

Capitola City Council

Agenda Report



Meeting: April 13, 2023

From: Police Department

Subject: Capitola Bar and Grill Entertainment Permit Appeal

Recommended Action: Adopt a resolution denying an appeal of the City Manager’s decision to deny an application for a 2023 Regular Entertainment Permit for Capitola Bar and Grill, due to the application not including the required authorization from the property owner.

Background: Capitola Municipal Code Chapter 5.24 governs entertainment permits. Section 5.24.020 requires any business to obtain an entertainment permit before arranging for or allowing entertainment to be conducted on the premises of any business. Section 5.24.010 defines “entertainment” as a performance by live entertainers for entertaining patrons; or playing recorded music, with or without video, for the specific purpose of entertaining patrons.

Section 5.24.030 divides entertainment permits into three categories, with varying fees and conditions based on the type of entertainment and activities.

- “Single-event” entertainment permits are required for activities that occur within a single seven-day period.
- “Minor” entertainment permits are required for businesses that have entertainment that is incidental to the primary business, have no dance floor or elevated stage, and never require a cover charge.
- “Regular” entertainment permits are required for businesses that provide entertainment but do not qualify for a single-event or minor entertainment permit. This permit governs establishments that have live music and entertainment that attracts business.

Section 5.24.040.B authorizes the City Manager, or department head designee, to issue certain entertainment permits upon making the findings in Section 5.24.040.C. Section 5.24.040.D authorizes the City Council or City Manager to condition the permit to assure that the authorized entertainment does not cause disturbances.

To further guard against disturbance, CMC Section 5.24.040.D authorizes the City Manager to add conditions to each permit regarding the days and times of operation, addressing any public safety issues, and requiring the permittee to manage noise level limits.

Section 5.24.080 authorizes the City Manager to develop application forms for entertainment permits. Applicants may be required to submit any nonprivileged information reasonably related to the intent of the ordinance.

The current application form, which has been used by the City since 2018, requires applicants to provide information about the business, proposed entertainment, the hours of intended operation, and, if the applicant is a tenant, to obtain the signature of the property owner.

Entertainment permits for the cities of Santa Cruz, Watsonville, and Scotts Valley all require the property owner’s consent.

This year, the Capitola Police Department has issued five entertainment permits; three additional permits are in progress. The Department issued six permits in 2019, ten in 2020, seven in 2021, and twelve in 2022.

Discussion: On October 21, 2021, Michelle and Lasalle Strong applied for a new Minor Entertainment Permit for Capitola Bar and Grill, located at 231 Esplanade, #102, that would be effective for the remaining few months in 2021. 231 Esplanade is a mixed-use residential/business structure. The building

is comprised of residential apartments, a coffee shop, and two restaurants (Margaritaville and Capitola Bar and Grill). The application did not include the property owner's signature.

The Strongs had recently acquired the business, and their ABC license was pending due to the transfer of ownership. The type of ABC license issued to the applicant is important in the application process because ABC can place restrictions and specific requirements based on the type of license. Capitola Bar and Grill has a Type 47 – On Sale General Eating Place. The City requires a current ABC license and fire inspection before issuing entertainment permits. The applicant received their ABC license on October 29, 2021, and completed the required fire inspection on November 10, 2021.

The City issued the permit on November 16, 2021, for the remaining six weeks of 2021. Unfortunately, the City issued the permit without the property owner's signature, inconsistent with the City's entertainment permit application and past practice.

On January 3, 2022, the Strongs applied to renew their Minor entertainment permit for 2022. The Police Department accepted their previously submitted ABC license and recent fire inspection and began processing their application. The 2022 application did not include the property owner's signature.

Because the applicant intended to offer more than incidental entertainment, staff recommended the applicant apply for a "Regular" entertainment permit. The applicant agreed and staff issued Capitola Bar and Grill a 2022 Regular Entertainment Permit on January 27, 2022.

During the summer of 2022, the property owner, Steve Yates, contacted the Police Department and expressed concerns about the noise levels and live music being played at Capitola Bar and Grill. Staff explained that the City had issued Capitola Bar and Grill a Regular Entertainment Permit for 2022. Mr. Yates expressed his concerns about the sound levels and explained he had not signed the application form.

Staff then reviewed the application materials for Capitola Bar and Grill and determined that the application had not been signed by the property owner and the permit had been issued in error.

In December 2022, Capitola Bar and Grill applied for a 2023 General Entertainment Permit (Attachment 1). The application lists Steve Yates as the property owner with an email address but does not include Mr. Yates's signature.

As the application did not include the required signature, staff determined the application was incomplete. Staff notified the Strongs of this issue and met with the Strongs on December 23, 2022, to discuss options. At the meeting, staff explained why the application was incomplete, and that their prior permits had been issued in error. Staff offered to reach out to the property owner to recommend mediation. The Strongs indicated they were interested in mediation and, following that meeting, staff reached out to Mr. Yates to recommend a mediation process.

