

September 5, 2013

Honorable Mayor and Members of
The Hermosa Beach City Council

City Council Meeting of
September 10, 2013

**RECEIPT AND REVIEW OF A REPORT ON THE CLOSING HOURS INITIATIVE
SCHEDULED FOR THE NOVEMBER 5, 2013 REGULAR ELECTION**

RECOMMENDATION

Staff recommends that the City Council receive and file the report.

BACKGROUND

At its regular meeting of June 18, 2013, the City Clerk reported to the City Council that an initiative proposing an ordinance entitled “An Ordinance Reducing the Post-Midnight Operating Hours of Specified Businesses in the Downtown Area of Hermosa Beach, California” was qualified for the regular election ballot. The City Council elected to place the initiative measure on the November 5, 2013 ballot. The Council also requested that a report be prepared examining the impacts of the measure on the community. This report is the product of a collaborative effort by the Community Development, Finance and Police Departments and the City Attorney and is purely informational in character. Because some of the impacts of the Measure are unknown or uncertain, some of the analysis herein is necessarily speculative.

BRIEF SYNOPSIS OF THE INITIATIVE MEASURE

Current City law allows by right restaurants that do not serve alcohol or that serve beer and wine only and close by 10:00 p.m. Restaurants and bars that serve hard alcohol or stay open past 10:00 p.m. are given individual closing times by conditional use permits (“CUP”) issued on a case-by-case basis. Hours of most other types of businesses are not regulated.

The Measure would amend the Hermosa Beach General Plan, zoning ordinance and zoning map in order to establish new closing times for downtown businesses in the C-2 zone, with some exemptions. The new closing times for non-exempt businesses would be phased in over a period of five months to five years beginning in April, 2014. Closing times Sunday through Wednesday would be gradually reduced from 2:00 a.m. to 12:00 Midnight over a five-year period. Closing times Thursday through Saturday would be gradually reduced to 1:00 a.m. over a two-year period. The incremental reduction of operating hours is shown in the following chart:

Table 1: Closing Times

| Effective date: | Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|-----------------|-------|-------|-------|-------|------|------|------|
| Apr. 1, 2014 | | | | | | 1:30 | 1:30 |
| Oct. 1, 2014 | | | | | | 1:00 | 1:00 |
| Apr. 1, 2015 | 1:30 | | | | 1:30 | 1:00 | 1:00 |
| Oct. 1, 2015 | 1:30 | 1:30 | | | 1:00 | 1:00 | 1:00 |
| Apr. 1, 2016 | 1:30 | 1:30 | 1:30 | 1:30 | 1:00 | 1:00 | 1:00 |
| Oct. 1, 2016 | 12:30 | 1:30 | 1:30 | 1:30 | 1:00 | 1:00 | 1:00 |
| Apr. 1, 2017 | 12:30 | 12:30 | 1:30 | 1:30 | 1:00 | 1:00 | 1:00 |
| Oct. 1, 2017 | 12:30 | 12:30 | 1:00 | 1:00 | 1:00 | 1:00 | 1:00 |
| Apr. 1, 2018 | 12:00 | 12:00 | 1:00 | 1:00 | 1:00 | 1:00 | 1:00 |
| Oct. 1, 2018 | 12:00 | 12:00 | 12:30 | 12:30 | 1:00 | 1:00 | 1:00 |
| Apr. 1, 2019 | 12:00 | 12:00 | 12:00 | 12:00 | 1:00 | 1:00 | 1:00 |

In Table 1, the times shown are midnight or in the morning of the following day.

The City Council would be allowed to designate five days per year when businesses could stay open past these new closing times.

The proposed new closing times would be imposed by placing a new “Time-Restricted (T-O) overlay zone” over properties located in the C-2 zone within the “downtown” area of the City, defined as the area between 8th and 16th Streets and between the Strand and Manhattan Avenue. The City currently offers certain incentives in operating conditions if a late night restaurant or bar voluntarily reduces its post-midnight hours; these incentives would not be available to restaurants and bars in the downtown area until April 1, 2018.

The proposed ordinance would apply to new businesses and to existing businesses regardless of whether they have CUPs that permit post-midnight hours or have no specified closing time. Twenty-five restaurants and bars in the downtown area are permitted by CUP to operate until 2:00 a.m. or have unrestricted operating hours. Although the Measure is not restricted to restaurants and bars, its primary impact will be on those uses, as few other businesses in the downtown are open past midnight.

