

# Agenda Report

May 20, 2013

**TO:** Honorable Mayor and City Council

**FROM:** Planning & Community Development Department

**SUBJECT: CALL FOR REVIEW OF HEARING OFFICER'S DECISION:  
EXPRESSIVE USE PERMIT #6052, AND ASSOCIATED VARIANCE, AT  
25 NORTH RAYMOND AVENUE ('NEW YORK DELI')**

## **RECOMMENDATION:**

It is recommended that the City Council:

1. Find that the project is exempt from the California Environmental Quality Act ("CEQA") pursuant to State CEQA Guidelines Section 15301 (Existing Facilities); and
2. Uphold the Hearing Officer's decision to disapprove Expressive Use Permit #6052 and disapprove the associated Variance.

## **EXECUTIVE SUMMARY:**

The City Council has Called for Review the Hearing Officer's decision on applications submitted on behalf of *New York Deli*. These applications include a Variance from the distance separation requirements of the Alcohol Density Overlay Zone that would allow for the consideration of an Expressive Use Permit to reclassify an existing restaurant to a nightclub with alcohol sales as defined in the City's zoning code and to allow for the off-site sale of alcohol. The Hearing Officer's decision also included modifications of the previously approved Conditional Use Permit.

The Board of Zoning Appeals considered a Variance from the distance separation requirements to permit a Conditional Use Permit for off-site sales of alcohol as well as the modification of the applicant's existing Conditional Use Permit at a public hearing on May 15, 2013. The Board unanimously upheld the decision of the Hearing Officer to deny the Variance. Therefore, since approval of the Variance was necessary to consider the off-site sales of alcohol, the associated modification of the Conditional Use Permit to allow off-site sales was also disapproved. Additionally, the Board modified two existing conditions of approval (related to hours of alcohol sales and display of alcohol). The Board did not consider proposed modifications to the Conditional Use

Permit to allow a cover charge and customized lighting and sound systems as the applicant withdrew those requests at the hearing.

### **PROJECT SUMMARY:**

The City Council has Called for Review the Hearing Officer's decision concerning Expressive Use Permit #6052, and an associated Variance, for 25 North Raymond Avenue ('New York Deli'). The Expressive Use Permit and Variance applications were disapproved by the Hearing Officer at the April 3, 2013 public hearing.

The applicant and owner of *New York Deli*, Haamed Temory, submitted the Expressive Use Permit application in order to install a 96 square foot dance floor for use on holidays, Fridays, and Saturdays from 9:00 p.m. to 2:00 a.m. for customer dancing. Per the City's Zoning Code, the installation of a dance floor for customer dancing changes the land use category of the business from a Restaurant with Limited Live Entertainment to a "nightclub" (Commercial Entertainment) which therefore requires the approval of an Expressive Use Permit. Establishing a nightclub with alcohol service is not permitted within the AD-1 (Alcohol Density overlay, 1) district unless it is located at least 250 feet away from an existing bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, or use which provides sales of alcohol for off-site consumption within the AD-1 (Alcohol Density overlay, 1) district. In this case, *Vertical Wine Bistro* was determined to be located 239.5 feet away. Therefore, the applicant has submitted a Variance to deviate from the distance separation requirement established by the AD-1 district.

### **BACKGROUND:**

#### **Violations of Conditional Use Permit and Proposed Remedies**

*New York Deli* opened to the public in October 2010 as a restaurant without alcohol service. Around this time, the business owner submitted the necessary Conditional Use Permit application materials seeking approval of the sale of full alcohol (beer, wine, and distilled spirits) for on-site consumption as an accessory component of the restaurant operation. The Conditional Use Permit was approved by the Hearing Officer in February 2011.

As proposed by the business owner and as conditioned by the approval, it was understood *New York Deli* would be a full-service restaurant that would offer alcohol to compliment the food-service. The conditions of approval included many standard conditions (limiting the hours of alcohol sales, not permitting the sale of alcohol for off-site consumption, prohibiting features indicative of a nightclub or bar, etc.) that the City regularly imposes on restaurants with alcohol sales to ensure that they do not transform into a bar, nightclub, or similar use that could potentially be problematic or a nuisance.

In response to a complaint by the Pasadena Police Department, in July 2012, a City Code Compliance Officer commenced an investigation into the operation of *New York*

*Deli* and possible violations of several of these conditions of approval. The investigation resulted in the issuance of a Notice of Violation was issued in late July, which identified the following violations of the CUP:

Condition #8 (limitation on hours of alcohol sales); Condition #10 (bona-fide eating establishment); Condition #15 (no cover charges, entry fees, etc. allowed); Condition #16 (no promoter-produced parties); Condition #17 (no customized lighting); Condition #18 (compliance with City's Noise Ordinance); and #21 (posting of conditions of approval). In addition, it was found that a dance floor area had been created for customer dancing; customer dancing is not permitted in restaurants per the Zoning Code definition of 'Restaurants with Limited Live Entertainment':

*A restaurant, including a fast food or formula restaurant, that provides accessory live entertainment, where the performance area does not exceed 75 square feet, and customer dancing does not occur. The use shall be classified as a nightclub (commercial entertainment) if the performance area exceeds 75 square feet or customer dancing is provided. Live entertainment does not include a sexually oriented business.*

After the issuance of the Notice of Violation, it was found during subsequent inspections that these conditions were continuing to be violated and as a result a citation was issued in August 2012 with a financial penalty. In September and October, additional citations were issued for continued violations. However, inspections conducted since November have found *New York Deli* to be generally in compliance with the conditions of approval.

The owner/operator of *New York Deli* met several times with City staff to discuss the situation. The options he was presented with were to apply for modifications of the conditions of approval of the Conditional Use Permit or risk the City proceeding with a Revocation/Modification hearing where the Conditional Use Permit could potentially be revoked. The owner submitted the application to modify the Conditional Use Permit in January 2013. These application materials included four entitlements:

- 1) Expressive Use Permit: To establish a "nightclub" (commercial entertainment) through the installation of a 96 square foot removable dance floor for use on holidays, Fridays, and Saturdays from 9:00 p.m. to 2:00 a.m.
- 2) Variance: To establish a nightclub with alcohol service within 250 feet of an existing bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, or use which provide sales of alcohol for off-site consumption within the AD-1 (Alcohol Density overlay, 1) district.
- 3) Conditional Use Permit (modification): Modify five conditions of approval to allow: a) the sale of alcohol for on-site consumption from 7:00 a.m. to 2:00 a.m. seven days a week; b) the display of alcohol for sale in a refrigerator case; c) the sale of alcohol

for off-site consumption; d) the charging of entry fees for events, e) and customized lighting and sound systems for events.

