



SAN FRANCISCO PLANNING DEPARTMENT

Executive Summary Planning Code Text Change

HEARING DATE: MAY 8, 2014

Date: May 1, 2014
Project Name: **Amendments to the Definition of Bona Fide Eating Place**
Case Number: 2013.1668T [Board File No. 131064]
Initiated by: Supervisor Wiener/ Reintroduced April 15, 2014
Staff Contact: Aaron Starr, Acting Manager of Legislative Affairs
aaron.starr@sfgov.org, 415-558-6257
Reviewed by: AnMarie Rodgers, Senior Policy Advisor
anmarie.rodgers@sfgov.org, 415-558-6395
Recommendation: **Recommend Approval with Modifications**

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

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

PLANNING CODE AMENDMENT

Ordinance amending the Planning Code to expand the definition of “bona fide eating place” to include a definition based on food sales per occupant and modifying the definition of a Bar to include establishments with an ABC License Type 47 that are not Bona Fide Eating Places; and making environmental findings and findings of consistency with the General Plan and the eight priority policies of Planning Code Section 101.1.

The Way It Is Now:

1. The Planning Code defines a Bona-Fide eating place as an establishment that receives a minimum of 51 percent of its gross receipts from food and non-alcoholic beverage sales prepared and sold to guests on the premise.
2. Only Restaurants, as defined in Planning Code Section 790.91, can have an Alcohol Beverage Control (hereinafter ABC) license type 47¹.

The Way It Would Be:

1. The Definition of a Bona Fide Eating Place would be defined as an establishment that:
 - a. Receives a minimum of 51 percent of the restaurant's gross receipts from food and non-alcoholic beverage sales prepared and sold to guests on the premises; or

¹ ABC License Type 47 is a full liquor license for a Bona-Fide Eating Place, which allows the holder to sell wine, beer, and distilled spirits as opposed to just wine and beer, which is an ABC License Type 41. A full liquor license for bars is called a License Type 48.

- b. Has annual gross food and non-alcoholic beverage sales prepared and sold to guests on the premises of at least \$4,200 per occupant based on the premises' maximum occupant load as determined and approved by the San Francisco Fire Department and Department of Building Inspection.
2. The definition of a Bar would be amended to include establishments that have an ABC License Type 47, but do not meet the definition of a Bona-Fide Eating Place.

ISSUES AND CONSIDERATIONS

Background on Restaurant and Bar Controls

Prior to the Department's 2012 Restaurant Rationalization Ordinance, the Planning Code had 13 separate eating and drinking use definitions. The amending Ordinance rationalized these definitions and brought the total number definitions down to three; Limited-Restaurant, Restaurant, and Bar. As part of that process, the rules for Restaurants with a full liquor license (License Type 47) also changed. Before, if a Restaurant had a full liquor license it was considered both a Restaurant and a Bar; after, a Restaurant could have a full liquor license without being considered a Bar if it also qualified as a Bona-Fide Eating Establishment, which is defined as an establishment that generates at least 51% of their revenue from food and non-alcoholic beverages. The Department obtained the 51% rule from ABC that was using it at the time for their own regulatory purposes; however, since then ABC has stopped using the 51% rule and instead uses a less exact definition of what it considers a Bona-Fide Eating Place.²

What's Needs Improvement?

Restaurants and Bona-Fide Eating Establishment. The Department has heard from several restaurant owners, OEWD (Office of Economic and Workforce Development) and Supervisor Wiener that the 51% rule does not work for a significant number of Restaurants. They assert that many establishments that are not in compliance with the 51% rule, even though these establishments are effectively Restaurants in that their primary purpose is serving food to customers on site and the Planning Code's definition of a Restaurant is met in every other way. For small, casual eating restaurants, the 51% rule seems to work fine; however, for higher-end restaurant, the 51% rule does not work because their alcohol sales tend to be higher than their food sales.

Bars. Currently, the Code does not include ABC license type 47 in the list of alcohol licenses that are permitted for Bars. Some businesses have a license type 47 because they meet ABCs definition of a Bona-Fide Eating Place; however for Planning Department purposes these establishments function more as Bars or Places of Entertainment rather than a Restaurants. Because this license type is not listed in the Planning Code's definition of a Bar, these establishments are not in compliance with the Planning Code on a technicality. To address this issue and bring these uses into compliance, License Type 47 would be added to the list of alcohol license types that Bars are allowed to have. This change simply allows establishments that the ABC considers a Bona-Fide Eating Place to be permitted as a Bar under the

² ABC defines a Bona-Fide Eating Place as: "Licensed premises that are maintained in good faith and used for the regular service of meals to patrons. The premises must have suitable kitchen facilities and supply an assortment of foods commonly ordered at various hours of the day."

Planning Code when they do not meet the Planning Code's definition of a Bona-Fide Eating Establishment.

