

REVISED LEGISLATIVE DIGEST

(7/30/2019, Amended in Board)

[Health, Planning, and Police Codes - Small Business Permit Streamlining]

Ordinance to streamline small business permitting by, among other things, amending the Health Code to align regulation of restaurant enclosures for outdoor food service and restroom requirements with state standards; amending the Planning Code to clarify that a Type 2 (winegrower) and Type 23 (small beer manufacturer) liquor licenses may be used in conjunction with a Bar or Restaurant use, to amend the definition of a Bar to provide for consistent treatment of Type 64 liquor licenses, to modify Nighttime Entertainment use food service requirements, to reduce the distance measured for Retail Sales and Services uses in Neighborhood Commercial zoning districts to certain neighborhood commercial districts, to amend the use limitation provisions for nonconforming uses in RH (Residential, House), RM (Residential Mixed), and RTO (Residential, Transit-Oriented) districts to certain neighborhood commercial districts, to amend the definition of General Entertainment to include Amusement Game Arcade, to allow mechanical amusement games as a principally permitted use on the first story in the Haight Street Neighborhood Commercial District, to allow General Entertainment uses on higher floors in the Japantown Neighborhood Commercial District, and to allow Limited Restaurant use as an Accessory Use, and to revise the Upper Market Neighborhood Commercial Transit (NCT) District to allow General Entertainment as a principal use on the first and second stories; amending the Police Code to eliminate certain duplicative inspections and signoffs in connection with Place of Entertainment permits, and amending the definition of Limited Live Performance Locale to remove the requirement for food and beverage service; affirming the Planning Department's determination under the California Environmental Quality Act; and making findings of consistency with the General Plan, and the eight priority policies of Planning Code, Section 101.1, and public necessity, convenience, and welfare findings pursuant to Planning Code, Section 302.

Existing Law

A. The California Health and Safety Code Section 114266, part of California Retail Food Code, requires that “each permanent food facility shall be fully enclosed in a building consisting of permanent floors, walls, and an overhead structure,” but states explicitly that this provision “does not require the enclosure of dining areas or any other operation approved for outdoor food service.” San Francisco Health Code Section 412 applies a more restrictive approach, requiring all doors, windows, apertures, or other openings in restaurant places or kitchens to be enclosed with finely woven wire mesh screens. This applies to all places where “foodstuffs are cooked, prepared, sold, or disposed of for human consumption.”

Health Code Section 412 prevents San Francisco restaurants and other eating places from creating open air experiences. It also impacts manufacturing businesses that have a food or

beverage component, such as breweries that include a tasting room. In those facilities, roll-up doors often must be kept open for operational purposes. Under the existing Health Code, Section 412 a roll-up door may not be kept open in a tasting room or other dining area inside a manufacturer.

B. The California Retail Food Code (California Health and Safety Code Section 114276) requires a food facility to have toilet and handwashing facilities for patrons where there is onsite food consumption, or when the facility has more than 20,000 square feet of floor space. San Francisco Health Code Section 440.5 is more restrictive by requiring that every food establishment must provide toilet and handwashing facilities for use by patrons if the establishment is “selling food for the purpose of immediate consumption without the reasonable expectation of further preparation or addition to other foods” even if those foods are not consumed onsite.

Unlike the state law, Health Code Section 440.5 requires even a very small, to-go-only food establishment with no seating to provide a restroom for customers. This restroom requirement is a barrier for retail storefronts hoping to incorporate small food establishments (such as to-go coffee or ice cream) in order to create a unique shopping experience and attract customers who might otherwise choose to shop online.

C. The Planning Code defines “Bar” and “Restaurant” uses to include a number of state liquor license types, but does not provide clear guidance regarding the treatment of businesses with several types of licenses. A business using a Type 23 brewery liquor license is defined as a “Bar,” even though this license may be used by a brewery in conjunction with either a bar or restaurant. The lack of clarity on this point has required multiple breweries to seek Letters of Determination, adding time and money in order to move projects forward. Additionally, the definitions of Bar and Restaurant do not include a Type 02 winery liquor license, even though this license may be employed by a winery with either a bar or a restaurant.

The definitions also do not mention a Type 64 liquor license, which authorizes a nonprofit theater to serve alcoholic beverages to patrons before, during, and after theatrical performances. The lack of clear guidance has led to confusion about whether such a license would create a Bar use.

D. Under existing law an entertainment venue must have both Restaurant and Nighttime Entertainment uses as principal uses in order to hold a restaurant-style liquor license and admit patrons of all ages. Under Section 102 of the Planning Code, a “Restaurant” serving alcohol must operate as a “Bona Fide Eating Place,” defined to include requirements that the business (1) must receive at least 51% of its gross receipts from food sales; and (2) must be open and serving meals at least five days a week.

Some ticketed venues may not receive 51% of their gross receipts from food sales, and may not be open five days a week.