- 4) Variance: To allow the sale of alcohol for off-site consumption within 250 feet of an existing bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, or use which provide sales of alcohol for off-site consumption within the AD-1 (Alcohol Density overlay, 1) district.

### Public Hearing

All four entitlement applications were presented to the Hearing Officer at a public hearing on April 3, 2013. Staff recommended disapproval of the Expressive Use Permit and the separation Variances.

A large number of letters, e-mails, and speakers supported both applications, however the Hearing Officer concurred with the staff recommendations. This is because although the operator and his business appear to be generally well-liked, no evidence was presented that assisted in making the necessary land use findings (as shown in Attachment B to this report), particularly the Variance, which require findings related to any unique circumstances of the applicant's site and property, not the business. The Hearing Officer has submitted an addendum and it is provided in Attachment B to this report.

Subsequent to the decision of the Hearing Officer, (now former) Councilmember Bryant of the City Council requested that the City Council consider a Call for Review (similar to an appeal) of the decision. On April 22, 2013 the City Council voted to Call for Review the applications to the Board of Zoning Appeals. However, as the City Council is designated by the Zoning Code as the appeal body for decisions on Expressive Use Permits (and not the Board of Zoning Appeals), the Board of Zoning Appeals has only considered the modification requests to the Conditional Use Permit and the Variance required to allow for the sale of alcohol for off-site consumption. The City Council voted on April 29, 2013 to consider the Expressive Use Permit, and associated Variance to deviate from the minimum distance requirements of the overlay.

At the City Council consideration for the Call for Review, a number of issues were discussed including the history and purpose of the Alcohol Density Overlay, the measurement method and accuracy of the separation distance, and the business operator's attempt to run his business.

### Alcohol Density Overlay

The Alcohol Density (AD) zoning overlay was created by the City Council in February 1995 to create separate use classifications for eating establishments and bars or taverns, include nightclubs in the definition of Commercial Recreation and Entertainment (since redefined as 'Commercial Entertainment'), increase public notification for new bars or taverns, billiard parlors with alcohol service, nightclubs with

alcohol service, and uses that sell alcohol for off-site consumption, and require a minimum distance separation for the establishment of these same uses.

These amendments to the Zoning Code were initiated by the City Council in March 1994 in response to alcohol-related concerns in the Old Pasadena area, including the possible over-concentration of alcohol-related uses. It was through a task force of city staff and members of the Old Pasadena Business and Professional Association (since renamed Old Pasadena Management District) that these amendments were crafted and presented to the City Council for consideration.

### *Separation*

As noted above, the AD overlay established a minimum 250-foot separation requirement. As stated in the February 27, 1995 City Council staff report to create the AD-1 overlay, "...new bars or taverns, billiard parlors with alcohol service, nightclubs with alcohol service and business which provides for the sale of alcohol for off-site consumption will have to be at least 250 feet from existing bars or taverns, billiard parlors with alcohol service, nightclubs with alcohol service and business which provides for the sale of alcohol for off-site consumption."

Businesses that pre-date the AD overlay are only subject to the separation requirement if they expand their bar area such that they are no longer classified as a restaurant or if a bar/tavern or use that sells alcohol for off-site consumption changes its sales from beer and wine to full alcohol (beer, wine, and distilled spirits). If a proposed use cannot meet the separation requirement then a Variance would be needed. Variances are more difficult to approve than a Conditional Use Permit or Expressive Use Permit and require a finding that there are exceptional or unique circumstances to the site and that the site is unique from other sites in the same zoning district.

Unlike other separation requirements in the Zoning Code that are typically measured from building to building or property to property, the AD-1 overlay separation requirement in the Zoning Code states, "...the facilities regulated by this Section shall be separated by a minimum distance of 250 feet." Therefore, rather than measure from property line to property line, the separation measurement in these cases is a straight-line distance between the nearest corner of the businesses in question.

To determine whether a new bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, or use that sell alcohol for off-site consumption is located within 250 feet of an existing such use, City staff first does a record search for approved Conditional Use Permits and Expressive Use Permits to ascertain whether there are any such uses currently exist within this radius. If none are found, and recognizing that some existing uses pre-date the AD overlay and therefore were reclassified as a result of the AD overlay amendments, staff will canvas the vicinity of the project site to determine whether any such uses exist.

In this case, during the record search staff found a Conditional Use Permit and Expressive Use Permit for *Vertical Wine Bistro* at 70 North Raymond Avenue. The Conditional Use Permit to establish *Vertical Wine Bistro* as a bar/tavern (because its bar area exceeded 30 percent of the dining area) was approved in 2005, with subsequent modifications in 2006, 2007, and 2008 for expansion of the wine bar, the off-site sales of alcohol, customer dancing, and expansion into the ground floor courtyard. As part of the 2007 modification, an Expressive Use Permit was approved to permit customer dancing. Staff measured the distance (this method is described below) and determined that *New York Deli* was 239.5 feet from *Vertical Wine Bistro* and that a Variance from the separation requirement is needed.

Because *Vertical Wine Bistro* was identified as being within the 250-foot distance from *New York Deli*, it was determined that there was not a need to do further research into other existing uses that may be within the separation radius. However, in response to a query by the City Council, staff has done further research and has determined that *Barney's Beanery* (formerly *Q's Billiards*) at 99 East Colorado Boulevard has a valid Conditional Use Permit from 1991 to be a billiard parlor with alcohol sales that pre-dates the AD overlay amendments. *Barney's Beanery* is located 179.9 feet from *New York Deli*. Further, there may be other businesses that pre-date the AD overlay within 250 feet of *New York Deli*, however, only one is needed to in order to initiate the Variance process.

#### *Measurement Method and Accuracy*

To determine the distance between two points, City staff uses an internal web-based Geographic Information System (GIS), called "iMap". GIS programs are used to spatially show data and information (i.e. linking information in a table to a map). One can display multiple layers of information to show spatial relationships between the data.

The City's iMap application is used by City staff for a wide variety of purposes including determining the separation between family day-care businesses, adult businesses, and to create mailing radii and notification labels and perform Neighborhood Compatibility analysis for Hillside Development Permit applications. It is also used for a variety of uses including information requests and case research. Using the iMap application allows for consistency for not only Planning activities, but for also other City departments that utilize this tool.