Lodging (i.e. motels and hotels), emergency medical facilities, parking lots, business offices and stores that sell alcohol for off-site consumption would be exempt from the new closing times imposed by the Measure.

A full copy of the Measure is appended at the end of this report.

LAND USE ISSUES RAISED BY THE INITIATIVE MEASURE

To address the cumulative impacts of late-night establishments citywide, in 2012 the City adopted Municipal Code Section 17.40.080(B) which applies to “late-night alcohol beverage establishments” that have been granted a conditional use permit that allows the establishment to operate after 11:00 p.m., including restaurants, establishments that serve or allow alcoholic beverages as the primary use (e.g., bars), and establishments that provide live entertainment. Due to adverse land use impacts resulting from the operations of individual businesses, since 2008 the city has modified CUPs and reduced late night hours for Dragon (now Waterman’s) (located on Pier Plaza), The Shore (now Studio), Blue 32 (now Establishment), and Café Boogaloo, all of which are located in the downtown area encompassed by the proposed Measure, as well as Club 705 on upper Pier Avenue.

As of August 2013 there were 21 on-sale alcoholic beverage establishments regulated by conditional use permits which may be subject to the Measure. Of those, 10 establishments are located on Pier Plaza, which tends to be the focal point of the city’s nightlife.

Relationship of Establishments in Downtown to Proposed Initiative

| Conditional Use Permits Hours of Operation | Establishments affected by proposed initiative based on allowed hours in CUP | Establishments with ABC Licenses that restrict hours for sales, service or consumption to hours earlier than the CUP and the initiative | Establishments affected by proposed initiative based on allowed hours in the CUP and ABC License |
|---|---|--|--|
| CUPs with unrestricted late-light hours | Mermaid Silvios Sharkeez Mickey McColgan’s Paisano's Pizza Comedy Club (6 total, 3 on Pier Plaza) | Mickey McColgan’s Paisano's Pizza (2) | Mermaid Silvios Sharkeez Comedy Club (4) |
| CUPs with 2:00 a.m. close | Hennessey’s Patrick Malloy’s Fat Face Fenners American Junkie Poop Deck Umami Burgers Game Changers Rok Sushi Barnacles | Umami Burgers Game Changers Rok Sushi (3) | Hennessey’s Patrick Malloy’s Fat Face Fenners American Junkie Poop Deck Barnacles Abigaile’s Zeppy’s* |

| | | | |
|--|---|----------|--|
| | Abigaile's Zeppy's* (11 total, 5 on Pier Plaza) | | (8) |
| Other CUPs allowing hours later than 1:00 a.m. on one or more days Thursday to Saturday, or later than 12 midnight on one or more days Sunday to Wednesday | Lighthouse Pamilla Studio Underground (4 total, 2 on Pier Plaza) | -- | Lighthouse Pamilla Studio Underground (4) |
| Total | 21 | 5 | 16 |

* Zeppy's CUP and ABC License require it to cease alcohol sales by 10 p.m. but it can stay later than the hours in the initiative.

Table does not reflect restrictions on holidays, patios, live entertainment or other special circumstances.

The proposed Measure would permanently reduce and set the closing time for 21 businesses with CUPs according to the schedule in the initiative. The ABC Licenses of 5 of the 21 businesses restrict the sale, service or consumption of alcoholic beverages consistent with or earlier than the hours proposed by the initiative; while most ABC licenses do not mandate a closing time, businesses typically close near the time that alcohol services ends. In addition, at least one of the 21 establishments appears to currently close by the time limits in the Measure (Poop Deck). Therefore, taking into account CUP and ABC License restrictions, as well as actual operating hours reported by establishments in connection with their business licenses, approximately 15 establishments are projected to need to reduce their current hours of operation if the Measure passes.

Several other on-sale establishments in the downtown have CUP hours that are similar to the hours in the Measure; for example, on weekends Waterman's must close by 1:00 a.m. and several others must close by 12 midnight. The Police Chief has in the past indicated a preference for staggered closing times in the late evening rather than a large number of establishments closing at the same time, which can pose problems in dispersing people. While the Measure would marginally reduce late-night hours and should therefore reduce intoxication and some adverse effects associated with late-night activity, especially on the weekends, a rigorous evaluation of how the schedule of closing times might affect each individual business and consequently the downtown economy and municipal costs and revenues in the short- and long-term would require a fiscal and economic impact study. Whether the initiative would result in a shift toward businesses placing more emphasis on food quality and sales is unknown.

