



# Information Item

**Date:** September 13, 2012

**To:** Mayor and City Council  
**From:** Rod Gould, City Manager  
**Subject:** Update on Main Street Restaurant/Bar Impacts

## **Introduction**

This report provides information on monitoring and enforcement activities undertaken by City staff in response to increased nighttime activities on Main Street, ongoing noise issues at The Victorian, and associated legal constraints.

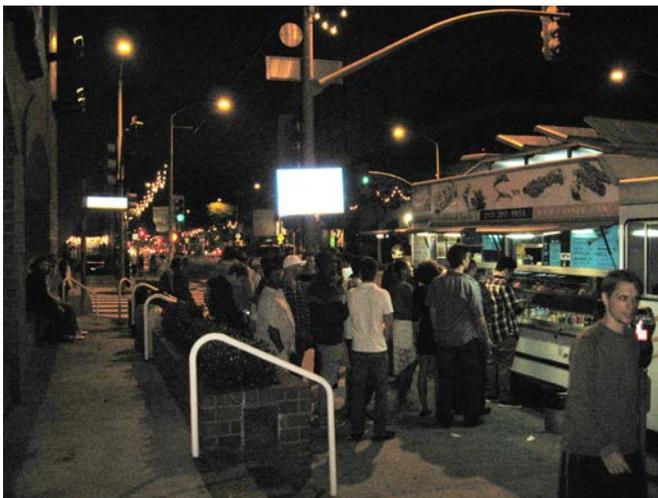
## **Background**

Main Street historically has been home to a wide variety of businesses. Over the past several years, Main Street has experienced a significant uptick in new restaurants with active bars and nightlife. Finn McCool, O'Briens, Barcopa, Main on Main, Areal, The Victorian/Basement, 3110, and a number of other establishments have become thriving nighttime businesses making Main Street a destination for people seeking an active nightlife. The popularity of these spots has a spillover effect on neighboring residents and businesses. Patrons who depart at closing time (2:00 a.m.) can be loud and inconsiderate of the surrounding community. This behavior, coupled with the businesses' close proximity to residents, has created tension between the two. Those affected by late night noise and disorderly conduct have repeatedly complained. Several community members have specifically noted ongoing noise impacts from the operation of The Victorian/Basement since 2010.

## **Discussion**

### *Conditions on Main Street*

Beginning in May 2012, a focused effort of attention on Main Street was headed up by the Police Department's Neighborhood Resource Officer (NRO). She spearheaded approximately six weeks of undercover vice enforcement on Main Street which found that many restaurants and bars were operating outside the guidelines of existing laws. Restaurants allowed persons to line up or queue to enter the bar. Restaurant doormen were checking identification of patrons to ensure they were of drinking age, suggesting a nightclub atmosphere. Music was loud with no effort to minimize the sound. Restaurants exceeded their occupancy levels, bartenders were over serving inebriants, and other code violations were noticed. Patrons, who were often loud, smoking, and as the night evolved, intoxicated, were bunching and clogging sidewalks, and often hollering at each other. Loud verbal and physical altercations occurred. Patrons had little awareness of their own safety. People routinely jaywalked or ignored traffic signals and often drove vehicles while under the influence. Some patrons were caught urinating in public or littering. Taxis congested red zones and impeded traffic lanes. Inebriated patrons routinely ran into the street to wave down taxis which created hazards. Food trucks parked on either end of the restricted zones and created impromptu gathering points for patrons at last call, which extended the bar scene beyond the 2:00 a.m. curfew. This added to the excessive noise, littering, assaults, and collisions.





### *Monitoring and Enforcement*

As a result of these observations, a highly visible and coordinated enforcement operation was conducted by Police, Code Compliance, and the Fire Marshall with an emphasis on identifying and eliminating or mitigating the causes of the complaints.

Code Compliance officers were dispatched on Friday and Saturday nights from 9:00 p.m. until 1:00 a.m., concentrating on those businesses that are open after 6:00 p.m. Officers initially met with 16 restaurant/bar managers and provided them with information regarding the proper conduct of restaurant/ night clubs, overcrowding, noise and queuing. After the initial education and inspection of the 16 businesses, four were found to be in violation and promptly made the appropriate corrections. One hundred and sixty four overtime hours have been used to date in this effort.

Since January 2012, Police and City staff participated in four community meetings with residents, and five business meetings with Main Street bar and restaurant managers. Four officers were assigned to work Main Street on both Friday and Saturday nights. On several weekends, these officers were supplemented with motorcycle enforcement officers. The Police Department's DUI Enforcement Team conducted a DUI checkpoint on Saturday, August 18 in the 2200 block of Main Street to help educate and thwart drunk driving. Two DUI arrest were made and 11 hazard citations were issued.

