



SAN FRANCISCO PLANNING DEPARTMENT

August 29, 2007

Joel Yodowitz
Reuben & Junius, LLP
1 Bush Street, Suite 600
San Francisco, CA 94104

Re: Zoning Administrator Letter of Determination
2101 Hayes Street
Block 1212, Lot 001
Zoning: NC-1 (Neighborhood Commercial, Cluster) District
40-X Height & Bulk District

Dear Mr. Yodowitz,

This letter is in response to your request for a determination as to whether a new full-service restaurant would be permitted at 2101 Hayes Street. The subject property is located in an NC-1 District. Although full-service restaurants are principally permitted in NC-1 Districts, the controls for NC-1 Districts are further restricted by any named neighborhood commercial district within one quarter mile of the subject property. In this case, the subject property is located within one quarter mile of the Haight Street NCD, where new restaurants are Not Permitted; therefore a new full-service restaurant at the aforementioned address is also not permitted, pursuant to Planning Code Sections 710.42 (Specific Provisions) and 719.42.

In your request for determination you reference the Board of Appeals Decision and Findings for Appeal No. 06-021, where the Board of Appeals overturned the Zoning Administrator's determination prohibiting a proposed restaurant use at 2232 Bush Street in the Upper Fillmore NCD. The introduction to the Upper Fillmore NCD states the following: "Special controls are designed to preserve the existing equilibrium (emphasis added) of neighborhood-serving convenience and specialty commercial uses. In order to maintain convenience store and protect adjacent livability, additional eating and drinking establishments are prohibited and ground-story entertainment and financial service uses are limited." However, other neighborhood commercial districts, such as the Haight Street NCD, state the following: "In order to maintain the balanced mix (emphasis added) and variety of neighborhood-serving commercial uses and regulate the more intensive commercial uses which can generate congestion and nuisance problems, special controls prohibit additional eating and drinking uses, restrict expansion and intensification of existing eating and drinking establishments and limit entertainment and tourist hotels." In the brief submitted to the Board in the Bush Street case, you made the introduction to the neighborhood commercial controls and indicated that the term "equilibrium" is of utmost significance to your argument stating that:

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“In the past, the Planning Department apparently treated all of the City’s 17 Individual Area NCDs the same, although the Upper Fillmore NCD and two others (the Castro Street NCD and the Inner Clement NCD) uses the “equilibrium” terminology. The Planning Department’s blanket treatment of the Upper Fillmore NCD improperly overlooked, and therefore failed to give effect to, the directive that the “equilibrium” of uses be maintained. If the Board of Supervisors wanted to wholly ban any new restaurant use in an NCD, it easily could have done so. However, by carefully choosing the “equilibrium” terminology, the Board of Supervisors made plain its intent to allow new restaurant uses provided the number in the district does not exceed that which existed when the legislation was enacted.”

In this analysis and your own argument you differentiate the Upper Fillmore Street NCD, Castro Street NCD and Inner Clement Street NCD from all of the other 14 Individual Area NCDs including the Haight Street NCD. Your argument then, was clear to exclude the Haight Street NCD and other neighborhood commercial districts that did not use the term “equilibrium” from any future connection with any decision made by the Board of Appeals regarding Appeal No. 06-021 for the property at 2231 Bush Street. While the Department at that time argued there was no real distinction between “equilibrium” and “balance” as some of the other districts used, the Board of Appeals overturned the Department’s position and carefully focused on the distinction in wording. It seems somewhat curious for you to reverse your previous argument.

An additional argument was implied to suggest that the Board of Supervisors intent was to include not only Individual Area NCDs in their introductions to the NC Table controls, but to also include all NC-1 Districts within one quarter mile to be subject to them. However, the 1983 surveys do not include restaurants in existence at that time within one quarter mile of the Individual Area Districts. They only consider those within the boundary of the District itself. The specific provisions for NC-1 Districts specifically state that full-service restaurants are a permitted use if located more than one quarter mile from any NC District or Restricted Use Subdistrict with more restrictive controls; otherwise, the same as the more restrictive control. The controls are clear that new restaurants in the Haight Street NCD are Not Permitted.

The appropriate course of action would be to initiate legislation that would allow new restaurants in Individual Area NCDs as long as the total number does not exceed a prescribed amount. Two recent examples would be the 24th Street Noe Valley NCD (which also has the language “Additional eating and drinking establishments are prohibited...” in its introduction) where the Board of Supervisors adopted legislation to allow three new full-service restaurants since 2005 through the conditional use process; and the Inner Clement Street NCD (which uses the term “equilibrium” in its introduction) proposed new legislation was recently forwarded to the Board of

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Supervisors from the Planning Commission with a recommendation to adopt a text amendment to allow up to five new restaurants.

If anyone believes that this determination represents an error in interpretation of the Planning Code or abuse of discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of this letter. For information regarding the appeals process, please contact the **Board of Appeals located at 1660 Mission Street, Room 3036**, in San Francisco, CA or call (415) 575-6880.

If you have any questions regarding this letter please contact Jonas P. Ionin at (415) 558-6309 or jonas.ionin@sfgov.org.

Sincerely,

Lawrence B. Badiner,
Zoning Administrator

JPI:g:/documents/WrittenDeterminations/2101 Hayes St.doc