Proposed New Standard for Bone-Fide Eating Place

The proposed new standard would use the maximum occupant load as a basis for determining if an establishment was a Bona-Fide Eating Establishment. Bona-Fide Eating Establishments would have to earn at least \$4,200 per occupant annually. It is worth noting that occupancy load doesn't necessarily reflect the number of seats available in any particular restaurant. The maximum permitted occupancy is based on the safety standards, so it is typically higher than the total number of restaurant seats.

The proposed standard was developed after both examination of Washington DC's Planning Code and averages reported by the National Restaurant Association. Washington DC's Planning Code uses significantly lower dollar amounts; \$2000 per occupant for a full liquor license and \$1,500 for a wine and beer license. The proposed \$4,200 figure was derived from a report put out by the National Restaurant Association that broke down the average revenue of food and alcohol for restaurants nationwide. Earning \$4,200 was on the low end of the scale, and should catch the majority of Restaurants that are not currently in compliance with the Planning Code.

REQUIRED COMMISSION ACTION

The proposed Ordinance is before the Commission so that it may recommend adoption, rejection, or adoption with modifications to the Board of Supervisors

RECOMMENDATION

The Department recommends that the Commission recommend *approval with modifications* of the proposed Ordinance and adopt the attached Draft Resolution to that effect.

- Amend the Ordinance so that the \$4,200 figure can be increased by the Zoning Administrator based on the Consumer Price Index³ (hereinafter "CPI") on an annual basis without having to go through legislative change.

BASIS FOR RECOMMENDATION

Based on feedback that we have received from various restaurant owners, the Department finds that the definition of a Bona-Fide Eating Place should be amended so that establishments whose primary focus is serving food can be in compliance with the Planning Code. Also, to accommodate for the difference between the ABC definition of a Restaurant and the Planning Code's definition of a Restaurant, the Department also finds it prudent to add License Type 47 to the list of ABC licenses that Bars are permitted to have.

³ The United States Department of Labor, Bureau of Labor Statistics produces monthly data on changes in the prices paid by urban consumers for a representative basket of goods and services. More information is available here: <http://www.bls.gov/cpi/> . Retrieved 4/29/2014.

The Department is recommending one modifications to the Ordinance; that the Ordinance be amended so that the \$4,200 figure can be increased by the Zoning Administrator based on the CPI. This is being proposed so that the number can stay current with inflation without having to make a legislative change.

ENVIRONMENTAL REVIEW

The proposed Ordinance would result in no direct or indirect physical impact on the environment. The proposed amendment is exempt from environmental review under Section 15060(c) and 15378 of the CEQA Guidelines.

PUBLIC COMMENT

As of the date of this report, the Planning Department received a records request for this case, but has not received any letters of support or opposition.

RECOMMENDATION: Recommendation of Approval with Modification
--

Attachments:

- Exhibit A: Draft Planning Commission Resolution
- Exhibit B: Board of Supervisors File No. 131064



SAN FRANCISCO PLANNING DEPARTMENT

Planning Commission Draft Resolution

HEARING DATE: MAY 8, 2014

Project Name: **Amendments to the Definition of Bona Fide Eating Place**
Case Number: 2013.1668T [Board File No. 131064]
Initiated by: Supervisor Wiener/ Reintroduced April 15, 2014
Staff Contact: Aaron Starr, Acting Manager of Legislative Affairs
aaron.starr@sfgov.org, 415-558-6257
Reviewed by: AnMarie Rodgers, Senior Policy Advisor
anmarie.rodgers@sfgov.org, 415-558-6395
Recommendation: **Recommend Approval with Modifications**

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

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

RECOMMENDING THAT THE BOARD OF SUPERVISORS ADOPT, WITH MODIFICATIONS, A PROPOSED ORDINANCE AMENDING THE PLANNING CODE TO EXPAND THE DEFINITION OF "BONA FIDE EATING PLACE" TO INCLUDE A DEFINITION BASED ON FOOD SALES PER OCCUPANT AND MODIFYING THE DEFINITION OF A BAR TO INCLUDE ESTABLISHMENTS WITH AN ABC LICENSE TYPE 47 THAT ARE NOT BONA FIDE EATING PLACES; AND MAKING ENVIRONMENTAL FINDINGS AND FINDINGS OF CONSISTENCY WITH THE GENERAL PLAN AND THE EIGHT PRIORITY POLICIES OF PLANNING CODE SECTION 101.1.