To determine the distance between *New York Deli* and *Vertical Wine Bistro* a two-point line was drawn from the northeast corner *New York Deli* to the southeast corner of *Vertical Wine Bistro* (the ground floor outdoor courtyard that is a part of the lease space and approved as part of its Conditional Use Permit for use as part of the establishment) at 70 North Raymond Avenue. This distance was determined to be 239.5 feet.

The same process was also used to determine the distance between *New York Deli* and *Barney's Beanery*, this time measuring from the southeast corner of *New York Deli* to

the northwest corner of *Barney's Beanery*, adjacent to Exchange Alley. As noted earlier, this distance is 179.9 feet.

The reference layer used for the measurement is a 2011 orthographic aerial photo (an aerial photo that has been geometrically corrected ("orthorectified") to account for the curve of the earth) that was obtained through Los Angeles Region Imagery Acquisition Consortium, a group of Los Angeles area groups and municipalities that combined resources and funds to obtain high-quality aerial imagery for the Los Angeles region. To determine the level of accuracy of the aerial imagery a study was conducted that found that it is accurate to 0.7433 feet (approximately nine inches) at a 95 percent confidence level. Given this high level of accuracy, staff is confident that that both measurements are accurate.

### Land Use Entitlements

One of the topics that were discussed by the City Council was whether the Conditional Use Permit, a land use entitlement, could be "connected" to the applicant such that were he to leave or sell the business the Conditional Use Permit would expire. It was explained to the City Council that such entitlements "run with the land" and per Section 17.64.060 of the Zoning Code, "...shall continue to be valid upon a change of ownership (e.g., of the site, structure, or use that was the subject of the permit application) provided that the use remains in compliance with all applicable provisions of this Zoning Code and any conditions of approval." Therefore, as with every land use application that the City processes, who the applicant is and how good their character is or is not, is not relevant to the analysis and cannot be considered.

### Proposed Entitlements and Staff Recommendations:

#### 1) Expressive Use Permit

The Expressive Use Permit process was established in order to ensure an orderly and thorough City review of applications for certain expressive uses and to ensure compatibility with the surrounding uses the subject property. In this case, an Expressive Use Permit is needed to provide for customer dancing at *New York Deli*. While the Zoning Code permits "Restaurants with Limited Live Entertainment" with certain restrictions (i.e. limited to a performance area of 75 square feet) without any special review, providing for customer dancing or exceeding a performance area of 75 square feet reclassifies the use as a nightclub ("Commercial Entertainment") instead of a restaurant. In this case, the applicant is proposing a 96 square foot dance floor that would only be used on holidays, Fridays, and Saturdays from 9:00 p.m. to 2:00 a.m. Although the dance floor would not be used at all times while *New York Deli* is open, the Zoning Code reclassifies the use if there is any amount of customer dancing, and an Expressive Use Permit is therefore required.

In addition to the Expressive Use Permit, a Variance is needed to establish the nightclub use. The Variance (discussed below) is needed because *New York Deli* is located within 250 feet of an existing 'Bar or Tavern'.

The five findings necessary to approve an Expressive Use Permit focus on the ability of the proposed use to provide and maintain: 1) wastewater and sanitary sewer services; 2) solid waste services; 3) fire prevention and suppression services; and 4) police services and crime prevention services. The remaining finding must find that the use complies with the applicable development and design requirements of the zoning district and all applicable provisions of the Zoning Code.

In this case, there is not a concern with the ability of the use to properly handle wastewater, solid waste, and fire prevention services, as all three are subject to review and permitting processes to ensure compliance with the applicable regulations. However, the Zoning Code-compliance finding cannot be made because the proposed use requires a Variance (see Variance discussion below). Without the approval of this Variance, all of the findings for the Expressive Use Permit cannot be made because the use is not allowed in the location proposed. Therefore, staff is recommending disapproval of the Expressive Use Permit request to establish a nightclub.

When the Expressive Use Permit was presented to the Hearing Officer, it was the staff position that the finding related to police services and crime prevention services could be made. While the Police Department has investigated the use in the past, staff was not aware of a significant number of serious incidents (e.g. fights, public drunkenness, etc.) that would be indicative of a potentially problematic or nuisance use.

However, it was the recommendation of the Police Department as stated in a February 25, 2013 memorandum (Attachment C) that after a review of the application, the Department is, "...not in agreement with the proposed modifications." This is based on, "...concerns affecting our daily operations as well as community safety." Based on this memorandum, and testimony provided by a representative of the Department at the Hearing Officer public hearing, it was the Hearing Officer's decision to also make the determination that the police services and crime prevention services finding could also not be made.

## 2) Variance (Separation between uses: nightclub with alcohol service)

In addition to being located in the CD-1, *New York Deli* is also located within AD-1 (Alcohol Density 1) overlay district. The AD overlay district has additional regulations that apply to proposed bars or taverns, billiard parlors with alcohol service, nightclubs with alcohol service, and uses which provide for the sale of alcohol for off-site consumption.

The two purposes of the AD overlay district are to: 1) have increased public notification for when these uses are proposed; and 2) regulate the density of these uses. The first purpose is achieved by increasing the notification period from 14 days prior the hearing



to 28 days prior and by including building occupants, not just property owners. The density regulation purpose is achieved by not permitting new bars or taverns, billiard parlors with alcohol service, nightclubs with alcohol service, and uses which provide for the sale of alcohol for off-site consumption to be located within a specified distance of these same uses that already exist. Within the AD-1 overlay district, this distance is 250 feet (within the AD-2 overlay district, this distance is 1,000 feet). The separation requirement has been in place since 1995.

As noted earlier, *New York Deli* is located 239.5 feet from *Vertical Wine Bistro*, located at 70 North Raymond Avenue and approximately 179.9 feet from *Barney's Beanery*, located at 99 East Colorado Boulevard. As a result, a Variance is necessary to deviate from the 250-foot separation requirement. This Variance to deviate from the distance requirement is the same variance considered by the Board of Zoning Appeals on May 15, 2013.

In order to approve a Variance application, it must be shown that: 1) there are exceptional or extraordinary circumstances or conditions applicable to the subject site that do not apply generally to sites in the same zoning district; 2) granting the application is necessary for the preservation and enjoyment of a substantial property right of the applicant and to prevent unreasonable property loss or unnecessary hardship; 3) granting the application would not be detrimental or injurious to property or improvements in the vicinity of the subject site, or to the public health, safety, or general welfare; 4) granting the application is in conformance with the goals, policies, and objectives of the General Plan, and the purpose and intent of any applicable specific plan and the purposes of this Zoning Code, and would not constitute a grant of special privilege inconsistent with limitations on other properties in the vicinity and in the same zone district; and 5) cost to the applicant of strict compliance with a regulation is not be the primary reason for granting the Variance.

