a farmers market is typically located in a heavily-trafficked area

(such as a downtown) or in a public space. Vendors at farmers markets are usually not required to grow their own produce and some vendors don't even sell produce. Many farmers market vendors sell arts and crafts. Some farmers markets in warmer climates occur on a regular schedule throughout the year, whereas farmers markets in colder climates usually occur seasonally.

Mobile Food Vendors

Mobile food vendors such as food trucks usually operate in the public right-of-way or on other public property, but sometimes also operate on private property. Many communities welcome mobile food vendors but have requirements for a minimum separation or setback distance from any restaurant or festival unless written permission is obtained by the restaurant owner or festival event coordinator. These requirements are intended to protect the economic interests of the brick-and-mortar restaurants (which pay property taxes and rely on lunch and dinner revenue) as well as festivals (which may rely on food sales inside the festival to fund the event). Many ordinances also include provisions for parking, hours of operation, garbage removal, noise, lighting, and storage and security of flammable or combustible materials.

Sidewalk Sales and Temporary Outdoor Dining

Sidewalk sales and other temporary outdoor sales are usually limited products that are also sold inside the business. Sidewalk sales are opportunities for a business to display additional merchandise during certain times of the day. In some communities, sidewalk sales events are coordinated among all businesses in a certain district for a specific period of time. In other cases, an individual business may want a special outdoor sales event permit. In either case, the community must ensure that adequate access along the sidewalk is maintained and that the products are brought indoors at certain times.

Temporary outdoor dining is typically an accessory use to a permitted restaurant use that takes place in one of two areas: either on the private property of the restaurant or temporarily in the public right-of-way (e.g., on a



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Diners enjoy lunch in a seasonal outdoor dining area located on a public sidewalk in downtown Grosse Pointe, Michigan.

public sidewalk or in a converted on-street parking area). Typical standards for temporary outdoor dining areas include maintaining pedestrian and vehicular access on sidewalks, ramps, and building entrances; limiting amplified music if there are residences within a certain proximity; and requiring a barrier from vehicular traffic. Depending on the local ordinance and the site's capacity, outdoor dining areas may have restrictions on the number of allowable seats and duration of the use. For example, in colder climates, many municipalities require all outdoor dining furniture and fixtures to be removed during the winter months. However, many northern cities embrace the cold and encourage temporary outdoor dining during the winter season.

Pop-Up Uses

Pop-up uses can take many forms, including a temporary occupancy in a vacant building

or in a lightly constructed interim building on vacant land. Where a pop-up use is permitted in a permanent building, some communities will allow for a temporary certificate of occupancy (e.g., 90 days) that requires few or no building upgrades, provided the building official and fire marshal approve the temporary occupancy and the use is permitted in the zoning district. If



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Pop-up shops at Lexington Avenue Shopping Center, New York City.



Many of the nation's best artists exhibit their work downtown at the annual Charlevoix (Michigan) Waterfront Art Fair, which draws more than 25,000 visitors.

the pop-up use is successful and plans a long-term occupancy, the community will often require additional building upgrades to qualify for a permanent certificate of occupancy. Thus, allowing temporary occupancy for pop-up uses can serve as an incubator for start-up businesses.

Allowing for pop-up uses in lightly constructed interim buildings can be an effective use of public land or private land that is not ready for development, provided the location is appropriate and the use is permitted in the zoning district. Communities that allow these types of temporary pop-up structures often permit them for a fixed period of time or until the site is ready for redevelopment.

Festivals and Large-Scale Events

Festivals, concerts, running events, and similar large-scale events are the most complex temporary land uses to regulate because they vary in size and activity. While many of these types of events are welcomed by communities and enjoyed by the public, it is important for the community to have a

full understanding of the proposed activity so that the regulations can be appropriately applied. If the municipality is holding the event, the process is easier. However, many non-public organizations also hold festivals, such as churches and other nonprofits. As we will see later in this article, there are a number of regulations to consider for festivals and similar large events that address safety, sanitation, light, noise, insurance, and performance guarantees.

Other Temporary Uses

Keep in mind that there will be temporary uses proposed that are not necessarily anticipated by a community's ordinances. Therefore, when considering regulations for a temporary land use, the community must take time

to define the use (see section below) and consider the use's potential impacts, both positive and negative. For temporary land uses not included in a community's ordinance, the community may want to consider allowing the zoning administrator or planning commission to classify other temporary uses as the most similar temporary use listed in the ordinance. In the long term, however, it is best to amend the ordinances as necessary to account for newer types of temporary land uses.

