

February 21, 2023

CITY OF CAPITOLA
CITY CLERK
FEB 21 2023

To: Hon. Mayor and City Council Members

From: Michelle and Lasalle (Sal) Strong, Capitola Bar & Grill proprietors

Phone: 559-341-9882

Mailing Address: 231 Esplanade, Suite 102, Capitola, CA 95010

Email: info@capitolabarandgrill.com PLEASE ALSO EMAIL ANY COMMUNICATIONS. Thank you.

RE: Appeal to City Council of City Manager's Decision to Cancel Capitola Bar & Grill's Permit for Music and Dancing (Entertainment Permit) by letter of 1/31/23. (Attached.)

Introduction

We appeal to you for fair and even-handed treatment in continuing to offer music and dancing to the community for afternoon and early evening enjoyment. We have had no significant complaints. We first got the permit in summer of 2021. The Chief of Police renewed it for 2022. And then suddenly at the beginning of this year, the City Manager decided to cancel it despite the last couple years of bringing life back to the Village. Why? There were no significant complaints. The only explanation is that our landlord, who is trying to force us out of the space before the end of our lease, somehow influenced him. That's not fair. The City should stay out of private disputes and not take sides either way. All we are asking is that you continue the status quo of the past couple years and allow us to continue to peacefully share entertainment at our restaurant in the Village. Thank you for the wise exercise of your power as Capitola's lawmakers in hearing our appeal.

What Happened (the Facts)

August 2021-

We took over from the old Sotola B&G, including a lease assignment with the landlord, Steve Yates, who (at first) wanted us in the space and approved of us getting an Entertainment Permit. He knew we were offering music and dancing and approved our lease with that knowledge. Entertainment is a big part of our business.

September 2021-

Chief of Police Andrew Dally issued us an Entertainment Permit, including conditions for sound proofing, hours of use, sound limits, etc., all of which we complied with. We spent almost \$10,000 on various improvements, because we had the Permit, for soundproofing, wood paneling, ceiling treatment, curtains, self-closing doors, cameras, and more.

January 2022-

Chief of Police Andrew Dally renewed our Entertainment Permit as a matter of course.

September 2021 through March 2022-

We had various communications with the landlord Steve Yates and his property manager. We were concerned about the elevator to the restaurant that never worked since we got there (and which has since been removed and half-replaced, remaining undone). We were also concerned that the roof of the residential unit we rented leaked during the rains. We noticed that progress was very slow and that the little work done was unprofessional. At first though, at least the tone of these communications was cordial on both sides.

April 2022-

Lasalle (Sal) Strong bumped into the landlord Steve Yates who was on site trying to fix the elevator himself. (He lives in Hawaii.) This was the first time they saw each other in person. The relationship deteriorated from there. For whatever reason, Mr. Yates' emails became argumentative and angry in tone. His tone remained cordial with our master tenant, the previous restaurant owners. He referred to our patrons as the wrong "element."

He was very concerned about the cost of repairs to his building and asked us to pay for the elevator. And he began complaining about the music. We began getting confusing legalistic notices about posted on our doors. Since then, he has consistently taken a scolding tone with us and refused to negotiate or identify any actual operational issues, including entertainment. We are mystified as to why; we have done nothing wrong.

June 2022-

We met with Police Chief Andrew Dally to discuss any compliance issues because of the confusing notices posted on our doors by the landlord. The Chief said there were no significant issues or complaints and that he was not concerned with our providing music and dancing. Police Captain Sarah Ryan informed us that landlord Steve Yates had asked them to cancel our Entertainment Permit.

August 2022-

We hired a law firm to help us with our landlord conflict which continued, and continues, to escalate. He wants us out and is pressuring us every way he can, including by getting our Entertainment Permit cancelled by the City.

October 2022-

We met with Chief of Police Andrew Dally. We offered to file the same annual renewal form for 2023 that we had filed for 2021 and 2022. However, suddenly it became an issue that the landlord Steve Yates refused to sign the form. But he had not signed the first two forms either, and the City gave us the Entertainment permit in 2021 and renewed it in 2022. We used the Permit and provided a community gathering place for live music and dancing in the afternoon and early evening. We had very few if any complaints (if you don't count the complaints of the landlord Steve Yates which were and are part of his campaign to remove us).

December 2022-

We filled out and submitted the annual renewal form for Entertainment Permit.