In this case, staff cannot make the first finding that there are exceptional or extraordinary circumstances or conditions related to the site. Just like the properties in the vicinity, the property is a regular-shaped rectangle, the building in which *New York Deli* is located is a multi-story, multi-tenant building, and is accessed by pedestrians directly from the sidewalk. Similar to many sites in the vicinity, this one also has retail and restaurant on the ground floor with housing units above and is bounded on at least one side by an alley.

The separation regulation applies equally to all properties in the AD-1 overlay district; this property is not treated differently or singled-out. Further, *Vertical Wine Bistro* is an established business and the 250-foot separation requirement from it has been in place since its Conditional Use Permit was approved in 2005, long before *New York Deli* was approved as a restaurant with alcohol sales in 2011 and before the current application was submitted in January of 2013.

Because staff cannot make the exceptional or extraordinary circumstances finding as shown in Attachment A, it is recommended that the Variance be disapproved. This is

the same recommendation that was previously made by staff; the application was disapproved by the Hearing Officer.

### **BOARD OF ZONING APPEALS ACTION MAY 15, 2013**

The Board of Zoning Appeals considered the modification of the Conditional Use Permit, and the associated Variance, at a public hearing on May 15, 2013. At the conclusion of the public hearing the Board took the following actions:

- Upheld the disapproval of the Variance to sell alcohol for off-site consumption within 250 feet of a bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, and/or use which provides for the sale of alcohol for off-site consumption.
- Approved modifying the limitation of the hours of alcohol sales from 11:30 p.m., seven days a week, to 12:00 a.m., Sunday through Thursday, and 2:00 Friday and Saturday;
- Approved the display of alcohol in the refrigerator case, limited to no more than 75 percent of the display area;
- Upheld the disapproval of the charging of entry fees (the applicant withdrew this request during the hearing);
- Upheld the disapproval of the installation of customized lighting and sound systems (the applicant withdrew this request during the hearing);
- Upheld the disapproval of the sale of alcohol for off-site consumption; and

The decision of the Board of Zoning Appeals is not appealable by the applicant, but may be called for review by the City Council, if the Council votes to hear the case. The last day that a member of the City Council may file a request to consider a call for review is Tuesday, May 28, 2013. If the matter is called for review, a 28-day notice period would be required before the Council could conduct the public hearing.

### **CONCLUSION:**

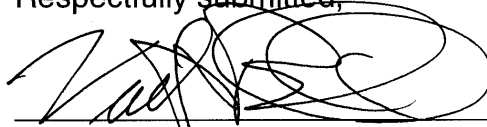
Based on the above analysis, the findings to approve Expressive Use Permit #6052 and the Variance for separation cannot be made because the site on which *New York Deli* is located is not unique or exceptional such that a business located on it is deprived of a substantial property right. Because the Variance findings cannot be made, and due to the public safety concerns of the Pasadena Police Department, the findings for the Expressive Use Permit also cannot be made.

Therefore, it is staff's recommendation to uphold the Hearing Officer's decision to disapprove Expressive Use Permit #6052 and disapprove the associated Variance.

**FISCAL IMPACT:**

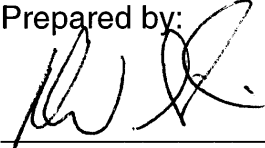
The decision of the Council will not have any impact on the City's general fund or other budgetary aspects.

Respectfully submitted,



VINCENT P. BERTONI, AICP  
Director of Planning & Community  
Development Department

Prepared by:



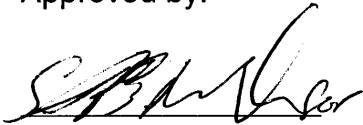
David Sinclair, LEED AP  
Planner

Concurred by:



David Reyes  
Deputy Director of Planning & Community  
Development Department

Approved by:



MICHAEL J. BECK  
City Manager

**Attachments:**

- Attachment A – Zoning Administrator and Hearing Officer Recommended Specific Findings
- Attachment B – Hearing Officer Addendum
- Attachment C – Memorandum from Pasadena Police Department (February 25, 2013)
- Attachment D – Hearing Officer Decision Letter (April 4, 2013)

**ATTACHMENT A**  
**ZONING ADMINISTRATOR AND HEARING OFFICER RECOMMENDED SPECIFIC**  
**FINDINGS FOR EXPRESSIVE USE PERMIT #6052**

Expressive Use Permit #6052

1. *The proposed use is allowed with an Expressive Use Permit within the subject zoning district and does not comply with the applicable development and design requirements of the subject zoning district and with all applicable provisions of this Zoning Code. Nightclubs (“Commercial Entertainment”) are permitted in the CD-1 zoning district subject to the approval of an Expressive Use Permit. In this case the need for an Expressive Use Permit is required because the applicant intends to install a 96 square foot dance floor for customer dancing. However, the establishment of the proposed nightclub requires the approval a Variance because the use is located within 250 feet of an existing “Bar or Tavern”. Staff is unable to make all of the necessary findings to support the Variance applicable and consequently, cannot make this finding that the proposed use complies with all applicable provisions of the Zoning Code.*
2. *The proposed use will not provide and maintain police services and crime prevention services to establish and maintain minimum response time for police calls for service as established by the city's approved general plan. The Pasadena Police Department has reviewed the application and has stated that it is, “...not in agreement with the proposed modifications.” This is based on, “...concerns affecting our daily operations as well as community safety.” As a result, this finding cannot be made.*

Variance (Separation between uses: nightclub with alcohol service)

3. *There are not exceptional or extraordinary circumstances or conditions applicable to the subject site that do not apply generally to sites in the same zoning district. The 250-foot separation regulation for a new nightclub with alcohol service applies equally to all properties in the AD-1 overlay district; this property is not treated differently or singled-out. *Vertical Wine Bistro* (at 70 North Raymond Avenue) is an established business and is within the 250-foot separation. The Conditional Use Permit that allowed *Vertical Wine Bistro* to be established as a bar was approved in December 2005, and subsequent modifications in 2006, 2007, and 2008 allowed the expansion of the wine bar, the off-site sales of alcohol, and customer dancing. The separation requirement has been in place long before *New York Deli* was approved as a restaurant with alcohol sales in 2011 and before the current application was submitted in January 2013.*

## ATTACHMENT B HEARING OFFICER ADDENDUM

I denied Expressive Use Permit #6052 because the findings could not be made, especially the variance findings.

