

Atijera, Evamarie (CPC)

From: Dito, Matthew (CPC)
Sent: Tuesday, August 15, 2017 4:36 PM
To: John Kevlin
Cc: Atijera, Evamarie (CPC)
Subject: RE: 1390 Haight Street

WITHDRAWN -

ZAD REQUEST

R# 2017-00924/ZAD

Will do, John.

Eva – could you please close out the record for this LOD and have finance process any refund? I will leave the hard copy of the request at your desk.

Thanks,
Matt

Matt Dito
Planner | Northwest Quadrant
Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94103
415-575-9164

From: John Kevlin [<mailto:jkevin@reubenlaw.com>]
Sent: Tuesday, August 15, 2017 4:34 PM
To: Dito, Matthew (CPC)
Subject: RE: 1390 Haight Street

Hey Matt –

Please accept this email as my official withdrawal of the Letter of Determination request for 1390 Haight Street. Let me know if there are any refunds available. Many thanks.

John

From: Dito, Matthew (CPC) [<mailto:matthew.dito@sfgov.org>]
Sent: Wednesday, August 02, 2017 11:48 AM
To: John Kevlin <jkevin@reubenlaw.com>
Subject: 1390 Haight Street

Hi John,

I received your voicemail earlier this week, sorry for the delay in response (caught a bug and was out of the office). I have reviewed the LOD request but haven't had a chance to discuss with the Zoning Administrator yet. I should be able to review it with him sometime next week; can we touch base after that? Before I draft the letter we can go over what its likely content will be.

Thanks.
Matt



SAN FRANCISCO PLANNING DEPARTMENT

Time Accounting Project Detail Report

From July 19, 2017 through August 16, 2017

August 16, 2017

Application Name: 1398 Haight Street (aka 1390-1392 Haight) - ZAD Request
Property Address: 1390 HAIGHT ST
Record Number: 2017-009241ZAD
Record Alias: Zoning Administrator Determination Letter (ZAD)

1650 Mission St.
 Suite 400
 San Francisco,
 CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
 Information:
415.558.6377

Staff	Date	Hour	Cost	Comment
David Lindsay	07/25/2017	0.50	\$85.50	reviewed/assigned to Matt Dito
Sub-total		0.50	\$85.50	
Evamarie Atijera-Taylor	07/20/2017	0.50	\$55.39	ZAD Request reviewed, fee processed, scanned, and assigned.
Sub-total		0.50	\$55.39	
Matthew Dito	07/31/2017	1.25	\$131.21	review request, code. need to talk with Scott or Corey to determine if notification is needed for intensification of use.
	08/02/2017	0.25	\$26.24	phone call with John Kevlin to discuss main points of interest on LOD
	08/10/2017	0.50	\$52.48	ZA drop in to discuss
	08/15/2017	0.50	\$52.48	call RJR twice, speak with John Kevlin, initiate closeout, leave docs with Eva
Sub-total		2.50	\$262.41	
TOTAL		3.50	\$403.30	

REUBEN, JUNIUS & ROSE, LLP

July 14, 2017

R# 2017-009241 ZAD
CK # 28894 8664 -
D. LINDSAY (NW)

Delivered Via Messenger

Scott Sanchez, Zoning Administrator
San Francisco Planning Department
1650 Mission Street, 4th Floor
San Francisco, CA 94103

**Re: 1398 Haight Street – Liquor License Change from Type 23 (Small Beer Manufacturer) to Type 75 (Brewpub)
Our File No.: 10692.01**

Dear Mr. Sanchez:

Our office represents Artisanal Brewers Collective (“Artisanal”) which is contemplating acquiring the existing restaurant and brewing operation at 1398 Haight Street (Assessor’s Block 1233/Lot 022) (the “Property”). The Property is currently occupied by Magnolia Gastropub & Brewery, which operates a restaurant with on-site brewing using a Type 23 ABC “Small Beer Manufacturer” License. The Property is located in the Haight Street NCD and the Haight Street Alcohol Restricted Use Subdistrict (the “Subdistrict”).

Artisanal will acquire the existing restaurant and brewery and will continue the operation at the same size and intensity. The only material change will be that the business may be given a new name. The only other change is that Artisanal will need to operate under a Type 75 “On Sale General—Brewpub” license instead of the existing Type 23.

By this Letter of Determination, we request confirmation that Artisanal can continue the operations at the Property with a Type 75 ABC License for a restaurant and brewpub.

