



DEVELOPMENT MANAGEMENT SCHEME COMPLIANCE ADVISORY: 8 OF 2021

GUIDELINES FOR APPLYING FOR A TEMPORARY LAND USE DEPARTURE IN TERMS OF THE CITY OF CAPE TOWN DEVELOPMENT MANAGEMENT SCHEME (DMS)

1. PURPOSE OF ADVISORY

- 1.1. The purpose of this advisory is to provide guidelines for applying for a temporary land use departure in terms of the City of Cape Town Development Management Scheme (DMS).
- 1.2. This advisory follows Departmental Circular 2 of 2019 on the same matter.

2. BACKGROUND

- 2.1. Section 42(c) of the City of Cape Town Municipal Planning By-law, 2015 (MPBL) permits an owner to apply to the City to utilise land on a temporary basis for a purpose not provided for in the land unit's zoning, within the Development Management Scheme (DMS).
- 2.2. In terms of Section 45 of the MPBL, the City may not grant a temporary departure:
 - a) for a period exceeding five years;
 - b) if another temporary departure is in operation at the time; or
 - c) if the temporary departure includes an improvement to land that is not permitted by the zoning applicable to the property.

3. TEMPORARY DEPARTURE ISSUES

- 3.1. Due to the ever-changing economy, new trends and the public demand to use land for uses which are not provided within a certain zoning, as well as the MPBL not envisaging all land use possibilities, temporary departures are sometimes desired.

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- 3.2. Other than the fact that uses permitted through this mechanism should be of a bona fide temporary nature and that such option should not be used to circumvent the provisions of a zoning scheme by avoiding a rezoning process, this document provides further guidelines on the matter. Misuse of the temporary departure mechanism does occur regularly and includes for example motivation by an applicant of a temporary departure (sometimes successive ones) to effectively achieve a semi-permanent change in land use rights when a rezoning (permanent) may not have been desirable or supported.
- 3.3. The misuse further includes instances where a land owner may apply for a temporary departure to rectify a land use transgression.
- 3.4. Temporary departures may also be used to delay or circumvent development contribution requirements. Once the temporary departure expires, a subsequent rezoning is then sometimes motivated on the basis that “the surrounding area has adjusted to the new land use” and “the temporary departure has not manifested any detrimental effect in (or caused complaints from) the surrounding area”.
- 3.5. The conclusion from the above is that case officers and authorised officials need to carefully assess the legitimacy of the temporary nature of an application while still complying with Section 99 of the MPBL.
- 3.6. Although it is possible that a temporary departure use may not have had any detrimental effect on surrounding properties or manifested in complaints from surrounding residents, this does not automatically imply that permanent rezoning to entrench the use rights is desirable as it may conflict with long-term planning or the strategic intent for an area.
- 3.7. Such inconsistent approaches may prejudice the intent of the DMS and expose the City to legal risk and possible challenge in this regard. In the context of this, a common approach and standard operational guidelines for using temporary departures are provided in this advisory.
- 3.8. Note that development charges do not apply to temporary departure applications where rights are granted on a temporary basis: provided that, (i) the infrastructure impact of the temporary use is the same or less than the existing use; and (ii) the City has sufficient spare capacity available to accommodate the proposed temporary use.

4. DIFFERENCE BETWEEN TEMPORARY LAND USE DEPARTURE AND REZONING

- 4.1. A temporary departure forms part of the “use rights” of a property. A “use right” is defined by the MPBL as a right to use that land in accordance with its zoning, a departure, consent use, condition of approval or any other approval granted in respect of the rights to use the land. A departure is, therefore, an extension to the zoning rights of a property.
- 4.2. While both a temporary departure and rezoning affect the use rights of a particular land unit, a rezoning causes the change of a zoning of a particular land unit on a permanent basis, while a temporary departure allows a use right not provided for in a zoning scheme within a particular zoning (without any permanent change of zoning) with the intention of not being permanent.
- 4.3. It is thus clear from the MPBL that a temporary departure must be of a bona fide temporary nature and only be applied when the use or activity cannot be accommodated in terms of the provisions of the DMS. In addition, temporary departures should also be very specific in nature and cannot be used to grant a basket of new rights.
- 4.4. The nature of the difference between temporary departure and rezoning can further be summarised as follows:

	Temporary departure	Rezoning
Affects	Use rights	Zoning category and by implication, use rights
Use right duration	Lapses after a maximum of 5 years (thereafter a new application can be made for a maximum of 5 years)	Permanent
Use right	Defined / specific	Basket of rights
Subject to title restrictions	Yes	Yes
Impact assessments / environmental authorisation (if required) applicable	Yes	Yes
Discretion in respect of advertising in the media	Yes	No

5. CIRCUMSTANCES APPROPRIATE TO USE THE TEMPORARY DEPARTURE MECHANISM

- 5.1. The temporary departure mechanism should not be used to acquire land use rights which:
- would clearly not be of a temporary nature and may circumvent the provisions of the DMS (i.e. the requirement to rezone),
 - would require significant capital investment (e.g. new structures / buildings / infrastructure or drastic changes to existing ones), or
 - might not easily revert to the existing zoned use of the building and premises upon expiry of the temporary departure (e.g. where building work or demolition would be required to revert back to the original zoned use).
- 5.2. Where the above is the case, a temporary departure application should not be permitted and the applicant should be advised to rather consider applying for a rezoning.
- 5.3. Temporary departures can also not be used to:
- depart from a MPBL or DMS definition,
 - depart from a development rule,
 - permit a use right already provided for in the DMS in the zoning of the land unit (e.g. by consent use or additional use right), or
 - make a specific land use permanent by circumventing the rezoning procedure, specifically advertising requirements.
- 5.4. Depending on the context, temporary departure applications may instead be considered appropriate in the following circumstances:
- Where the temporary departure application is meant to confer a specific use right (and not to relax existing use right restrictions), additional to that of the permitted use of the property in terms of the zoning;
 - Where the proposed activity or use right would clearly be of a temporary nature;
 - Where the proposed activity or use right would be of a fairly small or modest scale in relation to the primary use / zoning right of the premises (as well as in relation to the extent of the site);
 - Where no new permanent buildings, infrastructure or other capital investment (or significant improvements to existing ones) as a precondition for the proposed activity would be required;

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- Where the services impact of the proposed use would be negligible and the required services infrastructure are already available;
- Where the proposed use right activity would easily terminate upon expiry and use of the premises in accordance with its existing zoning continue or resume without significant effort;
- Where the flexibility afforded by a temporary departure may be desirable for a limited period with little anticipated detrimental effect on its surroundings.

6. ISSUES TO CONSIDER WHEN ASSESSING TEMPORARY DEPARTURES

6.1. Application motivation (in addition to the criteria listed in Section 99 of the MPBL)

6.1.1. The reasons why proposed use rights are required on a temporary basis only should be clearly explained by an applicant in his/her proposal motivation (including the intended duration) and should thus be included in the application from the start. Where this is not the case, case officers should request this information from the applicant before proceeding with an assessment.

6.1.2. The application motivation should also address and provide details of the intended scale and extent of the proposed activity (e.g. staff / client numbers etc.).

6.1.3. The motivation must also include how the premises will revert back to the use as before a temporary departure is approved, as well as a convincing motivation that no major changes to the site or buildings would be required at that time. Where necessary, applicants may also be requested to provide a layout plan to illustrate such future continued / reverted use.

6.2. Aspects to consider in assessment

The following should form part of the assessment, in addition to the required motivation as per the MPBL:

- Primary purpose of the temporary departure and whether the proposed use or activity would be of a bona fide temporary / short-term nature;
- Reason for using the temporary departure mechanism (instead of applying for use rights of a more permanent nature);

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- Scale of the proposed use right or activity in relation to the primary use of the premises (as well as extent of the premises);
- Any proposed capital investment (buildings/structures/infrastructure/renovation etc.) required for the proposed activity and use of existing structures/buildings;
- How the zoned use of the premises would continue or resume once the temporary departure expires and whether any demolition / conversion would be required to enable this.

6.3. Successive temporary departures

The City may grant a temporary departure for a period of up to 5 years after which the approval will lapse. A new application for a maximum of 5 years can be applied for.

6.4. Building plans in relation to temporary departures

6.4.1. Where building works form part of a proposal, it must be clear that these relate to and are in support of the existing zoned use of the premises (e.g. normal renovations etc.) and that it isn't required as a precondition for the proposed temporary departure use.

6.4.2. Where such building work requires plan approval, care must be taken to ensure that the temporary departure use right is correctly reflected on the relevant building plan and that such temporary rights are not granted permanent status by implication when the plans are approved.



PLEASE NOTE

Always consult the City of Cape Town Municipal Planning By-law, 2015 (as amended) before any land use application is submitted to the Department.