The proposed Measure also applies to the variety of other businesses not excluded. Most businesses types typical to the downtown do not have closing times imposed by the city (except tattoo parlors, which must close by 10:00 p.m.). Staff identified businesses most likely to be open to the public in the late night hours via the list of Business Licenses and business websites, finding that four other food establishments within the subject downtown area appear to be open until 2:30 a.m. or 3:00 a.m. on one or more days (Project Taco on Pier Plaza, Number Nine, Pita

Pit, and Big Mike’s Philly Steaks & Subs). The requirement of the Measure for these types of businesses to also close will reduce the potential for extended loitering and assist in dispersing people away from the downtown area, which Police Chiefs have indicated to be desirable. However, Los Muchachos and Subway located on Pier Avenue in the downtown area are not affected by the Measure because they are zoned SPA-11 rather than C-2; it is indicated online that these establishments stay open until 2:30 a.m. and 3:00 a.m. respectively on Friday and Saturday nights, but it is possible that they would also adjust their hours if the Measure passes. Therefore, the Measure could have as an unintended consequence attraction to late-night food- or alcohol-focused businesses nearby or in other parts of the city not affected by the Measure.

FISCAL IMPACT OF THE INITIATIVE MEASURE

There is potential impact to the City in terms of reduced business license, sales tax and parking fees and to business owners in the downtown area defined by the Measure in terms of lower sales; business license fees for some owners would also be reduced depending on how many days they are open past midnight.

Business License

The only categories of business license fees based on hours of operation are:

- Bar and Restaurant with alcohol, closing before 12:00 a.m.
- Bar and Restaurant with alcohol, closing after 12:00 a.m., three (3) days or less per week - **\$2,048 (license fee)**
- Bar and Restaurant with alcohol, closing after 12:00 a.m. four (4) days per week
- Bar and Restaurant with alcohol, closing after 12:00 a.m. five (5) days or more per week - **\$5,121 (license fee)**
- Off Sale Establishments are eligible for a credit if they close prior to 12:00 a.m. however off sale establishments are exempt from this initiative.

For business license purposes, the only category that will be impacted by the Measure is “Bars and Restaurants closing after 12:00 a.m. 5 days or more per week.” There are 13 businesses in this category located in the downtown area defined by the Measure. The current fee for this category is \$5,121. Because of the business license structure, there is no impact until 2019. The annual fee for these businesses will decrease to \$2,048 from \$5,121 since they will move to the category of businesses closing after 12:00 a.m. 3 days or less per week. Overall revenue to the city will change from \$66,573 to \$26,624 or a loss of \$39,949. This amount will be a gain to the businesses since their business license fees will be less by that amount.

| | |
|---|------------------|
| Business License Revenue to City | |
| Bars and Restaurants Closing After 12am | |
| 5 Days or More Per Week | |
| Current Revenue | \$ 66,573 |
| Change in Revenue 2019 | <u>\$ 26,624</u> |
| Reduction in Revenue to City | \$ 39,949 |

Sales Tax

It is not possible to know the exact impact on sales tax revenue to the city or the impact on gross sales to the business since the city does not know how much revenue is generated for the businesses between 12:00 a.m. and 2:00 a.m. In addition to the loss of sales during those hours due to the earlier closing times, early closing times could cause some patrons to frequent establishments where they can stay at one place until 1:00 or 2:00 a.m. rather than going to Hermosa Beach establishments until 12:00 a.m. and then going elsewhere after 12:00 a.m.

For purposes of demonstrating ultimate potential losses in 2019 only, the current sales tax revenue and estimated gross sales for businesses are compared to reductions of 5%, 10% and 15%. There are two primary categories of businesses that will be affected for sales tax purposes. Since sales tax information for each business is confidential, only totals for the business category are presented.

Bars and Restaurants with Alcohol Closing After 12 a.m. 5 Days or More Per Week:

Total sales tax revenue to the city from Bars and Restaurants with Alcohol closing after 12:00 a.m. 5 days or more in the area defined by the Measure is \$377,085. If Restaurant and Bar sales decline 5%, the revenue to the City will be \$358,231 or a loss of \$18,854. A 10% decline in sales will result in revenue to the city of \$339,377 or a loss of \$37,708. A 15% decline in sales will result in revenue of \$320,522 or a loss of \$56,563.