January 2023-

We received the 1/31/23 letter from the City Manager cancelling our Entertainment Permit because Steve Yates did not give his consent by signing the form. Whether intentional or not, the cancellation letter contains the wrong deadline date for filing this appeal. If we had followed the City Manager's instructions in the letter we would have been a day late and this appeal would have been dead on arrival.

February 2023-

We filed this appeal on time and paid the fee.

Here are Some Factual Questions that We Would Like to Ask (or Have You Ask) the City Manager and Other City Staff:

- 1) Did the City Manager delegate his authority to issue Entertainment Permits to the Chief of Police?
- 2) Did the police exercise discretion to issue permits with or without explicit landlord consent on the form?
- 3) How many entertainment permits issued in last five years? How many with explicit landlord consent on the form? How many without?
- 4) Why the change in that policy?
- 5) Did City Manager, Police Department, or any other staff communicate with Steve Yates about this matter?
- 6) When, how, and what did he say?
Did Mr. Yates say that he never consented to entertainment, or that he changed his mind?
- 7) Did he say or imply he would sue the City if the permit was not cancelled or not renewed?

What You Should Do and Your Legal Power to Do It (Our lawyer helped with this part)

Your role is to serve as the judges in this appeal, our disagreement with the City Manager over the Entertainment Permit. As the judges, you are independent of both sides. To be fair to both us and the City Manager, you are required by law to have your own independent lawyer, separate from the City Attorney who has been advising the City Manager. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91-94.) To the extent that the City Attorney has been advising the City Manager who cancelled our permit, she is biased having already formed an opinion of the matter and taken a side. They cannot give you objective legal advice. At the very least, they should confirm that you have the power to decide the questions of fact and law in this matter, should have independent counsel, and need not follow their legal opinion in the matter (already formed to support the City Manager).

As the judges in this hearing, the Capitola Municipal Code (CMC) gives you the power to make your own decisions regarding the facts and the law. (CMC 2.52.050 saying that this hearing is "de novo" meaning, a complete do over of facts and law.) You are not bound by the City Manager's decision. You have the power to make a different decision.

The City Manager's letter says that he cancelled 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.* If you decide that the form shouldn't have that requirement on it, then the City Manager's decision is baseless, and you must overturn it and renew the Permit.

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." That's it. Nothing else. So now the question is does Section 5.24.005 give the City Manager the power to require the landlord's signature on the form.

Section 5.24.005 addresses the purposes and concerns of the Entertainment Permits program. (We have copied the entire section at the end of this appeal.) They include only issues related to entertainment: noise; attracting business; traffic; peace and quiet and nightly sleep; hours of operation; concentration of similar businesses (an entertainment district); proximity to residences; the need for a permit system; and the need for fees to cover the cost of the system.

That's it. That is what the form is supposed to focus on: controlling noise, traffic, hours of operation, and the like—all issues directly related to the conduct of the business. Nothing in that section relates to landlord-tenant issues. Which makes sense because it is not the City's job to regulate the private contracts (including leases) between commercial businesses and the landlords.

The City Manager could have left landlord consent off the form entirely and it would have been proper and legal under the municipal code. This is also shown by CMC 5.24.020 which lists who can obtain an Entertainment Permit: "owner, manager or operator." Nowhere in the municipal code does it say that only the owner can apply—or that their consent is required. But it does say explicitly that an operator can obtain a Permit. Nor is this a land use right that might involve the property owner. It's in the Municipal Code under Business Regulations, not under Zoning.

The landlord consent requirement is improperly on the form, irrelevant, and not authorized by the ordinance. This is clear from the track record of the City having twice issued the permit without requiring such extraneous information.

If a landlord wants to control the use of his property by his tenants, that is properly done in his contractual agreements with them. Here, the landlord is legally bound by his agreements to allow Entertainment. (If there were actual bona fide nuisance complaints they could be addressed with the City under the municipal code—but there is no mention of such complaints in the City Manager's 1/31/23 letter.)

The City has authorized entertainment at our restaurant for two years running. The City twice issued an annual permit that we relied on in building our business and offering music and dancing to Village. In all fairness, the City should not cancel that permit unless there is a good reason such as excessive noise complaints. Here, the only complaint is from the landlord who is trying to break our lease—and our business.


