



Planning and Development Department
Land Use Planning

U S E P E R M I T

CITY OF BERKELEY ZONING ORDINANCE
Berkeley Municipal Code Title 23

USE PERMIT # 12-10000044

Property Address: **2068 CENTER STREET**

Permittee Name: **PAUL W. FREDERICK**
Eureka Burger Berkeley LLC

Use and/or Construction Permitted:
to allow incidental service of beer, wine and distilled spirits within a new full-service restaurant to be established in an existing 3,994 sq. ft. commercial space.

- Use Permit to allow incidental sales and service of beer, wine and distilled spirits within a new full service restaurant under BMC Section 23E.16.040.A
- Administrative Use Permit to allow amplified music under BMC Section 23E.68.030

FINDINGS, CONDITIONS AND APPROVED PLANS ATTACHED

The Use Permit herein described has been duly granted by the Zoning Adjustments Board and is in effect on January 30, 2013.

ATTACHMENT 1

FINDINGS AND CONDITIONS

JANUARY 10, 2013

2068 Center Street

Use Permit #12-10000044 to allow incidental service of beer, wine and distilled spirits within a new full-service restaurant to be established in an existing 3,944 sq. ft. commercial space

CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq. and California Code of Regulations, §15000, et seq.) pursuant to Section 15301(a) of the CEQA Guidelines (“Class 1, Existing Facilities”). Furthermore, none of the exceptions in CEQA Guidelines Section 15300.2 apply, as follows: (a) the site is not located in an environmentally sensitive area, (b) there are no cumulative impacts, (c) there are no significant effects, (d) the project is not located near a scenic highway, (e) the project site is not located on a hazardous waste site pursuant to Government Code Section 65962.5, and (f) the project will not affect any historical resource.

GENERAL NON-DETRIMENT FINDING

2. Pursuant to Berkeley Municipal Code Section 23B.32.040, the Zoning Adjustments Board finds that the proposal to convert an existing vacant quick service restaurant space to a full service restaurant and to allow incidental beer, wine and distilled spirits service, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City, for the following reasons:
 - A. The proposed business would establish a full service restaurant within a vacant commercial building previously occupied by a quick service restaurant and thus would not change the existing permitted use within the Commercial-Downtown Mixed Use District.
 - B. The proposed service of alcoholic beverages would be incidental to food service and because of the incidental nature of the service and the size and location of the restaurant, alcohol sales will not have a significant detrimental impact.
 - C. The Berkeley Police Department reviewed the application and has no objection to the project given the proposed findings and conditions.

- D. The business will be subject to conditions of approval restricting the sale and consumption of alcohol.
- E. The live entertainment portion of the proposal promotes a performing art activity which offers an alternative option and contributes to the vitality of the Downtown.
- F. The permit is conditioned to include measures to mitigate potential impacts associated with the incidental alcohol service and the amplified music components and is therefore expected to meet applicable performance standards for potential off-site impacts.

OTHER REQUIRED FINDINGS

- 3. Pursuant to Berkeley Municipal Code Section 23E.68.090.B.1, the Zoning Adjustments Board finds that the proposal meets the purposes of the C-DMU District because the new business would implement the vision and goals of the Downtown Area Plan by establishing a full service restaurant within a vacant and underutilized commercial building and remodel and update the existing street front façade, which would contribute to the pedestrian-oriented vitality and economic revitalization of the Downtown. In addition, the new restaurant would be located in the Downtown Core area and within walking distance of theaters and other cultural uses, providing a new dining experience for patrons of these uses.
- 4. Pursuant to Berkeley Municipal Code Section 23E.68.090.B.2, the Zoning Adjustments Board finds that the project is compatible with the surrounding uses and buildings because:
 - A. The new full-service restaurant business represents a continuation of existing restaurant uses at the site, which is located in a commercial area characterized by restaurants and retail sales and services, as well as office/research and development, civic, entertainment and multi-level off-street parking uses;
 - B. No changes would be made to the existing building footprint and improvements to the exterior façade including new signage would, with staff-level Design Review approval, improve the overall character of the currently vacant building; and
 - C. Amplified music would be conditioned to restrict the hours which shall not extend past 12:30 a.m. and the building is not located in or near a residential area.
- 5. Pursuant to Berkeley Municipal Code Section 23E.16.040.B.2.a, the Zoning Adjustments Board finds that the service of beer, wine and distilled spirits incidental to the operation of a full-service restaurant at this location will promote the City's economic health, contribute to General Plan and Downtown Area Plan policies and further the purposes of the C-DMU Core District as previously described.