Bars and Restaurants Closing After 12 a.m. 5 Days or More Per Week

| | Sales Tax to City | Gross Sales of Businesses |
|-----------------|----------------------|------------------------------|
| Current Revenue | \$ 377,085 | \$ 37,708,500 |
| 5% Reduction | \$ 18,854 | \$ 1,885,425 |
| | <u>\$ 358,231</u> | <u>\$ 35,823,075</u> |
| 10% Reduction | \$ 37,708 | \$ 3,770,850 |
| | <u>\$ 339,377</u> | <u>\$ 33,937,650</u> |
| 15% Reduction | \$ 56,563 | \$ 5,656,275 |
| | <u>\$ 320,522</u> | <u>\$ 32,052,225</u> |

The City can only determine gross sales for the businesses by extrapolating from the sales tax paid. The City receives 1% of taxable sales in sales tax revenue; therefore gross sales on sales tax of \$377,085 would be \$37,708,500. If earlier closing times result in a 5% reduction in total taxable sales, that equates to lower sales of \$1,885,425 for bars and restaurants with alcohol that have closing times after 12:00 a.m. 5 days or more per week. A 10% reduction equates to \$3,770,850 and a 15% reduction equates to \$5,656,275.

Bars and Restaurants without Alcohol :

The City does not have closing times for these businesses but staff did a web search in an attempt to ascertain what the impact of the Measure would be. Four businesses were found to have hours past 12:00 a.m. Sales tax revenue received by the City from these businesses is \$6,148. A reduction of 5% equates to a revenue loss to the City of \$307; 10% is \$615; 15% is \$922.

Sales tax of \$6,148 equates to gross sales of \$614,800 for the businesses. A 5% reduction in gross sales would be \$30,740; a 10% reduction would be \$61,480; a 15% reduction would be \$92,220.

Bars and Restaurants Without Alcohol

| | Sales Tax to City | Gross Sales of Businesses |
|-----------------|----------------------|------------------------------|
| Current Revenue | \$ 6,148 | \$ 614,800 |
| 5% Reduction | <u>\$ 307</u> | <u>\$ 30,740</u> |
| | \$ 5,841 | \$ 584,060 |
| 10% Reduction | <u>\$ 615</u> | <u>\$ 61,480</u> |
| | \$ 5,533 | \$ 553,320 |
| 15% Reduction | <u>\$ 922</u> | <u>\$ 92,220</u> |
| | \$ 5,226 | \$ 522,580 |

There may be businesses other than Bars and Restaurants that are open past midnight but staff did not attempt to identify these. If the businesses are forced to close earlier, there could be an economic impact.

Parking Revenue

Parking Enforcement hours were only recently extended to 2:00 a.m. as approved in the 2013-14 Budget so there is little data for parking citations and meter revenue between 12:00 a.m. and 2:00 a.m. The 2013-14 Budget does assume enforcement until 2:00 a.m. with additional citation revenue and additional costs for part-time officers. The net revenue is \$106,585. If enforcement hours were cut back to 12:00 a.m., the budget would need to be reduced by this amount.

LAW ENFORCEMENT IMPACTS OF THE INITIATIVE MEASURE

The Hermosa Beach Police Department staffs personnel downtown to take into account the current closing time of 2:00 a.m. Officers assigned to the Plaza area are on duty until 3:00 a.m. on Thursday, Friday and Saturday nights and on major holidays. There are some establishments that close before 2:00 a.m.; but there are usually people in the area past the 2:00 a.m. closing time. Currently a number of food establishments remain open after 2:00 a.m. to provide food service to people leaving the bars and taverns.

The graph below lists the total calls for police service in the Downtown area affected by the proposed Measure from January 1, 2012 through December 31, 2012, from 12:00 midnight until 4:00 a.m.:

Calls for Service Downtown - 01/01/2012 to 12/31/2012

| Time | Downtown North | Downtown South | Total |
|-------------|----------------|----------------|-------|
| 00:00-00:59 | 254 | 199 | 453 |
| 01:00-01:59 | 326 | 209 | 535 |
| 02:00-03:00 | 229 | 205 | 434 |
| 03:00-04:00 | 38 | 31 | 69 |

Calls for service remain high after the current 2:00 a.m. closing time; however they drop off significantly after 3:00 a.m. Based on this data, staff feels that if the closing times were moved back to the times listed in the Measure, the Department would expect to have a high number of calls for service for the first hour after closing and then the number of calls for service should drop off considerably. This is based on patrons not having a reason to remain in the downtown area.