E. Section 710 of the Planning Code (zoning table note 2) provides that in NC-1 zoning Retail Sales and Service uses, including Restaurant and Bar uses, are principally permitted, unless the business is located within one quarter mile of any neighborhood commercial district or restricted use district with more restrictive controls. In those cases, the more restrictive zoning control applies. Similarly, for nonconforming uses in RH, RM, and RTO districts under Planning Code Section 186(a), a nonconforming use may be legitimized if, among other requirements, it conforms with NC-1 zoning, or of any neighborhood commercial district or restricted use district with more restrictive controls located within one quarter mile of the proposed use.

This requirement has prevented businesses from opening due to zoning restrictions in other neighborhoods. This requirement applies even if a zoning district with more permissive zoning is located between the proposed use and the more restrictive district. The proposed change seeks to implement a recommendation from the Planning Department's 2009 report, NC @ 20, which stated that "it is recommended that a suitable relaxation of the ¼ mile radius provisions be examined" (page 66).

F. The Planning Code defines Amusement Game Arcade as any business that includes 11 or more mechanical amusement devices (including pinball machines and arcade games). A business with 10 or fewer devices is considered a Nighttime Entertainment use. Amusement Game Arcades do not fall within the category of General Entertainment, which includes "entertainment or leisure pursuits to the general public including...billiard halls, bowling alleys, skating rinks, and mini-golf." In many zoning districts, General Entertainment is either principally permitted or permitted with a Conditional Use Authorization; in many of these same districts, Amusement Game Arcades are not specifically enumerated and are, as a result, not permitted under the umbrella "Entertainment, Arts, and Recreation Use" category.

In recent years, a number of new businesses combining Amusement Game Arcade with other food, beverage, and retail uses have emerged, leading to piecemeal legislation to permit these uses on a district-by-district basis. These uses are not materially distinct from billiards halls and other General Entertainment uses. The Planning Department previously considered folding Amusement Game Arcade into the General Entertainment use.

G. Under Police Code Section 1060.2, as part of the Entertainment Commission permitting process, an application for a Place of Entertainment permit is referred to the Planning, Building, Health, and Fire Departments for inspections and signoffs. These are separate from the signoffs required to close out a building permit and sign off on the establishment of an Entertainment use. Additionally, in order to serve food or drink, a new business will also need to secure a Permit to Operate from the Department of Public Health. In order to have an occupancy above 49 people, a new business will need an assembly permit from the Fire Department.

Where a business has recently completed the process of establishing an Entertainment use, or where a business secures a health or fire permit, the requirement to undergo additional inspections is redundant and adds extra expense for new business owners.

H. A Limited Live Performance (“LLP”) permit enables a business to incorporate limited entertainment performances as a secondary use alongside the business’s primary purpose. Under Police Code Section 1060, one of the requirements for a permitted “LLP Locale” is that “[p]atrons or members are admitted to the locale, which serves food, beverages, or food and beverages, including but not limited to alcoholic beverages, for consumption on the premises.”

This requirement prevents retailers that do not wish to serve food or drink from being able to acquire an LLP permit and offer limited entertainment to complement their retail offerings.

Amendments to Current Law

A. Health Code Section 412 is amended to replace the existing discussion of restaurant enclosures with language that aligns with the state standard for outdoor food service, while requiring that an establishment must be fully enclosed while the business is not operating.

B. Health Code Section 440.5 is amended to align with state law requirements for restrooms by replacing “for the purpose of immediate consumption without the reasonable expectation of further preparation or addition to other foods” with “for onsite consumption, or where the establishment has more than 20,000 square feet of floor space.”

C. Planning Code Section 102 is amended to delete the definition of “Amusement Game Arcade”; change the definition of “Arts Activities” to replace a reference to “Amusement Game Arcade” with a reference to arcades with eleven or more game devices; change the definition of “Bar” to include an ABC license Type 02 winemakers license and to clarify that a non-profit theater with an ABC license Type 64 is not a “Bar” use; change the definition of “Entertainment, General” to include arcades with eleven or more game devices; change the definition of “Entertainment, Arts and Recreation Use” to delete Amusement Game Arcade; and change the definition of “Restaurant” to include a ABC license Types 02, 23, and 87 liquor license.

D. Planning Code Section 102 is also amended to change the definition of “Bona Fide Eating Place” to exempt from certain requirements any place that has also established a Nighttime Entertainment Use, has actual and substantial sales of meals, and only provides on-site alcoholic beverage sales for consumption by ticket-holding patrons on the premises during the normal hours of operation of entertainment activities. This exemption does not apply to a place located in the Broadway Neighborhood Commercial District, North Beach Neighborhood Commercial District, Pacific Avenue Neighborhood Commercial District, or Polk Street Neighborhood Commercial District.

