

Modification to appeal of Planning Commission denial of Application # 22-0282
Additional sheets

To: The Honorable City Council
From: Amy Cheng

Dear City Council Members,

On December 9, 2022 I submitted a timely appeal of the Planning Commission denial of my Application #22-0282.

Thank you for the opportunity to have my appeal heard by the Council.

Desired Outcome of this hearing:

1. I would like to continue with the City Council's consideration of my appeal of the Planning Commission decision on my application #22-0282.
2. If the appeal of Application #22-0282 is not granted, I seek a De Novo review by City Council of any and all alternative proposals to that Application and to my current CUP for my business at 401 Capitola Avenue, and I hope to get a ruling from City Council granting one of the alternatives I have proposed.
3. A discussion with Council and Planning Staff of how much additional seating the addition of three parking spaces to my property would enable me to have.
4. If the City Council returns the matter to the Planning Department or Planning Commission I would request the ruling by City Council be 'without prejudice' to enable me to continue to engage with Planning Department.

I. Original Appeal of Application #22-0282 – appeal filed December 9, 2022.

I would like to continue with the City Council's consideration of my appeal of the Planning Commission decision on my application#22-0282, and I refer to and incorporate by reference the packet materials that I submitted for that purpose on December 9, 2022, which I will also attach to this Modified Appeal.

That proposal was to increase the number of seats in my business to 26 and modify my CUP to a restaurant/café, with service of alcohol.

My initial Appeal Packet contains the issue in more detail. Please see the original Appeal packet filed with the City Clerk on December 9, 2022. Briefly to summarize here, the reasons given for denial of the application were parking and sufficient kitchen facilities.

I continue to assert that the proposal could have been granted by Planning. The findings for a parking variance could have been made as Policy 1-1 of the Land Use Plan set forth the review standard- The intensity of new development shall be limited to the availability of parking and other alternative transportation systems, such as a shuttle bus and remote parking.” (Emphasis added.) There is ample public parking near me, and an increase in the use of shuttle bus and shared ride transportation modes.

With regard to the sufficiency of my proposed kitchen facilities, Staff informed the Planning Commission that that was not a factor for their review. Please see the tape of the proceeding at approximately the 1:15-1:17 mark, where Staff informed the Commission that the issue of the ABC license, including the issue of the ‘bona fide eating establishment’ required was NOT part of the findings to make. Yet the Planning Commission did heavily rely on the issue of the sufficiency of the kitchen facilities and I feel that was weighted inappropriately in their decision to deny my application.

II. Consideration of alternatives to the original CUP and the proposal in #22-0282.

Since December 2022, I have been in continued discussions with the City of Capitola’s Planning Department. I want to express my gratitude to the Planning Department City Staff for their time and work with me. City Staff and I have discussed alternatives to my proposal in the original Application #22-0282.

City Staff informed me that, as this is a De Novo review, City Council could consider not only the project contained in Application #22-0282, but also any and all alternative proposals to that Application and to my current CUP for my business at 401 Capitola Avenue.

Accordingly I would like to amend my appeal to include for your review and discussion the alternative proposals, contained herein.

I also would welcome any other direction and alternatives proposed by City Council at the hearing on March 23, 2023.

Without waiver of my appeal and for the purposes of trying to reach a mutually agreeable alternative, I propose the following alternatives:

1. First proposed alternative:

I am in agreement to remove the parking variance from the request and continue with the six-seat takeout business model, which is the business model I have now with my current, valid CUP.

However I would like to continue with my request to convert no more than 50% of my taps to beer/wine/hard kombucha (hard kombucha is classified as beer/wine so for this proceeding I will refer to the proposal as seeking a CUP for beer and wine). This alternative would be to allow the consumption of food, non-alcoholic drinks, and limited consumption of alcoholic drinks on the premises.