A. Background and 1997 Letter of Determination

Before Magnolia moved into the Property in the late 1990s, it was occupied by another full service restaurant called “Dish.” Dish held a Type 41 ABC License (on-sale beer and wine – eating place). Type 41 Licenses permit a business to sell beer and wine on or off the premises so long as the property operates as a bona-fide eating place. The license does not allow on-site consumption of liquor or beer brewing.

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Daniel A. Frattin | John Kevlin
Tuija I. Catalano | Jay F. Drake | Matthew D. Visick | Lindsay M. Petrone | Sheryl Reuben¹
Thomas Tunny | David Silverman | Melinda A. Sarjapur | Mark H. Loper | Jody Knight
Chloe V. Angelis | Corie A. Edwards | Coryn E. Millsagle | Jared Eigerman^{2, 3} | John McInerney III²

1. Also admitted in New York 2. Of Counsel 3. Also admitted in Massachusetts

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After Dish began operating, the City established interim controls for the Haight Street NCD prohibiting new or expanded establishments selling alcoholic beverages. Dish therefore became a legal non-complying restaurant use serving alcohol.

In 1997, the operations at the Property changed to the current use, and the Zoning Administrator determined that Magnolia could operate a restaurant and also add on-site brewing, changing the ABC License from Type 41 to Type 23. A copy of this determination is included as Exhibit A.

At that time, the Department concluded Magnolia's change in ABC License type and addition of brewing facilities did not amount to an intensification of Dish's restaurant use. The Zoning Administrator reasoned that the change in ownership alone without a change in the intensity of the restaurant itself met the Planning Code's requirement for legal non-conforming uses. Regarding the brewing facility, the new ABC license "does not change the nature of the licensed premises" because the overall amount of beer and wine sold at the site would not increase. In addition, the square footage of the business used for the sale of alcoholic beverages—as opposed to production—would not increase. Essentially, a substitution of sales brewed-on-premise beer replacing sales of brewed-off-premise beer did not amount to an intensification of the legal non-conforming use: restaurant customers could continue to drink beer at whatever quantity they saw fit.

B. Artisanal Brewer's Collective Cannot Continue to Operate Under a Type 23 License

Artisanal is unable to continue to operate the Property under a Type 23 license small beer manufacturer license because it currently holds more than six on-sale licenses. The ABC Act prohibits an entity that holds more than six on-sale licenses from also holding an alcohol manufacturing license (such as a Type 23 license).¹ Artisanal already holds more than six Type 47 and 48 licenses for restaurants and bars it operates in Los Angeles.. As such, it can only operate the restaurant and brewery at the Property with a Type 75 license.

Artisanal would replace Magnolia as owner and operator of the restaurant and brewery facilities at the Property. It would maintain the existing nature of the activity in the space, the overall amount of liquor sold would not increase, and the square footage of the restaurant would remain as-is.

¹ California Business and Professions Code § 25503.28(a)

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C. Establishment of a Type 75 License at the Property is Permitted by the Planning Code

The following is an analysis of a change of ABC License type from 41 to 75 under the Planning Code:

(1) Restaurant Use

A Restaurant use is defined by the Planning Code as follows:

A retail eating or eating and drinking use which serves foods to customers for consumption on or off the premises and which has seating...It may provide on-site beer, wine, and/or liquor sales for drinking on the premises (with ABC license types 41, 47, 49, 59, or 75); however, if it does so it shall be required to operate as a Bona Fide Eating Place as defined in Section 790.142...

Dish was originally established as a Restaurant use at the Property with a Type 41 ABC License, expressly recognized in the Restaurant use definition. Magnolia was subsequently established as a continuation of a previous Restaurant use, with a Type 23 ABC License. While a Type 23 license isn't expressly recognized in the current Restaurant use definition, clearly it is a bona-fide restaurant use with the privilege to sell alcohol on-site. The proposed new Restaurant would operate pursuant to a Type 75 license, another license type expressly recognized by the Restaurant use definition.² As such, it is a continuation of an existing, legal, non-conforming Restaurant use (since Restaurant uses are no longer permitted in the Haight Street NCD and Subdistrict).

The change from a Type 23 to a Type 75 license will in fact bring the restaurant operation more in-line with the Planning Code's "Restaurant" use definition.

- A Type 75 license is expressly recognized by the Planning Code's Restaurant definition and a Type 23 is not.
- A Type 23 license is considered a non-retail license (with certain retail privileges) whereas a Type 75 license is considered a retail license.³ The Haight Street NCD permits and encourages retail uses and does not permit industrial or other non-residential uses, other than institutional uses.