- 6.** Pursuant to Berkeley Municipal Code Section 23E.16.040.B.2.b, the Zoning Adjustments Board finds that the economic benefits associated with establishment would be enhanced by the proposed sale and service of alcohol. With a Type 47 ABC License for full alcoholic beverage service, incidental to food-service, the new business would be in keeping with comparable dining experiences located within the area. The applicant would commit a substantial amount of financial resources to improving the interior and exterior of the building with the expectation that the restaurant experience offered, including full alcohol service both in the dining area with meals and at the bar areas will result in a positive customer experience as well as an economic benefit to the District. Without this service, which is an essential component of the operation's business model, the business would be at a competitive disadvantage with other, nearby restaurants that offer comparable service.
- 7.** Pursuant to Berkeley Municipal Code Section 23E.16.040.B.2.c, the Zoning Adjustments Board finds that the applicant has not operated a licensed establishment which has been the subject of verified complaints or violations regarding alcohol, public safety or nuisance statutes or regulations. The attached conditions of approval for the proposed project provide for the Zoning Adjustments Board to modify or revoke this Use Permit upon finding that the maintenance or operation of the proposed establishment violates any of the conditions of approval or is detrimental to persons residing or working in the neighborhood, or to the general welfare of the City.
- 8.** Pursuant to Berkeley Municipal Code Section 23E.16.040.B.2.d, the Zoning Adjustments Board finds that, although the site is located within 1,000 feet of a Berkeley Unified School District (BUSD) school (Berkeley High School) the proposed establishment will not have an adverse effect on this use.
- 9.** Pursuant to Berkeley Municipal Code Section 23E.16.040.B.2.e, the Zoning Adjustments Board finds that the Police Department has no objections or concerns with the proposal.

STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS

1. Conditions Shall be Printed on Plans

The conditions of this Permit shall be printed on the first sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title 'Use Permit Conditions'. The second sheet may also be used if the first sheet is not of sufficient size to list all of the conditions. The sheet(s) containing the conditions shall be of the same size as those sheets containing the construction drawings; 8-1/2" by 11" sheets are not acceptable.

2. Applicant Responsible for Compliance with Conditions

The applicant shall ensure compliance with all of the following conditions, including submittal to the project planner of required approval signatures at the times specified. Failure to comply with any condition may result in construction being stopped, issuance of a citation, and/or modification or revocation of the Use Permit.

3. Uses Approved Deemed to Exclude Other Uses (Section 23B.56.010)

- A. This Permit authorizes only those uses and activities actually proposed in the application and excludes other uses and activities.
- B. Except as expressly specified herein, this Permit terminates all other uses at the location subject to it.

4. Modification of Permits (Section 23B.56.020)

No change in the use or structure for which this Permit is approved is permitted unless the Permit is modified by the Zoning Adjustments Board, in conformance with Section 23B.56.020.A.

Changes in the plans for the construction of a building or structure may be modified prior to the completion of construction, in accordance with Section 23B.56.020.D. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project. The Zoning Officer may also approve a maximum two-foot variation to Board approved plans, provided that such variation does not increase a structure's height, reduce the minimum distance to any property line, and/or conflict with any special objective sought by the Board.

5. Plans and Representations Become Conditions (Section 23B.56.030)

Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

6. Subject to all City and Other Regulations (Section 23B.56.040)

The approved use and/or construction are subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies.

7. Exercised Permit for Use Survives Vacancy of Property (Section 23B.56.080)

Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant, except as set forth in Standard Condition #8 below.