With respect to the Expressive Use Permit findings, and because the variance findings cannot be made, the proposed use does not apply with the applicable provisions of the Zoning Code (first finding required for an Expressive Use Permit). Based, largely, upon input from the City of Pasadena Police Department, it is clear that the proposed use will not provide and maintain police service and crime prevention services to establish and maintain minimum response time for police calls for service as established by the city's approved general plan (second finding requires for an Expressive Use Permit).

The Police Department provided a memorandum (Attachment C, February 25, 2013) opposing the granting of the requested permits. During the hearing, a Police Department representative confirmed that the Department was opposed to all of the applicant's requests. Further, the Police Department reported about multiple visits to *New York Deli*, and noted that the applicant was not cooperative on several occasions. The strong position taken by Police Department representatives make it difficult, if not impossible, to make this second finding.

With respect to the Variance findings, there are no apparent exceptional or extraordinary circumstances or conditions applicable to the subject site that do not apply generally to sites in the same zoning district. Despite the applicant's written application, and testimony, about the "uniqueness" of a delicatessen in Pasadena, this is not the kind of exceptional or extraordinary circumstances, or uniqueness, necessary to grant a variance. If an offering of a "unique" product line or type of food met the uniqueness finding, this finding could be made for dozens of restaurants in Pasadena. The finding, however, references "exceptional or ordinary circumstances or conditions applicable to the subject site" and there is nothing unique about the subject site [emphasis added].

Although not directly related to the findings, there also exists an issue relative to compliance with the current conditions of approval found in the existing CUP for *New York Deli*. There was a lengthy back-and-forth between the applicant and code enforcement staff which lasted for several months. During his testimony at the ZHO Hearing, the applicant conceded alcoholic beverages are displayed—and accessible to the public—on a refrigerated shelf in the restaurant. Such display is not permitted by the current CUP.

The combination of multiple factors—the Police Department interactions, extensive code enforcement record, and failure to comply with existing CUP conditions—do not exactly present the applicant's permitting record in a favorable light. Nor does this track record present a compelling argument for granting additional uses beyond what is currently allowed.

I did not feel that it was within my purview to adjudicate a difference of opinion about the “distance” issue—how the two hundred fifty feet (250’) between *New York Deli* and *Vertical Wine Bistro* is measured. Staff presented that the two establishments are within that distance, and I had no means at my disposal to verify that claim.

Following the hearing, the applicant asked me what he could have said that would have enabled me to grant the requested Expressive Use Permit #6052. I said that he should have provided information showing how the findings could be made. At the conclusion of his original testimony, early on in the ZHO Hearing, I urged the applicant to address the findings in his rebuttal; unfortunately, he did not do so in his rebuttal.

The applicant did not adequately address the findings in the written application, nor in the supplemental documents provided in advance of the hearing, nor in the documents submitted at the hearing, nor in any of the testimony during the hearing. On the last point, even after my prodding on this issue, the applicant still did not testify to the findings.

ATTACHMENT C

**MEMORANDUM - City of Pasadena  
Police Department**

February 25, 2013

**TO:** David Sinclair, Planner  
Planning and Community Development

**FROM:** Diego Torres, Lieutenant  
Criminal Investigations Section

**RE:** Conditional Use Permit Modification Request #5465  
New York Deli

**Summary of Issue**

The representatives of the Pasadena Police have reviewed the submitted modifications to the Conditional Use Permit #5465 regarding 25 N. Raymond Ave. (New York Deli). The following is our findings.

**Background Information**

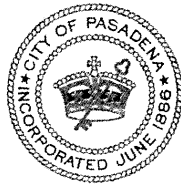
The Pasadena Police Department has reviewed the requested proposed Conditional Use Permit modification to the New York Deli. As a result, the Pasadena Police Department has specific concerns and are not in agreement with the proposed modifications. The foundation of this data based finding is related to concerns affecting our daily operations as well as community safety.

**Recommendation**

In response to a comment request from the City of Pasadena's Planning Department, it should be noted that the Pasadena Police Department has found not be in agreement with the proposed CUP modifications related to the New York Deli.

**ATTACHMENT D  
HEARING OFFICER DECISION LETTER**





PLANNING & COMMUNITY DEVELOPMENT DEPARTMENT  
PLANNING DIVISION

April 4, 2013

Haamed Temory  
25 North Raymond Ave  
Pasadena, CA 91103

**Subject: Expressive Use Permit #6052  
Modification of Conditional Use Permit #5465  
25 North Raymond Avenue  
Council District #3**

**PLN2013-00143  
PLN2013-00006**

Dear Mr. Temory:

Your application for an **Expressive Use Permit and Modification of Conditional Use Permit at 25 North Raymond** was considered by the **Hearing Officer on April 3, 2013.**

1. **Expressive Use Permit:** To establish a "nightclub" through the installation of a 96 square foot removable dance floor for use on holidays, Fridays, and Saturday from 9:00 p.m. to 2:00 a.m.
2. **Variance:** To establish a "nightclub" with alcohol service within 250 feet of an existing bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, or use which provide sales of alcohol for off-site consumption within the AD-1 (Alcohol Density overlay, 1) district.
3. **Conditional Use Permit (modification):** Modify five conditions of approval to allow: a) the sale of alcohol for on-site consumption from 7:00 a.m. to 2:00 a.m. seven days a week; b) the display of alcohol for sale in a refrigerator case; c) the sale of alcohol for off-site consumption; d) the charging of entry fees for events, e) and customized lighting and sound systems for events.
4. **Variance:** To allow the sale of alcohol for off-site consumption within 250 feet of an existing bar or tavern, billiard parlor with alcohol service, nightclub with alcohol service, or use which provide sales of alcohol for off-site consumption within the AD-1 (Alcohol Density overlay, 1) district.

After careful consideration of this application, and with full knowledge of the property and vicinity, it was decided by the Hearing Officer to: 1) **disapprove** the Expressive Use Permit application; 2) **disapprove** the first Variance for separation between uses; 3) **approve** some of the requested modified conditions (and deny other requested modified conditions) as shown in

the findings in Attachment A and the conditions in Attachment B; and 4) **disapprove** the second Variance for separation between uses in accordance with submitted plans stamped **April 3, 2013**.