As was stated in the staff report for the Planning Commission hearing dated December 1, 2022, (page 124 of the Agenda packet):

Conditional Use Permit Findings A. The proposed use is allowed in the applicable zoning district. Restaurant businesses and alcohol sales are not permitted by-right in the MU-N zoning district and require a conditional use permit. A restaurant serving beer and wine that meets parking standards is a potentially supportable proposal.

Therefore a CUP application for a proposal serving beer and wine is a supportable proposal if it meets the parking standards. In this alternative proposal, I am not seeking to expand seating and therefore my proposal meets existing parking standards. There is no longer that impediment to this proposal.

I received an email from Senior Planner Brian Froelich on December 27, 2022, which stated:

The staff advice is to continue with the takeout business model and remove the parking variance from the request. Staff is also unlikely to support use of the tap system for beer and wine for a takeout business. A takeout business and a tap system are not compatible. Bars and full-service restaurants have tap systems where customers stay for longer periods and consume on property.

We are open to reviewing bottle and can sales from an appropriately sized refrigerator to accompany the takeout business model.

It seems to me that Planning Staff is now proffering a new impediment to my proposal that was not the basis for Staff's recommendation for denial in the Staff Report for my application #22-0282. This new impediment is based on the length of time my customers will patronize my business. Specifically Staff is maintaining that "a takeout business and a tap system are not compatible. Bars and full-service restaurants have tap systems where customers stay for longer periods and consume on property."

I think that Staff's statement here is not well founded. The length of time my customers

can stay now to consume the drinks I currently sell, in the six seats allowed in my business, has never been an issue. There is no limit placed on how long one of my customers can sit and drink the kombucha drinks I sell now. Realistically with only six seats and the type of environment that my business presents (family oriented, minors welcome, light and bright, minimal seating, limited hours- closing at 8 pm) it is not going to draw the type of activity that a typical bar/lounge does. A bar/lounge has ample seating, dark lighting, adults only, who settle in for hours on end consuming unlimited alcoholic beverages. That is not what my proposal will look like.

As stated in my original application in #22-0282, I will implement a Self Pour Technology Card Key system - which manages and controls alcohol consumption by limiting each adult customer to no more than two (2) alcoholic drinks, and measuring and controlling portion size on the self-pour. This technology will ensure this limitation consistently and accurately. This will address Staff's concern, as it will limit the length of time customers will stay and consume on the premises, as well as the amount that can be consumed on the premises. Further, I can adjust the number and size of the pour even further. I am open to Council discussion on what Council feels is acceptable.

Alcohol sales are allowed in this zone with a CUP. Fundamentally alcohol sales are not incompatible with a takeout business. Staff's suggestion is proposing takeout alcohol sales in cans and bottles from a refrigerator.

2. Second Proposed Alternative:

Please note that alcohol from the pour taps can be also bottled and sealed for take out in pints, growlers and crowlers. If I am not granted the option of regular size pours (limited to two per person) of alcohol from the taps, I would like to accept the idea of a refrigerator for beer and wine sales but propose that the refrigerator offer prefilled, sealed bottles of my beverages from my taps. On premises, customers could be limited to trial, flight size pours (limited in number) enabling them to try a beverage and then select a sealed bottle of choice either for consumption on premises and/or to buy it to-go as well. This makes much more economic sense than stocking the fridge with other canned brands of beer and wine, and is compatible with the uniqueness of my business brand. And this would also address Planning's concerns about length of time of consumption on the property.

While I appreciate that Staff is open to allowing the sale of alcohol in bottles and cans, if this means other brands of alcohol this is a limitation that will continue to present an economic hardship on me and my business. I have invested very significant cost in the tap system that is presently installed in my business. I implemented this system to differentiate my business from others and offer a unique and fun service with a modern, innovative touch that will draw customers and allow me to survive financially as a small business owner. I want to bring in customers with this distinctive service, but I also want

to encourage the turnover of customers with the two drink maximum, (or whatever is proposed by Council) so that I can increase revenue.

3. Third Proposed Alternative:

Accept the use of a refrigerator for all sales of beer and wine but request that the presealed beer and wine beverages be from my tap system. Accept no self-pour consumption on premises of any size. Request to allow the consumption on premises of the presealed bottles from the refrigerator. (See discussion, below.)