REGULATORY TOPICS AND BEST PRACTICES TO CONSIDER

When determining how to apply regulations to each temporary land use, remember that the degree of regulation should be commensurate with its size and intensity. In the example that we will see later, the regulations for a garage sale are far less restrictive than a festival.

As you read the following regulatory tools, think of some small-scale temporary

land uses where a regulation should be inapplicable, and also think of some larger, more impactful temporary land uses where such regulation is necessary to protect public safety, health, and general welfare of the participants, neighbors, and community as a whole. In some cases, the community will want these addressed in its ordinance; in other cases, the community may want to allow administrative discretion for these standards based on the use, location, duration, etc.

Definitions, Allowable Uses, and Maximum Duration

A community's ordinance should include as many definitions of temporary-use types as possible. To create definitions, it is helpful to have several examples to draw from, such as ordinances in similar communities, planning publications such as PAS Report 521/522, *A Planners Dictionary* (available at planning.org/pas/reports/archive.htm), and searching for online definitions.

Depending on the type of temporary land use, communities should determine whether to regulate the land use by zoning district, in certain locations, or based on the current uses of the property. Additionally, communities should consider the type of temporary uses, their associated activities, and whether certain activities will be explicitly permitted or prohibited in relation to the temporary land use.

Will the temporary land use be limited to a maximum number of days in a calendar year or a maximum number of days per event? For certain temporary uses, the community may want to have fixed hours of operation or allow the reviewing authority to set more restrictive hours of operation based on nearby residences, impact of noise and lighting, etc.

Parking, Circulation, Pedestrian Access, and the Americans with Disabilities Act

If parking is required, consider requiring the applicant to submit a parking and circulation plan. The community may also want to specify minimum parking spaces based on use, activity area, building size, or other factor determined by the approving authority.

Depending on the intensity and location of the use, consider allowing the approving

COMPARISON OF EXAMPLE REGULATIONS FOR GARAGE SALES VERSUS FESTIVALS

	Garage Sales	Festivals
Permitting	No permit required. Operator may be property owner, lessee, or manager.	Permit is required by the planning commission. Operator may be property owner, lessee, or manager.
Locations and Allowable Uses	Permitted only on private property in a residential district with an established residential use. Use is limited to sale of personal items of the owner, lessee, or manager to the general public.	Use is permitted only on public property or property owned by a nonprofit organization. Allowable uses include rides, food sales, carnival games, arts and crafts, live musical entertainment, and similar uses approved by the planning commission.
Maximum Duration	12 days per calendar year, only between the hours of 6 a.m. to 10 p.m.	Not to exceed 7 days per permit, only between the hours of 6 a.m. to midnight.
Parking, Circulation, Pedestrian Access, and ADA	No parking plan required.	1 parking space per every 2 people of the facility capacity, which may be located on-site or approved off-site public or private spaces. An access plan is required for planning commission review, which must show accessibility between parking lot, buildings, and on-site amenities.
Development and Operations Standards	Use of the public right-of-way is prohibited except for allowable on-street parking	All structures must be removed upon completion of the event. All structures must be at least 25 feet from any lot line and at least 200 feet from an adjacent residential zone or use. Use of the public right-of-way is prohibited unless it is closed by the police department. Garbage cans and portable toilets must be located and maintained according to the approved plans. Adequate lighting must be provided after dusk, with all lighting being turned off by 12:30 a.m.

authority to require an access plan based on the size of the facility or event. For example, if allowing sidewalk sales in the public right-of-way, make sure that there is sufficient area for barrier-free access. For more information on this topic, please refer to *A Planning Guide for Making Temporary Events Accessible to People with Disabilities*, published by the ADA Action Network.

Development and Operations Standards

For many temporary uses, the size of the associated structures won't matter so long as they are temporary. However, when determining appropriate locations of structures, consider minimum setbacks to the road right-of-way, adjacent residential uses or zoning districts, and other lot lines. In some cases, the structures and uses will be permitted in the public right-of-way. If a temporary land use is permitted in a public right-of-way, such as a sidewalk sale or a closed street for a festival, it should be delineated on a plan and reviewed by the police department and fire marshal.

Depending on the type and size of a temporary land use, certain sanitation requirements should apply. For example, while some small temporary uses will not require garbage cans and portable toilets, larger temporary uses should be required to locate and maintain them if there are a lot of people expected or if visitors are expected to stay for a long time.