You are hereby notified that, pursuant to Pasadena Municipal Code Chapter 17.72, any person affected or aggrieved by the decision of the Hearing Officer has the right to appeal this decision within **ten days (April 15, 2013)**. The effective date of this case will be **eleven days after the hearing date (April 16, 2013)**. Prior to such effective date, a member of the City Council or Planning Commission may request that it be called for review to the Board of Zoning Appeals. However, if there is a request for a call for review, the appeal period will continue to run. If the tenth day falls on a day when City offices are closed, the appeal deadline shall be extended through the next day when offices are open. The decision becomes effective on the eleventh day from the date of the decision. The regular Appeal fee is \$3,505.50. The Appeal fee for Non-profit Community-based Organizations pre-registered with Neighborhood Connections is \$1,752.75.

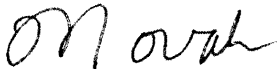
Any permits necessary may be issued to you by the Building Division on or after the effective date stated above. A building permit application may be submitted before the appeal deadline has expired with the understanding that should an appeal be filed, your application may, at your expense, be required to be revised to comply with the decision on the appeal. A copy of this decision letter (including conditions of approval and any mitigation monitoring program) shall be incorporated into the plans submitted for building permits.

For a period of twelve months following the effective date of disapproval of a land use permit, no application for the same or substantially the same permit shall be filed except on grounds of new evidence, proof of changed circumstances, or if the disapproval was without prejudice.

This project has been determined to be exempt from environmental review pursuant to the guidelines of the California Environmental Quality Act (Title 14, Chapter 3, Section 15301, Class 1, Existing Facilities). Class 1 exempts projects that involve negligible or no expansion of an existing use. The proposed applications would not result in permanent physical changes to the business.

For further information regarding this case please contact **David Sinclair** at **(626) 744-6766**.

Sincerely,



Paul Novak  
Hearing Officer

Enclosures: Attachment A, Attachment B, Attachment C (Floor Plan)

xc: City Clerk, City Council, Building Division, Public Works, Power Division, Water Division, Design and Historic Preservation, Hearing Officer, Code Enforcement-Jon Pollard, Case File, Decision Letter File, Planning Commission (9)

**ATTACHMENT A**  
**SPECIFIC FINDINGS FOR EXPRESSIVE USE PERMIT #6052 AND**  
**MODIFICATION OF CONDITIONAL USE PERMIT #5465**

Expressive Use Permit #6052

1. *The proposed use is allowed with an Expressive Use Permit within the subject zoning district and does not comply with the applicable development and design requirements of the subject zoning district and with all applicable provisions of this Zoning Code.* Nightclubs ("Commercial Entertainment") are permitted in the CD-1 zoning district subject to the approval of an Expressive Use Permit. In this case the need for an Expressive Use Permit is required because the applicant intends to install a 96 square foot dance floor for customer dancing. However, the establishment of the proposed nightclub requires the approval a Variance because the use is located within 250 feet of an existing "Bar or Tavern". Staff is unable to make all of the necessary findings to support the Variance applicable and consequently, cannot make this finding that the proposed use complies with all applicable provisions of the Zoning Code.
2. *The proposed use will not provide and maintain police services and crime prevention services to establish and maintain minimum response time for police calls for service as established by the city's approved general plan.* The Pasadena Police Department has reviewed the application and has stated that it is, "...not in agreement with the proposed modifications." This is based on, "...concerns affecting our daily operations as well as community safety." As a result, this finding cannot be made.

Variance #1 (Separation between uses: nightclub with alcohol service (EUP #6052))

3. *There are not exceptional or extraordinary circumstances or conditions applicable to the subject site that do not apply generally to sites in the same zoning district.* The 250-foot separation regulation for a new nightclub with alcohol service applies equally to all properties in the AD-1 overlay district; this property is not treated differently or singled-out. *Vertical Wine Bistro* (at 70 North Raymond Avenue) is an established business and is within the 250-foot separation. The Conditional Use Permit that allowed *Vertical Wine Bistro* to be established as a bar was approved in December 2005, and subsequent modifications in 2006, 2007, and 2008 allowed the expansion of the wine bar, the off-site sales of alcohol, and customer dancing. The separation requirement has been in place long before *The New York Deli* was approved as a restaurant with alcohol sales in 2011 and before the current application was submitted in January 2013.

Conditional Use Permit #5465 (Modification)

4. *There are changed circumstances sufficient to justify the modification of the original approval.* The applicant, and business owner, has requested several modifications of the existing conditions of approval related the services provided at the establishment, with the intent of accommodating additional customers. While city staff is unable to make all of the findings to approve all of the modifications, it has been determined that an increase in the hours of alcohol sales and the limited display of alcohol can be justified and as a result the finding for modification can be made.
5. *The proposed location of the site for the Conditional Use Permit would not adversely affect the general welfare of the surrounding property owners.* The operation of a restaurant with on-site sale and consumption of alcoholic beverages is consistent with the activity of the

surrounding uses. The subject site is located within the Central District's Old Pasadena area, which is identified as a retail/entertainment destination with a variety of restaurants and retail uses. The use will operate in accordance with the City's laws, ordinances, and conditions of approval that ensure the continuity of the compatible coexistence of this use with surrounding area. The hours of alcohol sales as conditioned and the limited display of alcohol is not anticipated to be problematic or a nuisance.

6. *The proposed location of the site for the Conditional Use Permit would not result in an undesirable concentration of premises for the sale of alcoholic beverages, including wine, in the area.* An overconcentration of alcohol establishment as defined by the State ABC exists in the Census Tract; however, the ability to sell alcoholic beverages at a full-service, bona fide restaurant is considered an amenity. Also, the project is located within the Central District's Old Pasadena area, a highly identifiable regional retail and entertainment destination. Conditions of approval have been included that will limit the potential for negative impacts and to ensure that the business will not deviate from the planned operation as recommended for approval by city staff
7. *The proposed location of the site for the Conditional Use Permit would not detrimentally affect the nearby surrounding area after giving special consideration to the proximity and nature of the proposed use with respect to the following: a. Residential uses and residential districts; b. Hospitals, park and recreation facilities, places of public assembly, public or private schools, and religious assembly uses that attract minors and other similar uses; and c. Other establishments offering alcoholic beverages (including wine) for sale for consumption both on- and off-site.* Residential uses are located on the upper floors of this mixed-use building, but are located within an urbanized district of Pasadena. Approximately 3,500 square feet of restaurant use was included in the original approval of the mixed-use project, and this full-service restaurant has been at this location since October 2010. Given the urbanized location and encouraged mix of residential, commercial, retail, and entertainment uses in the Central District, it has been determined that a restaurant with incidental alcohol sales will not be detrimental to the area. The conditions of approval will ensure that the use is maintained as a bona fide restaurant.
8. *The proposed location of the site for the Conditional Use Permit would not aggravate existing problems created by the sale of alcohol (e.g., littering, loitering, noise, public drunkenness, and sales to minors).* Bona-fide restaurants with incidental sales of alcoholic beverages are not considered a problematic use and do not contribute to an aggravation of any existing problems in the vicinity. With this approval, the project is subject to the City's Condition/Mitigation Monitoring Program. Noncompliance with any of the conditions of approval or any of the provisions of the Zoning Code may result in the revocation or modification of the Conditional Use Permit.
9. *The proposed use is in conformance with the goals, policies, and objectives of the General Plan and the purpose and intent of any applicable specific plan.* As conditioned, the proposed use is consistent with Objective 10, Diverse Economy, of the Land Use Element of the General Plan. The on-site sale of a full-line of alcoholic beverages with the conditions of approval will promote a diverse economy base and long-term economic contribution to the City.