On February 10, 2023, I had a zoom meeting with Capitola Planning Staff. Planning Staff articulated their position in an email to me dated 2/14/23, as follows:

Staff supportable alternatives:

- a. No Beer and Wine (B&W) – No new permit required
- b. Takeout Food & Beverage

OK to sell food, beverage, and retail with following limitations

- i. No tap use for B&W in any capacity
- ii. Cannot fill containers with B&W from taps for consumption on or off site.
- iii. Small display fridge for B&W– example Castagnolas
- iv. Keep legal nonconforming seating (6 seats)

- c. B&W retail w/taps

- i. Retail liquor store that packages to-go B&W beverages from the taps (pints, growlers, etc.) as well as food and retail goods.
- ii. No onsite consumption of food and drink. No dining areas, no seats, no drink rails, etc..
- iii. All sales would be retail only.

Staff's alternative 'a' is for me to withdraw my application and continue to maintain my business as currently permitted. Staff's alternative 'c' is to convert my business from a take-out establishment, which creates community for the public, to essentially a liquor store. No seating on the premises, no consumption of even non-alcoholic beverages on the premises, just retail sales to go of both my non-alcoholic kombucha, and beer and wine, and any food and retail goods.

These are not the proposed alternatives I wish to accept. While option 'a.' maintains what I have now, (and I certainly don't want to go less than what I have now) I am trying to survive and wish to increase my business. Most importantly option 'c' is not acceptable and I would think that Council would not want the beautiful building at 401 Capitola Avenue to become essentially a liquor store.

What I love about being a small business owner in the beautiful City of Capitola is the community! I am developing a core group of customers who love the City and what my business brings and could bring to the City. It would be a shame to convert this location from a family friendly, community oriented meeting place to a retail liquor store.

City Staff and I spent much time discussing Option 'b'.

Staff offered the proposal, similar to Castagnola's, where I could offer food and non-alcoholic kombucha for consumption on premises along with a refrigerator of precanned/prebottled beer and wine from outside vendors (i.e. not my taps). Staff stated that the customers could consume the beer and wine from the refrigerator on my premises, as well as the customers who were buying the non-alcoholic kombucha drinks and the food could stay and consume on the premises.

However Staff would not support the conversion of any of my taps (proposal was 50%) to beer and wine if there were any consumption of beer and wine on the premises. Staff then went further and said that if any of the taps were converted to beer and wine (even if only for filling bottles for to-go sales), no consumption of any food and non-alcoholic drink could occur on the premises.

I submit to Council that this hardline position is not reasonable or good for Capitola. It seems unnecessarily stringent.

I am fortunate to own a business that is much more weather proof than those right up against the ocean. My location is not as vulnerable to storms and resultant flooding and destruction. My business can be a year round draw to Capitola, a community destination and an important source of revenue to the City.

I think it is unduly restrictive to allow me to sell commercial brands of beer and wine from my premises, for consumption on the premises, but not allow for my use of the already existing tap system for beer and wine (unless I convert my business to a liquor store.) This defeats the uniqueness of my business model.

Staff is clearly very worried about my business becoming a bar. That is absolutely not going to happen. I have a family friendly; minors welcome business with limited hours and limited seating. Expanding my offerings somewhat to a limited amount of beer and

wine will not result in an adverse impact to the City or my immediate surroundings. Although I am in the mixed use –N zone, I am surrounded by commercial/office buildings and the open trestle space. I know that this proposal would not have the negative impact that the City Staff are worried about.