For those reasons we ask that you find that the landlord’s consent is not related to the purposes of the Entertainment Permit program under Section 5.24.005 and is not a required part of the form. Based on that legal finding we ask that you reinstate our Entertainment Permit for 2023 so that we can continue providing entertainment in the Village as we have for the past two years.

Alternatively, if you decide that the landlord’s consent is required, you can still reinstate the Permit by finding that the issue of whether the landlord can revoke his previously given consent, under the lease and other agreements with, us is a matter for the courts to decide—or for us to negotiate with him. You can find that the issue of landlord consent does not require the City Manager’s form as a kind of “magic paper.” The requirement can be met by the landlord’s binding legal agreements that authorize us to have entertainment at the restaurant. Even if landlord consent is required, he has already given it in the lease and other contracts and he cannot revoke it now; the form is unnecessary because he has consented as a matter of law.

As the City’s policymakers you can decide, based on the policy of keeping the City out of private commercial disputes, and based on the landlord’s binding consent, that the City will maintain the status quo of music and dancing at the restaurant and reinstate the permit.

In Conclusion

For all the reasons given above, we ask that you exercise your legal powers to make this decision based on the facts and law as presented above and reinstate the Permit. Thank for supporting our continuing to share music and dancing in afternoons and early evenings in the Village.



LaSalle Strong



Michelle Strong

Capitola Municipal Code

5.24.005 Findings.

The city council finds as follows:

A. Entertainment often produces noise which is obtrusive to persons not patronizing the business or activity which produces the noise.

B. The availability of entertainment is often a significant factor in attracting patrons who infringe upon the peace and quiet and nightly sleep of nonpatrons, and is exacerbated by any of the following:

1. The entertainment is offered in conjunction with the distribution of alcohol.
2. The entertainment is offered by businesses which are open after nine p.m. and do not, like theaters, have fixed beginning and ending times at which most of the patrons enter and exit.
3. The entertainment is offered in an area where there is a concentration of similar businesses, thereby resulting in the area becoming an after-hours draw and the patrons of those businesses frequently entering and exiting the other establishments.
4. The entertainment is offered in locations where many of the patrons, when leaving, pass through or near areas where people reside.

C. To protect the peace and quiet of nonpatrons and their nightly ability to sleep it is necessary to have a licensing system and to thereby limit and condition the establishments offering such entertainment.

D. Policing and monitoring entertainment licenses entails considerable expense to the city, such that it is appropriate to collect a portion of such expenses from the entities providing the entertainment. (Ord. 1020 § 1 (part), 2018; Ord. 699 (part), 1990)



FINAL NOTICE OF DECISION

January 31, 2023

Capitola Bar and Grill
231 Esplanade #102
Capitola, CA 95010

RE: Notice of Decision on Application for 2023 Regular Entertainment Permit at 231 Esplanade #102

On behalf of Capitola Bar and Grill you applied for a 2023 Entertainment Permit as required by Capitola Municipal Code 5.24 – Entertainment Permits. Our understanding is that you lease the space at 231 Esplanade #102, and manage and operate Capitola Bar and Grill in that space.

We have reviewed your application and have determined the application does not include the property owner's consent to the application, as required on page 3 of the application (IX. Property Owner Statement).

The requirement for the property owner's consent is a standard inclusion on the City's application form. The form was developed pursuant to Capitola Municipal Code section 5.24.080, which allows the City Manager to develop the application.

Because your application does not include all of the required information, your application is denied.

If you would like to appeal this determination to the City Council, you must file your appeal within 14 working days of the date of this letter. The Council will hear the appeal at the City Council meeting following receipt of your appeal or, upon a request from staff, may hear the appeal at a later date. The deadline for you to file an appeal is five p.m. on February 22, 2023.

All appeals must be in writing and delivered to the office of the City Clerk with payment of the Administrative Decision Appeal Fee, which is \$562. The request for appeal must set forth the appellant's name, the phone number for the appellant, an address to which notices may be sent to the appellant and the grounds upon which the appeal is made. Further detail regarding the appeal procedure can be found in Chapter 2.52 of the Capitola Municipal Code.

Please note that because you do not currently have a valid Entertainment Permit, you are not permitted to engage in entertainment activities, as described in 5.24.010 of the Capitola Municipal Code.

Sincerely,



Jamie Goldstein, City Manager
City of Capitola