E. Planning Code Section 186 is amended to provide that nonconforming limited commercial uses in RH, RM, and RTO districts must comply with the nearest Neighborhood Commercial District or specified Restricted Use District within one-quarter of one mile. The specified Restricted Use Districts are the Geary Boulevard Formula Retail Pet Supply Store and Formula Retail Eating and Drinking Subdistrict, the North Beach Financial Service, Limited Financial Service, and Business or Professional Service Subdistrict, the Lower Polk Street Alcohol Restricted Use District, the Third Street Formula Retail Restricted Use District, and the Mission Street Formula Retail Restaurant Subdistrict. The effect of this change is to remove the requirement that nonconforming limited commercial uses in RH, RM, and RTO districts comply with the one quarter of one mile buffer surrounding all other Restricted Use Districts, but retains all other limitations on nonconforming limited commercial uses in RH, RM, and RTO districts relating to Neighborhood Commercial Districts and NC-1 zoning currently set forth in Planning Code Section 186.

F. Planning Code Section 710 is amended to reduce the distance measured for Retail Sales and Services uses in NC zoning districts to any neighborhood commercial district within 300 feet and delete the distance-measuring requirement for Restricted Use Districts, but the existing quarter-mile distance restrictions for Retail Sales and Services uses in NC zoning districts are preserved for the following Named Neighborhood Commercial Districts and Restricted Use Districts: the Inner Clement Street Commercial District, the Outer Clement Street Commercial District, the Geary Boulevard Formula Retail Pet Supply Store and Formula Retail Eating and Drinking Subdistrict, the Noriega Street Neighborhood Commercial District, the Irving Street Neighborhood Commercial District, the Judah Street Neighborhood Commercial District, the Taraval Street Neighborhood Commercial District, the Broadway Neighborhood Commercial District, the North Beach Neighborhood Commercial District, the Pacific Avenue Neighborhood Commercial District, the Polk Street Neighborhood Commercial District, the Mission Street Neighborhood Commercial Transit District, the North Beach Financial Service, Limited Financial Service, and Business or Professional Service Subdistrict, the Lower Polk Street Alcohol Restricted Use District, the 24th Street – Noe Valley Neighborhood Commercial District, the Third Street Formula Retail Restricted Use District, and the Mission Street Formula Retail Restaurant Subdistrict.

G. Planning Code Section 703 regarding Neighborhood Commercial Districts is amended to clarify that a Limited Restaurant Use is not prohibited as an Accessory Use, except in the North Beach Special Use District and the North Beach Neighborhood Commercial District.

H. The Planning Code's Neighborhood Commercial District zoning tables are amended to delete references to Amusement Game Arcade.

I. Planning Code Section 303.1, dealing with formula retail requirements, is amended to reflect the deletion of the definition of Amusement Game Arcade from Section 102.

J. Planning Code Section 710 is amended to establish that, within NC-1 zoning, a Liquor Store requires Conditional Use Authorization in a defined area surrounding Haight Street.

K. The Planning Code is amended to establish that, within the Haight Street Commercial District, a General Entertainment use comprised of mechanical amusement game devices is principally permitted on the first story; that, within the Japantown Neighborhood Commercial District, a General Entertainment use is principally permitted on the third story and above; and that, within the Upper Market Street Neighborhood Commercial Transit District, a General Entertainment Use is principally permitted on the first and second stories.

L. Police Code Section 1060 is amended to change the definition of "Limited Live Performance Locale" to delete the requirement that food or beverages must be served on the premises.

M. Police Code Section 1060.2 is amended to establish that, when a business seeking a Place of Entertainment Permit files an application with the Entertainment Commission, the Entertainment Commission will send the application to the Police Department, the Planning Department, the Department of Building Inspection, the Department of Public Health, and the Fire Department to complete all necessary inspections or approvals, and the departments will report back to the Entertainment Commission within 20 City business days, but inspections for the Department of Public Health, the Department of Building Inspection, and the Fire Department will not be required if other required permits have been received or inspections performed, as specified in Section 1060.2.

Background Information

This legislation was introduced on December 11, 2018, and referred to the Planning Commission. The Planning Commission considered this legislation at a public hearing on March 7, 2019. The Planning Commission requested the following change, which had been incorporated: (1) an Outdoor Activity Area that is associated with a Bar use will continue to be conditionally permitted. The introduced version of this legislation proposed to make rear and rooftop Outdoor Activity Areas principally permitted between the hours of 6am and 10pm. Subsequent to the Planning Commission hearing, the sponsors agreed to remove these proposed provisions from the legislation.

The sponsors proposed, and the Planning Commission approved, the following additional changes: (1) within the Haight Street Commercial District, a General Entertainment use comprised of mechanical amusement game devices is principally permitted on the first story only; and (2) within the Japantown Neighborhood Commercial District, a General Entertainment use is principally permitted on the third story and above.

The Land Use and Transportation Committee considered this legislation on June 24, 2019, July 8, 2019, and July 22, 2019. The Committee recommended a district-by-district evaluation of the removal of buffers related to Neighborhood Commercial Districts and Restricted Use Districts, instead of a citywide approach, which resulted in the amendments considered by the Board of Supervisors.

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