³ <https://www.abc.ca.gov/permits/licensetypes.html>

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- A Type 23 license allows, but does not require, that food be served on the premises. A Type 75 license requires that the business operate as a bona fide eating place, consistent with the Planning Code's Restaurant definition.

For these reasons, a Type 75 license is in fact *more* consistent with the Restaurant use category than the existing Type 23.

(2) No Intensification of Legal, Non-Conforming Use

Per Section 181(a) of the Planning Code, a legal, non-conforming use may not be intensified. The proposed restaurant operation at the Property would not intensify or change the existing restaurant operation. The Property will continue to operate as a restaurant, serving beer and wine and operating a limited brewing operation on the site. The differences in privileges between the existing Type 23 license and Type 75 license are as follows:

	Type 23	Type 75
Beer manufacturing	Yes (up to 60,000 barrels / year)	Yes (up to 5,000 barrels/year) ⁴
Beer and Wine	Yes	Yes
Other liquor	No	Yes
Off site sales (growlers etc)	Yes	No
Food operations	Permitted	Required to be a bona fide eating place

The change from a Type 23 to a Type 75 license use would result in a materially less intense potential use than a type 23 license in 3 important ways: (i) lower maximum brewing capacities, (ii) no off site sales permitted and (iii) required food operations.

The only potential intensification that could be associated with a change from a Type 23 to a Type 75 license is that a Type 75 license does permit the sale of liquor. However, no liquor

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is proposed to be sold as part of Artisanal's use of the Property. The liquor sales can be effectively restricted by the Planning Department's enforcement authority to disallow an intensification of use, or a Notice of Special Restrictions barring liquor sales could be recorded on title for the Property.

Since the proposed restaurant operation at the Property would be identical to the current restaurant operation and since the sale of liquor on-site can be barred in several ways, no intensification of use results from the proposed operation.

(3) Subdistrict Application

The Subdistrict prohibits new "on sale or off sale liquor establishments" although it provides some exceptions to this rule for the continuation of existing legal, non-conforming establishments. The Subdistrict does not bar the change of license for an existing Restaurant to a Type 75 license since subsection (b)(2) expressly excludes Type 75 licenses from the definition of "on-site liquor establishments." As such, a Restaurant with a Type 75 license would not be a "prohibited liquor establishment" and would not be restricted by the Subdistrict.

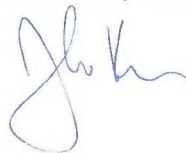
D. Conclusion

Artisanal is seeking to continue the use of the Property in an identical fashion as the current use. Due to a quirk in the California ABC Act, Artisanal is unable to continue to operate under the Type 23 license currently in place at the Property. Instead, Artisanal is seeking to operate under a Type 75 license, which allows the same privileges as a Type 23, with the addition of liquor sales. Artisanal does not propose on-site liquor sales at the Property and is willing to voluntarily and legally bar such sales through application of a Notice of Special Restrictions. As such, we seek the Zoning Administrator's determination that such proposed use would be permitted at the Property.

Thank you.

Sincerely,

REUBEN, JUNIUS & ROSE, LLP



John Kevlin

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Zoning Administrator Scott Sanchez
San Francisco Planning Department
July 14, 2017
Page 6

Enclosure:

- A - Letter from Robert W. Passamore of San Francisco Planning Department to David Mclean regarding 1398 Haight Street, February 18, 1997

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REUBEN, JUNIUS & ROSE, LLP

Exhibit A



PLANNING DEPARTMENT

City and County of San Francisco 1660 Mission Street San Francisco, CA 94103-2414

(415) 558-6378

PLANNING COMMISSION
FAX: 558-6409

ADMINISTRATION
FAX: 558-6426

CURRENT PLANNING/ZONING
FAX: 558-6409

LONG RANGE PLANNING
FAX: 558-6426

February 18, 1997

David McLean
616 Shrader Street, #3
San Francisco, CA 94117

Subject: Continuation of existing nonconforming Full-Service Restaurant use/addition of beer-brewing facilities, requiring a Type 23 Alcoholic Beverage Control License.

Street Address: 1398 Haight Street, San Francisco, CA 94117

Assessor's Block: 1233; **Lot:** 22

Previous Use: Nonconforming Full-Service Restaurant d.b.a. Dish, with a Type 41 Alcoholic Beverage Control license.