WHEREAS, On October 29, 2013, Supervisor Wiener introduced legislation amending the Planning Code to expand the definition of "bona fide eating place" to include a definition based on food sales per occupant and modifying the definition of a Bar to include establishments with an ABC License Type 47 that are not Bona Fide Eating Places; and making environmental findings and findings of consistency with the General Plan and the eight priority policies of Planning Code Section 101.1; and

WHEREAS, The Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting to consider the proposed Ordinance on May 9, 2014; and,

WHEREAS, the proposed Ordinance has been determined not to be a project under the California Environmental Quality Act Section 15060(c) and 15378; and

WHEREAS, the Planning Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of Department staff and other interested parties; and

WHEREAS, all pertinent documents may be found in the files of the Department, as the custodian of records, at 1650 Mission Street, Suite 400, San Francisco; and

WHEREAS, the Planning Commission has reviewed the proposed Ordinance.

MOVED, that the Planning Commission hereby recommends that the Board of Supervisors **approve with modifications** the proposed ordinance.

The proposed modifications include:

- Amend the Ordinance so that the \$4,200 figure can be increased by the Zoning Administrator based on the Consumer Price Index (hereinafter "CPI") on an annual basis without having to go through legislative change.

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The Commission finds that the definition of a Bona-Fide Eating Place should be amended so that establishments that meet all other aspects of the Planning Code's definition of a Restaurant and whose primary focus is serving food can be in compliance with the Planning Code.
2. To accommodate for the difference between the ABC definition of a Restaurant and the Planning Code's definition of a Restaurant, the Commission finds it prudent to add License Type 47 to the list of ABC licenses that Bars are permitted to have.
3. The Commission finds that the \$4,200 a year figure should be allowed to be adjusted on an annual bases based on CPI so that this figure can stay current with inflation.
4. **General Plan Compliance.** The proposed amendments to the Planning Code are consistent with the following Objectives and Policies of the General Plan.

COMMERCE AND INDUSTRY ELEMENT

OBJECTIVE 1

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKING ENVIRONMENT.

Policy 1.2

Assure that all commercial and industrial uses meet minimum, reasonable performance standards.

The proposed Ordinance will add a new minimum, reasonable performance standard for restaurants, a commercial use, in the Planning Code.

OBJECTIVE 2

MAINTAIN AND ENHANCE A SOUND AND DIVERSE ECONOMIC BASE AND FISCAL STRUCTURE FOR THE CITY.

Policy 2.1

Seek to retain existing commercial and industrial activity and to attract new such activity to the city

Modifying the definition of a Bona-Fide Eating place will help bring some Restaurants into compliance with the Planning Code so that they can continue to operate in the City's neighborhood commercial districts.

5. **Planning Code Section 101 Findings.** The proposed amendments to the Planning Code are consistent with the eight Priority Policies set forth in Section 101.1(b) of the Planning Code in that:

1. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced;

The proposed Ordinance would help ensure that existing neighborhood-serving retail uses are preserved by bringing existing Restaurants into compliance with the Planning Code.

2. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods;

The proposed Ordinance would not have a negative effect on housing or neighborhood character.

3. That the City's supply of affordable housing be preserved and enhanced;

The proposed Ordinance would not have an adverse effect on the City's supply of affordable housing.

4. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking;

The proposed Ordinance would not result in commuter traffic impeding MUNI transit service or overburdening the streets or neighborhood parking.

5. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced;

The proposed Ordinance would not cause displacement of the industrial or service sectors due to office development, and future opportunities for resident employment or ownership in these sectors would not be impaired.

6. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake;

The proposed Ordinance would not have an impact on City's preparedness against injury and loss of life in an earthquake.

7. That the landmarks and historic buildings be preserved;

The proposed Ordinance would not have an impact on the City's Landmarks and historic buildings.

8. That our parks and open space and their access to sunlight and vistas be protected from development;

The proposed Ordinance would not have an impact on the City's parks and open space access to sunlight and vistas.

- 8. Planning Code Section 302 Findings.** The Planning Commission finds from the facts presented that the public necessity, convenience and general welfare require the proposed amendments to the Planning Code as set forth in Section 302.

NOW THEREFORE BE IT RESOLVED that the Commission hereby recommends that the Board ADOPT the proposed Ordinance as described in this Resolution.

I hereby certify that the foregoing Resolution was adopted by the Commission at its meeting on May 8, 2014.

Jonas P. Ionin
Commission Secretary

AYES:

NOES:

ABSENT:

ADOPTED: May 8, 2014

1 [Planning Code - Definition of Bona Fide Eating Place]

2

3 **Ordinance amending the Planning Code to expand the definition of “bona fide eating**
4 **place” to include a definition based on food sales per occupant and exempting certain**
5 **bona fide eating places from the definition of “bar”; and making environmental**
6 **findings, and findings of consistency with the General Plan, and the eight priority**
7 **policies of Planning Code, Section 101.1.**

8 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
9 **Additions to Codes** are in *single-underline italics Times New Roman font*.
10 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
11 **Board amendment additions** are in double-underlined Arial font.
12 **Board amendment deletions** are in ~~strikethrough Arial font~~.
13 **Asterisks (* * * *)** indicate the omission of unchanged Code
14 subsections or parts of tables.