Variance #2 (Separation between uses: sales of alcohol for off-site consumption (CUP#5465))

10. There are not exceptional or extraordinary circumstances or conditions applicable to the subject site that do not apply generally to sites in the same zoning district. The 250-foot separation regulation for a business that sells alcohol for off-site consumption applies equally to all properties in the AD-1 overlay district; this property is not treated differently or singled-out. *Vertical Wine Bistro* (at 70 North Raymond Avenue) is an established business located less than 250 feet from *The New York Deli*. The Conditional Use Permit that allowed *Vertical Wine Bistro* to be established as a bar was approved in December 2005, and subsequent modifications in 2006, 2007, and 2008 allowed the expansion of the wine bar, the off-site sales of alcohol, and customer dancing. The separation requirement has been in place long before *The New York Deli* was approved as a restaurant with alcohol sales in 2011 and before the current application was submitted in January of 2013.

**ATTACHMENT B  
CONDITIONS OF APPROVAL FOR  
MODIFICATION OF CONDITIONAL USE PERMIT #5465**

The applicant or successor in interest shall meet the following conditions. These conditions supersede the conditions of approval from all previous Conditional Use Permit.

1. The site/floor plans submitted for building permits and/or future development shall substantially conform to the site/floor plans stamped "Received at Hearing, April 3, 2013," except as modified herein.
2. The approval of this application authorizes the on-site sale of a full-line of alcoholic beverages in conjunction with the operation of a 3,662 square foot restaurant with a bar area of 417 square feet, as depicted in the approved floor plan.
3. Pursuant to Chapter 17.78 of the Zoning Code, the Zoning Administrator can call for a review of the approved conditions at a duly noticed public hearing if it can be reasonably shown that there are grounds for revocation or modification of this Conditional Use Permit. These conditions may be modified or new conditions may be added to reduce any impacts of the use. The Hearing Officer may revoke the Conditional Use Permit if sufficient cause is given as allowed by Section 17.78 of the Zoning Code.
4. Any change to these conditions of approval or expansion of the use shall require the modification of this Conditional Use Permit or a new Conditional Use Permit, except as allowed by Section 17.64.050 (Changes to an Approved Project) of the Zoning Code.
5. The applicant or successor in interest shall meet the applicable code requirements of all other City Departments.
6. The final decision letter and conditions of approval shall be incorporated in the building plans as part of the building plan check process.
7. The proposed project, Activity Number **PLN2010-00229 and PLN2013-00006**, are subject to the City's Condition Monitoring Program and is subject to **Final Zoning inspection**. Condition Monitoring is required for your project. Under the Monitoring Program, your project will be inspected by Code Compliance staff to determine compliance with the conditions of approval. The Condition Monitoring inspection will occur during the term of the project. The Final Zoning Inspection will occur at the completion of the project. Required monitoring fees for inspections shall be paid on or after the effective date of this permit, but prior to the issuance of any building permits. Contact the Code Compliance Staff at (626) 744-4633 to verify the fee. All fees are to be paid to the cashier at the Permit Center located at 175 N. Garfield Avenue. The cashier will ask for the activity number provided above. Failure to pay the required monitoring fees prior to initiating your approved land use entitlement may result in revocation proceedings of this entitlement.

Planning Division

8. The last alcoholic beverage shall be served no later than one-half hour before closing or 1:00 a.m., whichever earlier.
9. The sale of alcoholic beverages shall be in conjunction with food sales. Food service with a full menu shall be made available during all hours of business operation.
10. The premises shall operate under Type 47 (On-Sale General Eating Place) alcohol license and be maintained as a bona-fide eating establishment. The premises shall not obtain Type 48 (On-Sale General Public Premises) or any other public premises type licenses without the approval of a Conditional Use Permit and/or Expressive Use Permit.
11. The bar area shall be defined by a barrier depicted on the approved plan. The west side of the bar counter shall not have any seating and shall be maintained as a servers' station.
12. Alcoholic beverages (limited to individual bottles or cans) may be displayed or stored in the refrigerated showcase in the dining area. The doors of the case shall remain locked during business hours and may only be accessed by employees. Alcohol may not occupy more than a length of 12'-6", or half, of the refrigerator case, whichever is less.
13. The off-site sale and/or consumption of alcohol are strictly prohibited.
14. Alcoholic beverages shall not be served in disposable containers.
15. No cover charges, entry fees, or minimum drink orders shall be charged /required of patrons. There shall be no restrictions on the age of customers.
16. Promoter-produced parties or events shall be prohibited. These events include private parties that involve with third persons who profit from organizing and/or drawing attendees to the events.
17. Customized lighting and sound system conducive of a nightclub atmosphere shall be prohibited at all times.
18. Amplification of music shall comply with the regulations of Chapter 9.36 of Pasadena Municipal Code.
19. Signs advertising brands and types of alcoholic beverages or the availability of alcohol for sale at the subject site shall not be visible from the exterior of the premises.
20. The following preventive measures shall be undertaken to reduce the potential for alcohol related problems:
  - a) Taxicab phone numbers shall be posted in a conspicuous location at all times in the area(s) where alcohol is served to customers;
  - b) All employees selling or serving alcohol shall be required to participate in an alcohol training program offered by the Alcoholic Beverages Control prior to the operation of selling/serving alcohol;

- c) The availability of a variety of non-alcoholic beverages shall be made known and offered to customers, and
  - d) No more than four video games shall be permitted.
21. These conditions of approval must be posted in a conspicuous location for public viewing within the restaurant on a continuous basis for the life of this Conditional Use Permit beginning on the date the alcohol sales commence.
  22. The site and surrounding area shall be maintained in a litter and graffiti free manner. Any graffiti that should appear on the site shall be removed within 48 hours.
  23. Compliance with the City of Pasadena Refuse Storage regulations, see Section 17.40.120 of the Pasadena Municipal Code, shall be maintained at all times.
  24. Customer dancing is prohibited at all times.
  25. Live entertainment, as allowed by Section 17.80 (Restaurants with Limited Live Entertainment), is permitted.
  26. Private events are permitted, however all conditions of approval shall still apply during such events.