Zoning Controls: Haight Street Neighborhood Commercial District/Interim Zoning Controls re: selling of alcoholic beverages within the District.

Dear Mr. McLean:

This letter is in response to your request for a Zoning Administrator determination regarding the addition of beer-brewing/producing capabilities at the basement level of an existing nonconforming Full-Service Restaurant use at the above referenced address, specifically in conjunction with the recent Board of Supervisors Interim Zoning Controls prohibiting the introduction of new establishments, or any expansion of existing establishments selling alcoholic beverages in the Haight Street Neighborhood Commercial District. In reviewing the Interim Zoning Controls for this district and other pertinent information, the Planning Department has determined that the addition of beer-brewing facilities at this site would be permitted.

As is relevant in this particular situation, the Interim Zoning Controls for the Haight Street Neighborhood Commercial District note that any establishment lawfully existing in the Haight Street Neighborhood Commercial District prior to the effective date of the resolution [6/20/96], and selling alcoholic beverages as licensed by the State of California for the retail sale of alcoholic beverages for on-site and off-site consumption, shall be subject to the Interim Controls with the following exception[s]:

- This interim control shall not apply in the case of a temporary closure for not more than ninety (90) days for repair, renovation or remodeling so long as such repair, renovation or remodeling does not substantially change the nature of the licensed premises and does not increase the square footage of the business used for the sale of alcoholic beverages...
- This interim zoning control shall not apply to...change in ownership or an owner-to-owner transfer of a California liquor license...

Planning Department records indicate that the previous Full-Service Restaurant (defined by Section 790.92 of the Planning Code) at this location, d.b.a. Dish, existed as a nonconforming use, with an existing Type 41 ABC license (on-site beer/wine sales for drinking on the premises). A change in ownership at the site, without a change in the nature of the restaurant activity would permit: (1) the continuation of the restaurant use, and (2) as noted in the discussion of the Haight Street Interim Controls above, the transfer and continuation of the existing Type 41 ABC license.

Letter to David McLean
Re: 1398 Haight Street
Assessor's Block 1233 and Lot 22
Page 2

Furthermore, in regard to the brewing facility (producing beer for on-site sale and consumption), it is the Planning Department's interpretation of the Interim Control provisions that, although the addition of a brewing facility at the basement level of the restaurant requires a new Type 23 ABC license, it does not substantially change the nature of the licensed premises and does not increase the square footage of the business used for the sale of alcoholic beverages. This is based on that fact that, in general, the overall amount of beer and wine sold at the site would not increase. As you note in your October 23, 1996 letter to the Planning Department, "there would only be a substitution of brewed on-premise beer for brewed off-premise beer."


As noted above the previous restaurant, Dish, had a nonconforming use status. Section 186.1(b) of the Planning Code allows intensification of a nonconforming use only if authorized as a conditional use by the Planning Commission. I have reviewed the proposed beer preparation activity as described in your letter to me dated January 24, 1997, and find that this activity is not sufficient to be considered an intensification of use. Thus the proposed change from operation under Type 41 ABC license to a Type 23 ABC license will not require conditional use authorization. Key in this determination is that the floor area currently authorized for restaurant use will not be expanded. Storage requirements for the beer production will be contained within the existing restaurant area and the seating capacity of the restaurant will remain approximately the same.

Your building permit application for building alterations to install the brew-pub will be approved accordingly.

If you have substantial reason to believe there was error in interpretation of the provisions of the Planning Code, or abuse of discretion on the part of the Zoning Administrator you may file an appeal with the Board of Appeals (875 Stevenson Street, telephone: 554-6720) within fifteen (15) days of the date of this letter.

Enclosed please find copies of relevant Planning Code Sections, as well as a copy of the Interim Zoning Controls for the Haight Street Neighborhood Commercial District. If you have any further questions about this matter, please contact Elizabeth Gordon of my staff at 558-6309.

Sincerely,



Robert W. Passmore
Assistant Director of
Planning-Implementation
(Zoning Administrator)

GGG:UAEMGWPS1\LETTERS\1398HA1.LTR

Enclosures

cc: Office of Supervisor Leal
Office of Supervisor Bierman
Haight Ashbury Neighborhood Council
Haight Ashbury Improvement Association
Cole Valley Improvement Association
Michael Harris, 27 South Park, San Francisco, CA 94107
Samus O'Connell, Business Investment Management, 1426 Fillmore Street,
San Francisco 94115