Most ordinances have lighting standards, and many ordinances have certain exemptions for lighting for temporary events. The municipality should determine whether lighting will be required after dusk and partially exempt from the general lighting standards in the interest of public safety. For example, if there is a nighttime festival where people are walking through the event and parking lot after dusk, the community will want to temporarily exempt the use from the lighting standards of the ordinance and require a minimum level of lighting in pedestrian and vehicle areas. However, glare should be prohibited from spilling onto adjacent properties and road rights-of-way.

Finally, if a temporary use has the potential of increasing stormwater runoff or soil erosion and sedimentation, protections should be put in place to protect adjacent properties.

Permitting and Regulatory Oversight

Does a temporary land use require a permit from the municipality? If so, determine whether to charge a fee to cover the cost to review the application and an inspection. Any terms and conditions of the temporary land-use approval should be written on the permit itself. Regardless of whether a permit is required, the community should have requirements regarding who is authorized to operate a temporary land use (e.g., property owner, lessee, manager, or anyone else).

If a permit is required, which entity will review the permit application (e.g., zoning administrator, planning commission, city council, township board, etc.)? If the planning commission, city council, or township board is the reviewing body, the applicants must be made aware of the lead time to apply for a permit based on the upcoming

meeting schedule. In some cases, these bodies require a public hearing, so there must be enough time between when the application is submitted and when any required public notices are mailed or published.

In addition to issuing permits, unless the temporary land use is minor (such as a garage sale), it is important to have the fire marshal review the temporary-use application and plans. The marshal will be familiar with the relevant fire safety codes and will be help address such safety factors as fire hazards, fire extinguisher requirements, and the proper care of flammable or explosive materials.

For large or public temporary events, the police department should review the application and materials to determine if traffic control is a concern or if other public safety items must be addressed by the applicant. If any structures are proposed or there is an electrical hookup, the building official should review the plans to determine compliance with building and electrical codes. Finally, the health department may be required to review and permit food and beverage distribution as well as sanitation.

Compliance and Liability Considerations

Depending on the size and intensity of the temporary land use, a municipality may want to require the operator to sign an agreement to indemnify and hold the municipality harmless for any loss, cost, damage, or injury arising directly or indirectly out, or in the course of, the temporary land use. The municipality may also want its attorney to prepare a standard indemnification agreement to be used for certain types of major temporary land uses.

For some temporary uses, especially large events or events on public property, the municipality should require the operator to provide proof of liability insurance listing the municipality as an additional insured as well as a performance guarantee. The amount of insurance coverage should be determined by the municipality and commensurate with the perceived risk. The purpose of a performance guarantee, such as a refundable cash deposit, is to ensure certain performance of the applicant. In the case of temporary land uses, many communities require a performance guarantee

in an amount sufficient to remove the use (including cleanup) or conduct ordinance enforcement in the event of a violation. Think of the cost that a municipality could incur if the municipality is responsible for removing the garbage and temporary structures after a large event because the operator failed to do so. While a performance guarantee should not be a punitive amount, it should be an amount sufficient for a municipality to remove the use and clean the site. If the operator removes the use and cleans the site upon completion of the temporary land use, the performance guarantee should be fully refunded.

Finally, there will undoubtedly be uses that have negative impacts that the municipality did not anticipate. For that reason, a municipality should reserve the right to revoke or amend a temporary land-use permit if the conditions of the approval have been violated or if public safety or health is jeopardized.

APPLYING TEMPORARY LAND-USE STANDARDS

The following table compares how a few of the previously discussed regulatory topics could apply to a garage sale as opposed to a large festival. Note that in the following example the garage sale requires no permit and minimal regulations while the festival is subject to many more regulations. If some of the standards below are not in a community's ordinance, the community should consider amending its ordinance to either explicitly include them or allow administrative discretion for the reviewing body to include additional standards.

CONCLUSION

In my experience working with dozens of urban, suburban, and rural communities, it is much easier for businesses and developers to obtain approvals when the regulations are clearly written and predictably administered.

In closing, keep in mind that written regulations of a community lead to better planning and predictability. Although comprehensive temporary land-use regulations may be labeled as "overregulation" by some, having no regulations is often interpreted by the municipality as an outright prohibition of the land use (i.e., some zoning ordinance states that no use is permitted unless

explicitly permitted in the ordinance). Therefore, it is not a question of whether to have any regulations for temporary land uses; rather, it is a question of how much regulation is appropriate for each use.

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ARE YOUR TEMPORARY-USE
REGULATIONS CLEARLY
WRITTEN AND ADMINISTERED?

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