Public Health Department

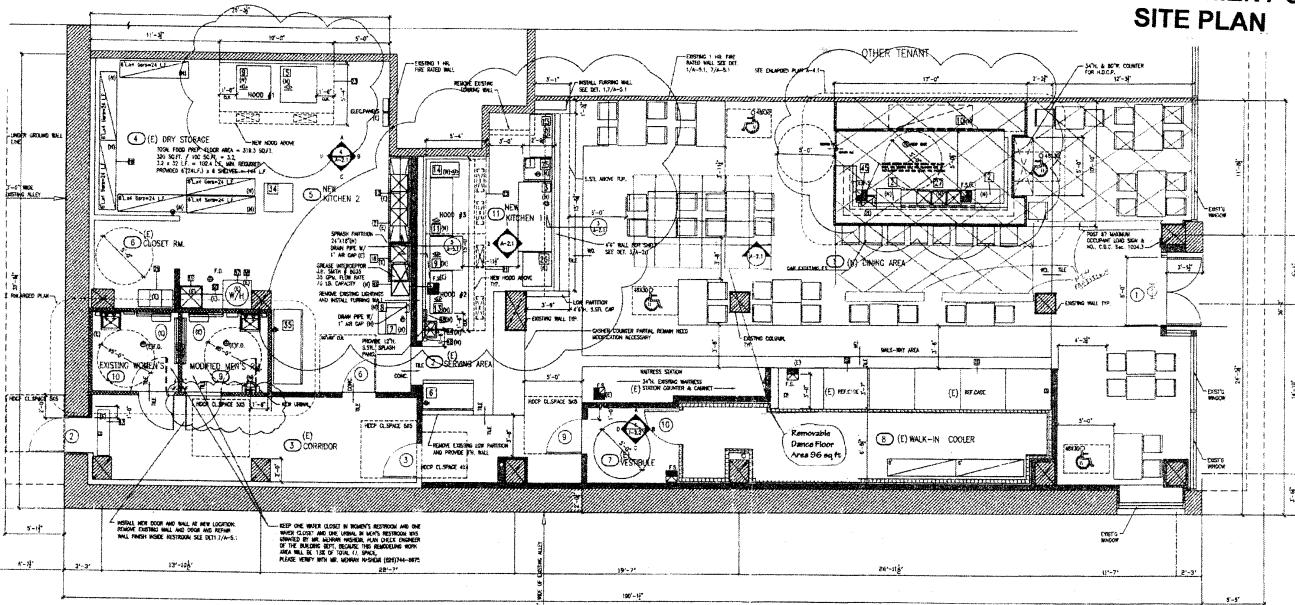
27. The applicant must comply with all local, state, and federal tobacco control laws, including but not limited to, Pasadena Municipal Code Sections 8.78.071 to 8.78.072, which prohibits smoking in unenclosed areas of bars and restaurants (e.g. outdoor dining areas).

Public Works Department

28. This application does not permit sidewalk dining in the public right-of-way. If the applicant intends to serve any food or beverages in the public right-of-way, an application shall be filed with the Department of Public Works for a sidewalk dining occupancy permit to establish or maintain a sidewalk dining area within the public right-of-way. Sidewalk dining shall comply with all the requirements of Chapter 12.13, entitled "Sidewalk Dining on Public Walkways," of the Pasadena Municipal Code.



# ATTACHMENT C SITE PLAN



NO.	QT.	DESCRIPTION
1	2	FOOD SLAB
2	1	REWORKING EXISTING STAIR
3	1	REWORK PARTIAL QUARTER SHOWER TO
4	1	PREP AREA
5	1	COMBINATION SINK
6	1	REACH-IN FREEZER 2-DOOR
7	1	ICE MAKER CABINET
8	1	ICE BIN
9	1	WINE COOLER
10	1	REWORKED BRASS SQUARE CHAIRS
11	1	GRIDDLE COOKTOP UNIT
12	1	STOVE/GRIDDLE COOKTOP
13	2	COUNTER TOP
14	2	STOVE
15	1	WINE COOLER
16	1	3 COMP. SINK
17	1	CAN PAN RACK
18	1	PREP SINK
19	1	SINK COOKTOP
20	1	CASE REFRIG.
21	1	WINE FR.
22	1	WINE FR.
23	1	WINE FR.
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25	1	WINE FR.
26	1	WINE FR.
27	1	3-COMP. SINK
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PLAN NEW PARTITION

- WALL LEGEND**
- (1) NEW PARTITION WALL 1/2" GYP BOARD ON 2x4 W/ 1" ST. AND 1/2" GYP BOARD ON 2x4 FOR PARTITION WALL
  - (2) EXISTING PARTITION WALL
  - (3) EXISTING INTERIOR WALL
  - (4) EXISTING INTERIOR WALL WITH POLYMER PLASTER
  - (5) EXISTING INTERIOR WALL WITH POLYMER PLASTER AND GYP BOARD
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**FIRE DEPT. NOTES:**  
 \* PER C.I.C. SECTION 1014, EGRESS SHALL NOT PASS THROUGH KITCHEN, STORAGE ROOM, CLOSET OR SPACE SIMILAR SIZES.  
 \* POST THE OCCUPANT LOAD NEAR THE MAIN EXIT, C.I.C. SEC. 1004.3

**REVISED AREA CALCULATION**  
 DINING AREA 804 SQ. FT.  
 BAR AREA 417 SQ. FT.  
 WALK-WAY AREA 199 SQ. FT.  
 TOTAL FLOOR AREA 1420 SQ. FT.

**RECEIVED**  
 APR 03 2013  
 BY: [Signature]

FLOOR PLAN

**ATELIER-U**  
 100 S. GARDEN AVE.  
 PASADENA, CA 91106  
 TEL: 626-798-9999  
 FAX: 626-798-9999

**NEW YORK DELI**  
 100 S. GARDEN AVE. PASADENA, CA 91106

**FLOOR PLAN**  
 100 S. GARDEN AVE. PASADENA, CA 91106  
 [Stamp]