On January 31, 2023, staff sent the Final Notice of Decision to the Strongs, denying their application for a 2023 Entertainment Permit (Attachment 2). On February 21, 2023, the Strongs appealed the denial (Attachment 3).

Following receipt of the appeal, staff reviewed all entertainment permits for prior years that remained on file at the City to determine if other applications lacked a property owner's signature. Of 21 applications, 18 included the property owner's signature. The three applications that did not have the property owner's signature were the Capitola Bar and Grill applications for 2021 and 2022, and the Wharf House Restaurant application for 2022. The City of Capitola is the property owner of the Wharf House, and staff had previously determined that the issuance of the Wharf House permit by the City constituted property owner consent.

Appellant's arguments in the appeal are below, with staff's response in bold.

Appellant states, "[t]he City Manager's letter says that he canceled the Permit (or denied the application for renewal, it comes to the same thing) because it did not include the landlord Steve Yates' consent on the application form that the City Manager himself made up. But under the Municipal Code section that he cites, his power to develop the form is limited. One legal question for you to decide is if that requirement

is properly on the form or not.” Appellant further notes that “CMC 5.24.080 gives the City Manager limited power to develop the application form. Specifically, it limits the form to ‘any nonprivileged information reasonably related to the concerns expressed in Section 5.24.005.’”

Section 5.24.080 authorizes the City Manager to “develop application forms pertinent to this chapter.” It does not limit the questions the City Manager may include on the form. Section 5.24.040.C allows the City Manager to issue permits upon making certain findings, including that no significant number of non-patrons will be disturbed by the entertainment. Similarly, Section 5.24.040.D allows the City Manager to condition the permit to assure non-disturbance by including certain permit-specific conditions. Both of these provisions underscore the City Manager’s authority in administering Chapter 5.24. In addition, if the requirement for the property owner’s signature did not appear on every application form, Section 5.24.040.D authorizes the City Manager to impose it as a condition on any specific permit.

The requirement for the property owner’s signature is related to the concerns expressed in Section 5.24.005, which states that, in adopting the Chapter, the Council found that “[e]ntertainment often produces noise which is obtrusive to persons not patronizing the business or activity which produces the noise.” Because property owners often have more than one tenant in a building, ensuring the property owner is supportive of the permit request helps protect the property owner’s other tenants in the same building. Finally, any complaints about noise from the business could affect the property owner in multiple ways, including impacting the property owner’s ability to lease the premises (or nearby properties) in the future or exposing the property owner to complaints about the noise. Lastly, requiring the property owner’s signature helps ensure the City is not authorizing entertainment on the property when such uses are not authorized in the lease between the tenant and property owner.

Second, appellant states that “the City should not cancel that permit unless there is a good reason such as excessive noise complaints.”

The City did not revoke the previously issued entertainment permits. The City denied the applicant’s 2023 entertainment permit because it lacked the landowner’s signature granting permission to use their property for entertainment purposes. There is no indication in Chapter 5.24 that the City is only permitted to revoke, or not issue a permit, for a specific reason. Instead, Section 5.24.050 states that a permit is valid for no more than one year from the date of issuance and that the issuance of a permit “does not establish a vested right to a renewal of the permit.” It also authorizes the City to cancel any permit for not complying with the requirements in the permit, however in this case the City is not canceling or revoking a permit for failure to comply with the permit requirements. The City is simply not issuing a 2023 entertainment permit because the permit lacks the landowner’s signature.

Third, appellant states that “the landlord is legally bound by his agreements to allow Entertainment.”

The City is not a party to the lease between the landlord and the appellant. Staff thus cannot comment on the provisions in the lease. The City is charged with administering and enforcing its own Municipal Code, which is what it is doing here.

Finally, appellant states that, because the City has twice issued the permit in the past, without the landlord’s signature, it should reissue it now.

Staff regrets its error in issuing permits without the landlord’s signature. However, the remedy for that error is not to grant another permit for 2023, especially given that other businesses in the City have been required to provide the property owner’s signature to obtain an entertainment permit. Based on staff’s review of prior entertainment permits that remain on file pursuant to the City’s record retention schedule, and staff’s historical experience administering the entertainment permit program, there has been no other example of a business obtaining an entertainment permit without the property owner’s consent over the last decade.

Alternative Actions: Council may grant the appeal or modify staff's determination. In either case, staff suggests that it return at a subsequent meeting with a resolution consistent with Council direction.

Fiscal Impact: None.

Attachments:

1. 2023 Capitola Bar and Grill Entertainment Permit Application
2. Denial Letter from the City
3. Appeal Letter from the Capitola Bar and Grill
4. Resolution
5. Correspondence

Report Prepared By: Andrew Dally, Police Chief

Reviewed By: Julia Moss, City Clerk; Samantha Zutler, City Attorney

Approved By: Jamie Goldstein, City Manager