



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 # AUP2013-0126

Property Address: **3136 SACRAMENTO STREET**

Permittee Name: **MOXY BEER GARDEN
c/o Phyllis Voisenat, Esq.**

Use and/or Construction Permitted:

to extend the hours of operation for an existing quick-service restaurant to 11PM Sunday to Thursday and 12 Midnight Friday, Saturday, and New Year's Eve.

- Administrative Use Permit at the above for an extension of the hours of operation for an existing quick service restaurant to 11PM Sunday to Thursday, and 12 Midnight Friday, Saturday, and New Year's Eve.

FINDINGS, CONDITIONS ATTACHED

The Use Permit herein described has been duly granted by the Zoning Adjustments Board and is in effect on September 23, 2014.

ATTACHMENT 1

FINDINGS AND CONDITIONS

AUGUST 14, 2014

3136 Sacramento Street

Administrative Use Permit to extend the hours of operation for an existing quick-service restaurant to 11PM Sunday to Thursday and 12 Midnight Friday, Saturday, and New Year's Eve.

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 of the CEQA Guidelines ("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 proposed project, 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 applicant has a current Type 41 California Department of Alcoholic Beverage Control (ABC) License to sell beer and wine incidental to food service;
 - B. Alcohol service is conditioned (COA #No.s 10-25) to limit detriment and to promote compatibility between the restaurant and nearby commercial and residential uses;
 - C. As permitted under Section 23E.52.030, the existing patio seating located outside of the main building does not abut a Residential District;
 - D. The permit is conditioned to require no music on the patio after 10PM (COA #No. 38) and to require the Zoning Adjustments Board to review operation of the quick-service restaurant and ensure continued neighborhood compatibility and compliance with the Conditions of Approval one year after the permit has been approved by the City (COA #No. 43); and

- E. The extension in the hours of operation for the existing quick-service restaurant does not require additional off-street parking requirements.

OTHER REQUIRED FINDINGS

3. Pursuant to Berkeley Municipal Code Section 23E.52.090.B.1, the Zoning Adjustments Board finds that the extension of hours of operation for the existing quick-service food service establishment is allowed because the use:
- A. Is compatible with the purposes of the C-SA District because the use:
- i. Provides an eating destination with extended hours for customers in the surrounding residential and commercial areas who chose a later dining option;
 - ii. Is located south of Ashby Avenue and is a gateway into the City, serving as a transition between the Downtown Area and the neighborhood-surrounding neighborhood;
 - iii. Is an inviting destination to residents and commercial uses in the area and is an amenity which supports pedestrian-oriented uses; and
 - iv. Will encourage the continued operation of a locally owned establishment which serves the local community.
4. Pursuant to Berkeley Municipal Code Section 23E.52.090.B.2, the Zoning Adjustments Board finds that there are no exterior modifications proposed which require additional discretionary permits and the existing façade and design of the establishment is compatible in design and character of the C-SA District as well as the adjacent residential neighborhood.
5. Pursuant to Berkeley Municipal Code Section 23E.52.090.B.3, the Zoning Adjustments Board finds the existing use and the extension in hours of operation will not result in a domination of one type of commercial use in this area of the District.
6. Pursuant to Berkeley Municipal Code Section 23E.16.040.B, the Zoning Adjustments Board finds that the extension in hours of operation for a food service establishment with incidental beer and/or wine service does not require Findings of “Public Convenience or Necessity”.

STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS

1. **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.

2. **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.

3. 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 Officer or the Zoning Adjustments Board, in conformance with Section 23B.56.020.A.

4. 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.

5. 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.

6. 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.

7. 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.

CONDITIONS BY PROJECT TYPE

ALCOHOLIC BEVERAGE SERVICE CONDITIONS (on-site)

10. 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 Alcoholic 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.
11. The establishment shall comply with all applicable regulations of the California Department of Alcoholic Beverage Control.
12. The applicant shall comply with ABC regulations for License Type 41, 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:
- The sale of alcoholic beverages for consumption off the premises is strictly prohibited;
 - 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;
 - 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;
 - 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.

13. A Berkeley Police Department Crime Prevention Through Environmental Design (CPTED) survey shall be completed prior to commencing alcohol service.
14. 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.
15. Employees shall not serve alcohol to patrons who appear to be inebriated or otherwise unable to behave in an orderly manner upon consuming alcohol.
16. 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.
17. The service of alcohol shall be limited to 11:30AM to 11PM Sunday through Thursday and 11:30AM to 12 Midnight Friday, Saturday, and New Year's Eve. Patrons may only purchase food or finish drinks already purchased within the hours noted above. The Zoning Adjustments Board shall approve any change in the hours of restaurant operations and/or alcohol service (except decreased hours in compliance with applicable ABC regulations). 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.
18. Fortified alcohol products (e.g., malt liquor), shall not be sold on the premises.
19. Neither alcohol-dispensing facilities nor sign(s) advertising alcoholic beverages shall be visible from the public right-of-way.
20. 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.
21. There shall be no service or consumption of alcohol on the public right-of-way.
22. No alcohol may be transported off-site from the establishment to any other establishment or to the public right-of-way.
23. 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.

24. The applicant shall establish cash handling procedures to reduce the likelihood of robberies and theft.
25. 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).

26. 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.
27. Changes in the nature of the operation including, but not limited to, the addition of seating, changes in hours (except decreased hours in compliance with applicable ABC regulations), and the addition of live entertainment, shall require modification of this permit subject to approval by the Zoning Adjustments Board.
28. 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.
29. 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.
30. Cooking odors, noise, exterior lighting and operation of any parking area shall be controlled so as to prevent verified complaints from the surrounding neighborhood including, but not limited to, noise created by employees working on the premises before or after patrons arrive and music within the building shell and on the patio.
31. Smoke and odor control equipment approved by the City Environmental Health Division and providing adequate protection to residential uses near the restaurant shall be installed (or prior installation verified) prior to issuance of an Occupancy Permit.

32. 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.
33. 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.
34. Any establishment selling beverages in cans or bottles that are subject to the State of California Container Deposit Law shall recycle such containers.
35. 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.
36. 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 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.
38. There shall be no amplified or unamplified music on the patio after 10PM.
39. The operation of the restaurant shall adhere to the exterior noise standard of the Berkeley Municipal Code Section 13.40.050 (Exterior Noise Standards) and Section 13.40.070.A (Prohibited Acts), limiting noise levels from the property line for any 30 minute period to:

R-1 District	7:00 a.m. – 10:00 p.m.	55 (dBA)
	19:00 p.m. – 7:00 a.m.	45 (dBA)
40. The operation of the restaurant shall adhere to the Smoking Pollution Control Ordinance, Berkeley Municipal Code Section 12.70.030 (Locations where Smoking is Prohibited) and Section 12.70.060 (Sign Posting Requirements).
41. The hours of operation shall not be extended without requiring Police Department input.

42. Any graffiti painted or marked upon the premises or on any adjacent area under the control of the applicant, shall be removed or painted over within forty-eight (48) hours of being applied.

43. The Zoning Officer shall place an informational item on the Zoning Adjustments Board agenda, or if the Zoning Officer deems it necessary, schedule a Public Hearing before the Zoning Adjustments Board, to take place one year after issuance of this Administrative Use Permit, to review operation of the quick-service restaurant and ensure continued neighborhood compatibility and compliance with the Conditions of Approval.