The Traffic Management Division created additional taxi zones, relocated existing zones, and identified visible signage to be placed in strategic areas. These interventions are meant to help reduce crowd clumping near the residential areas, jaywalking to passing taxis, and loitering in the roadway to hail a taxi as it drives by. The Police Department worked closely with fire marshals from the Fire Department, Code Compliance officers, and the City Attorney's Office to address the concerns expressed by the neighbors within the guidelines set by existing law. Emphasis has been placed on informing patrons to be quiet as they exit the restaurants and bars and proceed to their cars.

As a result of the enforcement efforts, most restaurant and bars on Main Street have come into compliance with City policy, existing permits, and ABC guidelines.

#### *The Victorian/Basement*

Restaurants and bars on Main Street have gone through a recent renaissance. Nighttime activity is at a fifteen year high. Establishments are attracting a younger audience seeking late night entertainment and social gathering opportunities. Several businesses, including Main on Main, 3110, Finn McCools, and The Victorian/Basement, have "reinvented" themselves to tap into this audience.

The most dramatic change has occurred at The Victorian. The venue changed its business model in 2010 through the addition of the Basement, a late night restaurant/bar and entertainment site. Its popularity became the source of regular complaints from several adjacent residents and one business. The majority of these complaints related to noise and the general public disturbance created by patrons leaving The Victorian/Basement at closing time. The Victorian occupies space in a City-owned building and because The Victorian/Basement is a lessee of the City, complainants have called upon the City to remediate the ongoing issues associated with its operation. Complainants have suggested that The Victorian/Basement is operating outside of the use approved in its lease and under the Zoning Ordinance.

### *Zoning Ordinance and Lease Conditions*

Staff examined The Victorian's lease documents and the Zoning Ordinance to determine whether either is being contravened. The Victorian is authorized to operate as a multi-purpose space, functioning as both an event venue and as a public premises restaurant. Further, based upon the long-standing use of the space for these purposes, which dates back to the 1970s, the establishment is also a legal non-conforming use and is permitted to sell alcohol subject only to Alcohol Beverage Control (ABC) regulations and without the additional regulations that would be associated with a Conditional Use Permit. There are four authorized operational scenarios for The Victorian:

1. Private Event Space. The entire three floor facility may be booked for a private event, such as a wedding, holiday party, or business gathering. Outside promoters and/or ticket sales are not considered private events. In addition, when operating as an event venue, The Victorian is permitted to have dancing that is associated with the event. When dancing is permitted for a special event, it must occur on a designated dance floor space.
2. Public Restaurant. The Victorian may operate as a public premises restaurant, with dining permitted on the first and second floors and the basement used as an ancillary bar area for the restaurant. In this capacity, the basement must maintain an operation consistent with both a restaurant use and the establishment's approved floor plan with dining tables and chairs.
3. Private Event Space/Public Restaurant. When there is an event occurring on the first or second floor of the Victorian and the basement is not being used in connection with the event, the basement may be open to the general public. In this scenario, the basement must operate as a restaurant and maintain dining tables and chairs consistent with the approved floor plans.
4. Basement Use Only. If no events are occurring at The Victorian, the basement may remain open, but must operate as a restaurant and maintain dining tables and chairs consistent with the approved plans.

When The Victorian is functioning in whole or in part as a restaurant, the following additional operational parameters apply to ensure the establishment comports with the Zoning Ordinance restaurant definition established in [SMMC Section 9.04.02.030.730](#):

- Live entertainment is permitted within the restaurant, provided that there is sit down meal service provided at all time while entertainment is taking place, there is no dancing or dance floor, except as permitted for events, there is no cover charge or minimum drink purchase requirement, and the entertainment is provided only in dining areas.
- Patron queuing for entry into The Victorian at either the front entrance or the back entrance to the basement is not permitted. Patrons congregating, inside or outside of the restaurant, while waiting for a table is acceptable as a typical restaurant operational feature. Further, the use of a notification system to alert patrons of table availability is appropriate to manage waiting customers.
- A cover charge for entrance into The Victorian is not permitted.
- Checking IDs at the door is not permitted. However, servers or bartenders may check identification when alcoholic beverages are ordered.
- A menu with a variety of food items is required to be available for dining patrons at all times.
- Dining areas should be set up with dining tables and chairs. The type of furniture used is not dictated, however, furniture should substantially fill the dining space. Additionally, wait staff are required to serve dining patrons.

