

VIA EMAIL

December 3, 2012

Mayor Sweeney, Mayor Pro Tempore Peixoto, and Council Members Halliday, Zermefio, Salinas, Jones & Mendall  
City of Hayward  
777 B Street  
Hayward CA 94541-5007

Re: Alcohol Beverage Outlet Regulations: Recommended Revisions  
3 December 2012 City Council Meeting: Work Session: Item 2

Subject: Suggested or Recommended Revisions

Mayor & Council Members:

Together with certain others, I own the real property more particularly identified as Alameda County APN 078C-461-1-13 and -14; I'm writing today in regards to the above-referenced matter.

We are pleased by the efforts of City of Hayward Development Services staff; the report by David Rizk is a good starting point for the City's upcoming discussions.

We respectfully wish to make several suggestions or recommendations to those outlined in the report. We believe the City would be wise to consider same, particularly in light of certain recent events at or near certain State-licensed on-sale alcohol establishments within the City. Such events include, but are not limited to, the recent shootings within the Dirty Bird Lounge at 29308 Mission Boulevard.

Our suggestions and recommendations are as follows:

1. Page 22 of the staff report reads in part as follows:

"... staff is recommending a new definition be developed in the alcohol beverage outlet regulations for an alcohol-serving entertainment establishment, the operations of which do not include food service associated with a permitted full-service restaurant..."

"For such establishments, staff also recommends that a dance/entertainment establishment permit be obtained from the City Manager or designee and that provisions/operating standards, review process, etc. for such establishments be included in Chapter 6, Article 2 of the Hayward Municipal Code ... In the recommended and updated ordinance, the dance/entertainment permit would be issued by the City Manager or designee (usually the Chief of Police), and would be in addition to any requirements for obtaining conditional use permits."

We recommend the City create separate permitting processes for temporary permits and permanent permits and adopt more rigorous standards for the latter.

For permanent permits, we recommend the City implements a prior written notice provision, whereby the City — prior to its consideration of the contemplated permit — ensures all property owners within a certain distance of the use receive written notice of the then-pending City action.

Further, we recommend (i) the City allow any property owner to contest such temporary or permanent permitting by a filing a notice and application with the City and paying a commercially reasonable fee, (ii) upon the City's receipt of same, the City promptly schedule a public hearing regarding such contested permit at the Planning Commission, and (iii) the City allow a City-standard appeal — heard by the City Council — of any Planning Commission approval or disapproval.

In addition, we recommend any temporary or permanent permit reference and include all terms and conditions of (i) the then-existing license issued by the State of California Department of Alcoholic Beverage Control (ABC) to such establishment, and (ii) any revisions or amendments made by the ABC to such license, including, but not limited, upon the renewal thereof.

Finally, we recommend such City-issued temporary or permanent permits cease promptly upon the suspension or revocation by the ABC of the State-issued license.

2. Page 24 of the staff report reads in part as follows:

“Such provisions would require that all legal nonconforming alcohol-serving establishments meet basic operating standards ... The purpose of such provisions ... would be to establish a process where establishments would be notified of their ‘deemed approved’ status and expectation to be operated in compliance with basic standards, describe the procedure associated with establishments that are not operated per a conditional use permit and associated conditions of approval, and establish a procedure for appealing imposition of conditions and/or revocation of the ‘deemed approved’ status.”

We recommend the City's initial issuance of a ‘deemed approved’ status require (i) a prior noticed public hearing at the Planning Commission, and (ii) concurrent issuance by the Commission of a conditional use permit. Without such hearing, the public, we believe, is unable to readily and fully voice concerns, particularly over those businesses with a demonstrated prior record of problems and complaints. Most, if not nearly all, businesses will likely generate no public comment; but, we believe one or more will generate significant comment. We believe a conditional use permit will strengthen the City's ability to take action here, when the establishment violates the provisions of the use permit or fails to comply with one or more operating standard.

In addition, we recommend any permit conditions or operating standards associated with such ‘deemed approved’ status reference and include all terms and conditions of (i) the then-existing license issued by the State of California Department of Alcoholic Beverage Control (ABC) to such establishment,

and (ii) any revisions or amendments made by the ABC to such license, including, but not limited, upon the renewal thereof.

We recommend such City-issued 'deemed approved' status cease promptly upon the suspension or revocation by the ABC of the State-issued license.

In addition, we recommend the City allow a City-standard appeal — heard by the City Council — of any Planning Commission approval or disapproval of such 'deemed approved' status.

There's a clear need to tighten up the operation of certain existing, non-conforming on-sale alcohol establishments. We believe the City would be wise to require a public hearing, to allow the public to comment on the proposed 'deemed approved' status.

3. Page 25 of the staff report reads in part as follows:

"Deemed approved' operating standards would be identified in the new provisions, similar to those below regarding operation of an establishment."

We recommend the City possess the unilateral right to temporarily shut down a business after a shooting, armed assault, or violent battery. Upon such shut down, the City should then commence a review of the conditional use permit — the one contemplated in our recommendations above — followed by a noticed public hearing.

We suggest that, within the operating standards, repetition should not be a key criterion. In other words, one nuisance activity — like those listed in operating standard 'C' — should give the City the power to step in, take action and require compliance.

We also suggest that, within the standards, terms should be well-defined. For example, in operating standard 'C', 'excessive loud noises', 'late night' and 'early morning' each need definition.

We recommend the standards include full compliance with the current City noise ordinance.

We recommend the standards include an affirmative obligation to operate in accordance with any and all Federal, State, regional, and City laws, regulations, and guidelines, including, but not limited to, State and local fire and life safety regulations.

We strongly recommend the standards include an affirmative obligation to operate in full accordance with the existing ABC license.

We suggest the City review the licensee's specific operating standards at each and every State renewal of the existing ABC license.

We recommend the City possess, upon significant violation or violations of the standards by any establishment, the right to require substantial bond to secure the future performance of the operating standards.

We further recommend the City possess broad rights to revoke any 'deemed approved' status subject to appeal rights.

We suggest the City compile a repository — publically available via the web — of all existing ABC licenses for such 'deemed approved' businesses.

4. Page 25 of the staff report states in part:

"Such regulations would allow an executive team ... to take action to abate imminent threats to public health, safety, or welfare."

We recommend the City formalize the process by which the Team takes such action. In particular, we suggest the City set specific dates for each action available to the Team.

Where the violation is the result of a significant crime, including, but not limited to, shooting, armed assault, or violent battery, we recommend the City possess the right to immediately suspend the operating permit for up to sixty (60) calendar days.

We suggest any member of the Team should be empowered to make the determinations noted at the top of page 26 in the staff report.

We recommend, to the extent permitted under existing law, the standards for making such determinations be discretionary and subject to the exclusive choice of any member of the Team.

We recommend, to the extent permitted under existing law, the standards for making such determinations be reasonably flexible, allowing the Team to adapt to perhaps unique permit violations and related threats.

We recommend members of the public, upon filing a notice and application with the City and paying a commercially reasonable fee, be allowed to appeal any decision made by the Team.

Thank you very much for your consideration of the foregoing.

~~Sincerely,~~

Richard C. Ersted

Cc: David Rizk, Director, Development Services, City of Hayward via email