12

13 Be it ordained by the People of the City and County of San Francisco:

14 Section 1. The Board of Supervisors of the City and County of San Francisco hereby
15 finds and determines that:

16 (a) The Planning Department has determined that the actions contemplated in this
17 ordinance comply with the California Environmental Quality Act (California Public Resources
18 Code Sections 21000 et seq.) and this Board adopts this determination as its own. Said
19 determination is on file with the Clerk of the Board of Supervisors in File No. _____ and
20 is incorporated herein by reference.

21 (b) On _____, the Planning Commission, in Resolution No. _____,
22 adopted findings that the actions contemplated in this ordinance are consistent, on balance,
23 with the City’s General Plan and eight priority policies of Planning Code Section 101.1. The
24 Board adopts these findings as its own. A copy of said Resolution is on file with the Clerk of
25 the Board of Supervisors in File No. _____, and is incorporated herein by reference.

1 Section 2. The Planning Code is hereby amended by amending Sections 790.22 and
2 790.142, to read as follows:

3 **SEC. 790.22. BAR.**

4 A retail use ~~which~~ that provides on-site alcoholic beverage sales for drinking on the
5 premises, including bars serving beer, wine and/or liquor to the customer where no person
6 under 21 years of age is admitted (with Alcoholic Beverage Control [ABC] license types 42,
7 48, or 61), ~~and~~ drinking establishments serving beer where minors are present (with ABC
8 license types 42 or 60) in conjunction with other uses such as movie theaters and other
9 entertainment, or establishments with ABC license type 47 that do not meet the definition of a Bona
10 Fide Eating Place under Section 790.142. This use must comply with the controls set forth in
11 Section 703.5.

12 * * * *

13
14 **SEC. 790.142. BONA FIDE EATING PLACE.**

15 A place which is regularly and in a bona fide manner used and kept open for the
16 service of meals to guests for compensation and which has suitable kitchen facilities
17 connected therewith, containing conveniences for cooking of an assortment of foods which
18 may be required for ordinary meals.

19 (a) "Meals" shall mean an assortment of foods commonly ordered at various hours
20 of the day for breakfast, lunch or dinner. Incidental food service, comprised only of appetizers
21 to accompany drinks is not considered a meal. Incidental, sporadic or infrequent sales of
22 meals or a mere offering of meals without actual sales is not compliance.

23 (b) "Guests" shall mean persons who, during the hours when meals are regularly
24 served therein, come to a bona fide public eating place for the purpose of obtaining, and
25

1 actually order and obtain at such time, in good faith, a meal therein. Nothing in this section,
2 however, shall be construed to require that any food be sold or purchased with any beverage.

3 (c) Actual and substantial sales of meals are required, during the normal days and
4 meal hours that a bona fide public eating place is open; provided that "normal days of
5 operation" shall mean a minimum of five days a week and "normal hours" of operation for
6 meal service shall mean approximately 7:00 a.m. to 11:00 a.m. if open for breakfast; 11:00
7 a.m. to 2:00 p.m. if open for lunch; or 5:00 p.m. to 10:00 p.m. if open for dinner.

8 (d) The premises must be equipped and maintained in good faith. This means the
9 premises must possess working refrigeration and cooking devices, pots, pans, utensils, table
10 service, condiment dispensers, menus, signs and enough goods to make substantial meals.
11 The premises must comply with all regulations of the Department of Public Health.

12 (e) The restaurant must secure significant revenue from food and non-alcoholic beverage
13 sales. Significant revenue from food and non-alcoholic beverage sales shall mean either:

14 (1) A minimum of 51 percent of the restaurant's gross receipts shall be from
15 food and non-alcoholic beverage sales prepared and sold to guests on the premises. Records of
16 the restaurant's gross receipts shall be provided to the Department upon request; or

17 (2) Annual gross food and non-alcoholic beverage sales prepared and sold to guests
18 on the premises of at least \$4,200 per occupant based on the premises' maximum occupant load as
19 determined and approved by the San Francisco Fire Department and Department of Building
20 Inspection.

21 (f) A "bona fide eating place" does not include an adult entertainment business as
22 defined in Planning Code Section 790.36.

23
24 Section 3. Effective Date. This ordinance shall become effective 30 days after
25 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the

1 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
2 of Supervisors overrides the Mayor's veto of the ordinance.

3
4 Section 4. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
5 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,
6 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal
7 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment
8 additions, and Board amendment deletions in accordance with the "Note" that appears under
9 the official title of the ordinance.

10 APPROVED AS TO FORM:
11 DENNIS J. HERRERA, City Attorney

12 By: _____
13 MARLENA G. BYRNE
14 Deputy City Attorney

15
16
17
18
19
20
21
22
23
24
25
n:\legana\as2013\1400165\00882423.doc