As noted earlier in this report, Police and Code Compliance staff extensively monitored operations at The Victorian/Basement over the past 16 weeks. The owners have added valet parking to eliminate patrons from gathering in the adjacent parking lot, installed a lectern away from the restaurant entrance to greet patrons and limit queuing, and increased security presence in the lots to prevent loitering, smoking, urination, and littering. The owners have also researched noise mitigation screening and offered similar noise reduction devises (carpeting / windows) to complainants to mitigate sound.

### *Noise and Legal Constraints*

The neighbors who have written to the City are most aggrieved about late night noise emanating from restaurants/bars and from patrons who leave establishments and congregate on the adjacent sidewalk. Several have suggested that the City modify its noise ordinance to prohibit outdoor speech at night and establish a curfew on outdoor patio use when a commercial establishment is within earshot of a residential community.

The sidewalks and parkways along Main Street are traditional public forums. Courts have described public forums as places that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Thus, Courts have consistently held that speech finds its greatest protection in traditional public forums. See, e.g., *Berger v. City of Seattle*, 569 F.3d 1029 (9<sup>th</sup> Cir. 2009) (“The protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora.”)

Accordingly, governmental regulations of speech at public forums must be:

- 1) content neutral
- 2) narrowly tailored to serve a significant governmental interest, and
- 3) permit alternative channels for expression

Applying the above broad principles to the public street, it is clear that any law that broadly prohibits speaking or loitering would likely be unconstitutional. Additionally, any law that singles out a particular class of speakers (e.g. bar goers), regardless of their noise levels, would also be disfavored by courts. The City could adopt, and has adopted, laws that limit noise levels, regardless of the noise source. However, based on noise meter readings taken by enforcement staff, the noise level on the sidewalks is no louder than the noise generated by the passing traffic. Based on these facts, it is difficult to further limit speech activities on the public sidewalks. See *United States v. Doe*, 968 F.2d 86 (DC Cir. 1992) (finding that enforcement of the 60 db noise level to be unreasonable in light of nearby traffic noise exceeding 60 db); *Klein v. City of Laguna Beach*, 381 Fed. Appx. 723 (9<sup>th</sup> Cir. 2010) (refusing to enforce amplified sound ban because lack of evidence that amplified sound is louder than ambient noise).

As indicated above, The Victorian possesses legal-non-conforming rights to continue its operations. The City's use of its police powers to further limit The Victorian's operations could only be done by a finding of public nuisance (e.g. continuing violations of local laws) or by amortization. Amortization is the process whereby zoning legislation provide for the eventual termination of nonconforming uses, by providing such uses with a reasonable time period to recoup prior investments into the property and/or business. As of now, enforcement staff has consistently found The Victorian to be in compliance with all applicable local laws, including local zoning laws. It is difficult to designate it as a public nuisance in light of such findings.

While Planning and Community Development Department staff is actively reviewing changes to the zoning code which could change the definition of restaurant and place further limitations on alcohol service restaurants, any such new limitations would generally only be applicable to new restaurant establishments, not existing non-conforming uses such as The Victorian. See e.g. *Jones v. City of Los Angeles*, 211 Cal. 204 (1930) ("Zoning looks to the future, not the past, and it is customary to allow buildings and businesses already in the district to remain, although of a class which cannot be established.") Of course, the Council retains the ability to amortize any class of businesses out of existence.

Finally, it is important to note that the noise emanating from Main Street remains an annoyance to several nearby residents and a motel. In such cases, a private nuisance claim brought by the affected individuals may be possible. See *Department of Fish and Game v. Superior Court*, 197 Cal.App.4<sup>th</sup> 1323 (2011) (in a private nuisance case, the plaintiffs need not prove substantial public impact).

## **Summary**

The growing popularity of Main Street's bars and nightlife has resulted in conditions that have required interdepartmental monitoring and enforcement activities. Currently, most restaurants and bars on Main Street have fallen into compliance with City policy, existing permits, and ABC guidelines. Improvements have been made to taxi zones to reduce jaywalking. However, several residents continue to be bothered by the noise and disturbances created by patrons of restaurant/bars on Main Street and identify The Victorian/Basement as the source.

Staff has evaluated the venue's lease and the City's Zoning Ordinance and reviewed relevant laws and Court decisions. The sidewalks and parkways along Main Street are traditional public forums. Therefore, any law that broadly prohibits speaking or loitering would likely be unconstitutional. Additionally, The Victorian possesses legal-non-conforming rights to continue its operations and is operating in compliance with all applicable local laws, including local zoning laws. Staff is actively reviewing changes to the zoning code which would change the definition of new restaurants and place further limitations on alcohol service restaurants.

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