8. Exercise and Lapse of Permits (Section 23B.56.100)

- A. A permit for the use of a building or a property is exercised when, if required, a valid City business license has been issued, and the permitted use has commenced on the property.
- B. A permit for the construction of a building or structure is deemed exercised when a valid City building permit, if required, is issued, and construction has lawfully commenced.
- C. A permit may be declared lapsed and of no further force and effect if it is not exercised within one year of its issuance, except that permits for construction or alteration of structures or buildings may not be declared lapsed if the permittee has (1) applied for a building permit or (2) made substantial good faith efforts to obtain a building permit and begin construction, even if a building permit has not been issued and/or construction has not begun.

9. The applicant shall hold the City of Berkeley and its officers harmless in the event of any legal action related to the granting of this Permit, shall cooperate with the City in defense of such action, and shall indemnify the City for any award of damages or attorneys fees that may result.

Prior to Submittal of Any Building Permit:

10. The applicant shall provide the project planner with the name and telephone number of the individual empowered to manage construction noise from the project. The individual's name, telephone number, and responsibility for noise management shall be posted at the project site for the duration of construction in a location easily visible to the public. The individual shall record all noise complaints received and actions taken in response, and submit written reports of such complaints and actions to the project planner on a weekly basis. **Individual Responsible for Noise Management:**

Name: _____ Phone: _____

11. The applicant and all persons associated with the project are hereby notified that a Transportation Management Permit (TMP) would be required under any of the following circumstances:

- Alterations, closures, or blockages to sidewalks or pedestrian paths
- Alterations, closures, or blockages to vehicle travel lanes (including bicycle lanes)
- Storage of building materials, dumpsters, debris anywhere in the public ROW
- Provision of exclusive contractor parking on-street
- Significant truck activity.

Contact the Permit Service Center (PSC) at 2120 Milvia Street or 981-7500 for details on obtaining Construction/No Parking Permits (and associated signs and accompanying dashboard permits). Public Works Traffic Engineering (981-6400) reviews all submitted TMP requests.

The TMP may include designation of a specific truck haul route. Meter heads (if in the construction area) shall be removed only by City staff. Contact the site inspector 72 hours in advance of required removal so arrangements can be made.

Prior to Issuance of Any Building Permit:

12. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.
13. Project requires approval of Final Design Review by the Design Review Staff.

During Construction:

14. Construction activity shall be limited to between the hours of 8:00 a.m. and 6:00 p.m. on Monday through Friday, and between 9:00 a.m. and noon on Saturday. No construction-related activity shall occur on Sunday or on any Federal Holiday.
15. If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.
16. Subject to approval of the Public Works Department, the applicant shall repair any damage to public streets and/or sidewalks by construction vehicles traveling to or from the project site.
17. All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter in thickness and secured to the ground.

18. All active construction areas shall be watered at least twice daily, and all piles of debris, soil, sand or other loose materials shall be watered or covered.
19. Trucks hauling debris, soil, sand, or other loose materials shall be covered or required to maintain at least two feet of board.
20. Public streets shall be swept (preferably with water sweepers) of all visible soil material carried from the site.
21. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way.
22. The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.
23. Any construction during the wet season shall require submittal of a soils report with appropriate measures to minimize erosion and landslides, and the developer shall be responsible for following these and any other measures required by the Building and Safety Division and the Public Works Department.

ALCOHOLIC BEVERAGE SERVICE CONDITIONS (on-site)

24. Alcoholic beverage service shall be "incidental" to the primary food service use, as defined in Zoning Ordinance 23F.04.010. An incidental use shall not exceed twenty-five percent (25%) of the floor area of the primary use, and if it consists of the commercial sales of a different line of products or services than the primary use, such incidental use may not generate gross receipts in excess of thirty-three percent (33%) of the gross receipts generated by the primary use. In addition, the California Department of Alcohol Beverage Control (ABC) allows this alcohol use only as part of a "bona fide eating place" making "actual and substantial sales of meals," and stringently enforces this requirement.
25. The establishment shall comply with all applicable regulations of the California Department of Alcoholic Beverage Control.
26. The applicant shall comply with ABC regulations for License Type 47, which requires that the food establishment operate as a bona fide eating place, make actual and substantial sales of meals during normal meal hours, and that the establishment operate at least five days a week. In addition, the applicant shall request that the ABC place the following conditions on the ABC permit for this site, and this Use Permit shall only be operative for as long as these conditions are placed on the associated ABC license:

- b.** The sale of alcoholic beverages for consumption off the premises is strictly prohibited;
 - c.** There shall be no bar or lounge area upon the licensed premises maintained for the sole purpose of sales, service or consumption of alcoholic beverages directly to patrons for consumption;
 - d.** During operating hours, 100% of the service area shall be designed and used for and must possess the necessary utensils, and condiment dispensers with which to serve meals to the public;
 - e.** There shall be no exterior advertising or sign of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverages or signs which are clearly visible to the exterior shall constitute a violation of this condition.
- 27.** A Berkeley Police Department Crime Prevention Through Environmental Design (CPTED) survey shall be completed prior to commencing alcohol service.
- 28.** All employees selling and/or serving alcohol, or directly supervising such sales and/or service, shall complete the Licensee Education on Alcohol and Drugs (LEAD) program, or another equivalent program offered or certified by the California Department of Alcoholic Beverage Control within 6 months of employment at the establishment. Employees who have completed the course within the last five (5) years shall be exempt from this requirement.
- 29.** Employees shall not serve alcohol to patrons who appear to be inebriated or otherwise unable to behave in an orderly manner upon consuming alcohol.
- 30.** Any operator of the licensed establishment shall not have had a prior licensed establishment that was the subject of verified complaints or violations regarding alcohol, public safety or nuisance statutes or regulations to be confirmed by the Zoning Officer prior to issuance or transfer of a business license at this location.
- 31.** The service of alcohol shall be limited to Type 47 ABC License controls. Patrons may only purchase food or finish drinks already purchased within the ABC licensing hours. The Zoning Adjustments Board or designee shall approve any change in the hours of restaurant operations, of alcohol service, or both. Hours of operation are subject to review and amendment by the Zoning Adjustments Board as necessary to avoid detriment to the neighborhood or to achieve conformance with revised City standards or policies.
- 32.** Neither alcohol-dispensing facilities nor sign(s) advertising alcoholic beverages shall be visible from the public right-of-way.
- 33.** All alcohol served to patrons must be served in durable restaurant tableware – i.e. either cups or glasses. No alcohol may be distributed in its original bottle or can, or in any other potentially disposable container.
- 34.** There shall be no service or consumption of alcohol on the public right-of-way.

35. No alcohol may be transported off-site from the establishment to any other establishment or to the public right-of-way.
36. The owner or operator of the establishment shall take reasonable measures to prevent disturbances by patrons in the immediate vicinity. Such measures shall include signs reminding patrons of nearby residences and requests not to congregate or loiter near such residences nor operate vehicles in a noisy manner on residential streets. The operator shall give surveillance to public areas near the establishment, keep such areas free of trash and litter, provide lighting, and otherwise attempt to prevent conduct that might disturb the peace and quiet of residences in the vicinity. Furthermore, the operator shall assume reasonable responsibility for ensuring that patrons do not block the entrance or interfere with pedestrian activity on the adjacent public sidewalk.
37. The applicant shall establish cash handling procedures to reduce the likelihood of robberies and theft.
38. This Use Permit, including these and all other required conditions, shall be posted in conspicuous location, available for viewing by any interested party.

FOOD SERVICE CONDITIONS

(These requirements are in addition to any other requirements under the City's Building, Health or Fire Codes or by agencies such as the Alcoholic Beverage Control Department of the State of California. The applicant is responsible for contacting these and other departments and agencies to identify and secure all applicable permits and licenses).