I plan to offer a menu of food items. Note that originally on April 4, 2019, the Planning Commission approved CUP #19-0031 for a takeout restaurant that was to serve rice bowls, salads, beverages, and ice desserts with six seats for customers (takeout). Although I then changed that proposal three years ago, my current proposal includes a similar but even more extensive menu of items:

Daily fresh soup • Variety crackers and cheese plates • Daily fresh specialty rolls • Beef kimbap rolls • Chicken kimbap rolls • Spam kimbap rolls • Tofu and fish cake kimbap rolls • Shrimps spring rolls • Chicken rice bowl • Daily fresh desserts

I am not seeking, in this alternate proposal, a CUP as a restaurant/cafe. I am staying with my current CUP of a takeout establishment:

Capitola Municipal Code Section 17.160.020 defines a takeout food and beverage establishment as offering, for example, limited service sandwich and pizza and snacks.

c. “Take-out food and beverage” means establishments where food and beverages may be consumed on the premises, taken out, or delivered, but where the area open to customers is limited to no more than one hundred sixty square feet. Includes take-out restaurants, take-out sandwich shops, limited service pizza parlors and delivery shops, and snack bars. Also includes catering businesses or bakeries that have a storefront retail component.

Therefore my request of City Council in this proposed alternative #3 is to accept no self-pour and consumption from self-pour of beer and wine on premises, but allow me to pre-fill sealed containers of beer and wine for sale from a refrigerator and consumption on premises of the drinks from the refrigerator. The distinction of that model from the model that Staff proposes of allowing sale and consumption of outside beer and wine from the refrigerator is not significant and I suggest it is unduly restrictive. The technology could be implemented that would not allow pouring from the beer and wine taps by customers, but only management wearing the appropriate card-key technology system. This would ensure compliance with this proposal. But this proposal enables me to get more value out of the already in place tap system, rather than have to purchase outside beer and wine.

III. Opportunity to obtain three parking spots:

I have been in talks with RTC to lease three parking spaces next door to my property. I believe I am able to lease three parking spaces immediately next to me. I would like to understand from the City Council and Staff what plans inside could now be afforded to me as a result of this increase in space. Could there be an increase in the amount of seating as a result of three additional parking spaces (in addition to the variance of four parking spaces that this CUP already has?)

IV. If Council denies the appeal and does not grant any of the alternatives, please do so 'without prejudice' so I can continue to discuss Staff Option B with Planning Staff.

Please note that this is not the option I really want and so I hope that putting it down here does not convey that impression. I am simply saying that if no other option is afforded me, I do not want to have Staff Option B foreclosed to me, and therefore would request City Council rule without prejudice so that option is still open.

SUMMARY

In sum my appeal to the Honorable City Council is:

1. A request for a reconsideration of the proposal that I submitted to the Planning Commission Hearing on December 1, 2022. I believe that the City Council can make the findings for the variance and reverse the Planning Commission's denial of my application # 22-0282 for the reasons articulated in my appeal filed on December 9, 2022 which I incorporate here by reference.
2. A request for a ruling on Alternative Proposals:
 - A request for the City to allow the conversion of no more than 50% of my taps to beer and wine for limited self-pour and consumption on premises along with on premises food and non-alcoholic kombucha.
 - A request for the City to allow the conversion of no more than 50% of my taps to beer and wine for trial size/flight tasting only on premises consumption and the refrigerator for sale of pre-filled beverages from my taps for on premises consumption and to-go sales along with on premises food and non-alcoholic kombucha.
 - A request for the City to allow the conversion of no more than 50% of my taps to beer and wine for no 'self pour' on premises consumption (which can be guaranteed by technology) but allow the refrigerator sale of pre-filled beverages from my taps for on premises consumption and to-go sales, along with on premises food and non-alcoholic kombucha.

- A request for the City to allow the conversion of no more than 50% of my taps to beer and wine for the sale of pre-filled beer and wine beverages from my taps for only to-go sales, while still allowing the consumption of non-alcoholic drinks and food on premises.

3. A request for guidance and discussion regarding any and all alternatives that City Council and Staff determine is possible with the addition of three parking spaces.

4. At a very minimum, if the City Council returns the matter to the Planning Department or Planning Commission I would request the ruling by City Council be 'without prejudice' to enable me to continue to engage with Planning Department on Staff option b.

Thank you.
Amy Cheng