39. This permit is subject to review, imposition of additional conditions, or revocation if factual complaint is received by the Zoning Officer that the maintenance or operation of this establishment is violating any of these or other required conditions or is detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the neighborhood or is detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.
40. Changes in the nature of the operation including, but not limited to, the addition of seating and changes in hours, shall require modification of this permit subject to approval by the Zoning Officer or the Zoning Adjustments Board.
41. The approved floor plan, including the number of seats, shall be followed and the operation shall be conducted as presented to the Board. The maximum occupancy shall be as specified in the application unless otherwise required by applicable regulations.
42. Changes to the building's facade, including doors or windows, site plans, landscaping, signage, and awnings are subject to Design Review and approval prior to issuance of a building permit.

43. The hours of operation of the restaurant portion of the business shall be limited to: 9:00 a.m. to 1:00 a.m. daily. Hours of operation refer to arrival of the first patron and departure of the last patron. Any change in the hours of operation shall be approved by the Zoning Adjustments Board or designee. Hours of operation are subject to review and amendment by the Zoning Adjustments Board as necessary to avoid detriment to the neighborhood or to achieve conformance with revised City standards or policies.
44. Cooking odors, noise, exterior lighting and operation of any parking area shall be controlled so as to prevent verified complaints from the surrounding neighborhood. This shall include noise created by employees working on the premises before or after patrons arrive.
45. Garbage and trash containers that are suitably enclosed and screened from view shall be provided subject to approval of the Zoning Officer, the Health Department and, where applicable, the Design Review Planner. Any establishment selling beverages in cans or bottles that are subject to the State of California Container Deposit Law shall provide separate bins or cans for the placement of such cans or bottles to ensure recycling of such containers.
46. Containers used for the dispensing of prepared food shall identify the establishment. Polystyrene foam food packing is prohibited by Section 11.60.030 of the Berkeley Municipal Code.
47. Any establishment selling beverages in cans or bottles that are subject to the State of California Container Deposit Law shall recycle such containers.
48. The operator of the restaurant shall place a waste receptacle near the entry way and shall insure that garbage on the sidewalk in front of the establishment and within 50 feet thereof will be picked up periodically during each day, so that the sidewalk remains clean.
49. The owner or operator of the establishment shall take reasonable measures to prevent disturbances by patrons in the immediate vicinity. Such measures shall include signs reminding patrons of nearby residences and requests not to congregate or loiter near such residences nor operate vehicles in a noisy manner on residential streets. The operator shall give surveillance to public areas near the establishment, keep such areas free of trash and litter, provide lighting, and otherwise attempt to prevent conduct that might disturb the peace and quiet of residences in the vicinity.
50. The operator shall assume reasonable responsibility for ensuring that patrons do not block the entrance or interfere with pedestrian activity on the adjacent public sidewalk.
51. The applicant shall reimburse employees the maximum non-taxable cost of commuting to and from work on public transportation (e.g., monthly passes) if they so commute,

and a notice informing employees of the availability of such subsidy shall be permanently displayed in the employee area.

LIVE ENTERTAINMENT CONDITIONS

- 52.** In order to ensure: 1) minimal impacts from noise on commercial and residential tenants in the immediate vicinity, and 2) compliance with the City Noise Ordinance, the applicant shall be responsible for enforcement of the following actions:
- A. Sound levels shall be monitored during sound checks and at regular intervals inside the restaurant during live music performances, using a hand-held sound level meter, to ensure that sounds levels are within the limits set by BMC Chapter 13.40.
 - B. Percussion instruments shall be limited to hand drums or drums played with brushes. Kick drums or drums played with sticks or beaters shall not be used.
 - C. The restaurant operator shall be responsible for keeping the windows and doors closed during performances.
 - D. No “buy-outs” or sub-leases to any group or individuals for live entertainment events are permitted.
 - E. A manager with full authority to control operations, including live performances, shall be on duty at all times that the restaurant is open.
- 53.** Live entertainment shall not extend beyond 12:30 a.m.
- 54.** A copy of these conditions shall be maintained on the premises and made available upon the demand of any peace officer or authorized code enforcement officer.
- 55.** This permit is subject to review, imposition of additional conditions, or revocation if factual complain is received by the Zoning Officer that the maintenance or operation of the proposed establishment violates any of the conditions of approval or is detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the neighborhood or is detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.