The Measure also affects all other food establishments, retail establishments (except off-sale businesses) and places with entertainment where people might choose to go in the downtown area after the proposed 1:00 a.m. closing time on Thursday to Saturdays. However, people could still choose to go to their residence or drinking establishments open outside the downtown area and continue drinking, which may result in additional calls for service in other parts of the City. The department has also experienced an ongoing problem of people walking home talking loudly and causing disturbances.

If the Measure passes, the Department would change the deployment hours to 2:00 p.m. to 2:00 a.m. The ICMA study recommends that one Sergeant and four Officers be assigned to the downtown area as a dedicated assignment. Staff concurs with this recommendation, and in previous years had officers dedicated to the downtown area. The department has not been able to fill these positions due to staffing shortages. These officers would perform a combination of duties that would be directed at policing problems in the downtown, The Strand, and the beach.

The City has recently approved additional personnel to work until 2:00 a.m. assigned to parking enforcement in the downtown area. Staff feels the number of citations issued would be impacted by the Measure as identified in the Fiscal Impact Section of this report.

In summary, if the Measure is approved the Department would schedule Officers assigned to the downtown area from 2:00 p.m. to 2:00 a.m. Thursday, Friday, and Saturday nights. It is staff's opinion that calls for service would decrease based on bars, restaurants, and food sales closing at 1:00 a.m. Based on past experience it will take approximately 1 hour for patrons to leave the downtown area. Staff is concerned that patrons of the establishments who would normally remain inside consuming their beverages until 1:45 a.m. will purchase alcoholic beverages at local stores that sell alcoholic beverages for off-site consumption and consume these beverages in the City parking lots or on the City beach; especially in the warm summer months. This would also take into account patrons walking home and possibly creating disturbances.

At this time staff anticipates that calls for service would drop off considerable after 2:00 a.m. instead of 3:00 a.m. as indicated in the above Calls for Service Chart. With no experience with a 1:00 a.m. closing time staff would be prepared to adjust the hours officers are assigned to the downtown to address any unanticipated policing issues that might arise as a result of a 1:00 a.m. closing time within the downtown area.

LEGAL ISSUES RAISED BY THE INITIATIVE MEASURE

A limitation on business operating hours is a legitimate exercise of the City's police powers to regulate businesses and avoid nuisance conditions specifically associated with late night food and alcohol-serving establishments and their patrons. The City possesses broad police powers under Article XI, section 7 of the California Constitution to enact ordinances for the benefit of the public health, safety and welfare. A zoning ordinance that regulates the hours of operation of businesses intended to protect community values such as nighttime peace and quiet and to enhance the overall safety of the downtown area carries with it a presumption of validity and will not be disturbed unless arbitrary and capricious.

If the Measure is adopted, existing businesses legally operating during hours beyond those allowed by the proposed ordinance would become "legal nonconforming." A legal nonconforming use is one that was allowed when it commenced but no longer conforms to existing regulations due to an intervening change in the applicable law. If the Measure passes, downtown businesses that today operate legally beyond the hours allowed by the Measure would become legal nonconforming as to operating hours.

Chapter 17.52 of the Hermosa Beach Municipal Code regulates the treatment of legal nonconforming uses. Section 17.52.020 would ordinarily allow legal nonconforming uses to continue indefinitely as long as they are not expanded. Section 7 of the Measure amends Chapter 17.52 to make clear that time-restricted businesses in the T-O Time Restricted Overlay Zone may not continue indefinitely (as is the case with other nonconforming uses) but must adhere to the phased reduction of operating hours set forth in the chart displayed on page 2 of this report.

A new regulation that does not pose a significant financial burden on an existing business will ordinarily take effect immediately without legal impediment. However, if the new regulation poses a significant financial burden on a legal nonconforming business or would put it out of business entirely, the constitution requires that the business owner be given sufficient time to depreciate its investment in the use – this is known as an "amortization period." Relevant factors to be considered in determining whether an amortization period is unreasonable as applied to a particular property include amount of investment or original cost, present actual or depreciated value, dates of construction, amortization for tax purposes, salvage value, remaining useful life, the length and remaining term of the lease under which the use is maintained, and the harm to the public.

Amortization is usually applied when a new ordinance requires the discontinuation of an entire business and the case law addresses that situation. Immediate termination of a legal nonconforming use that is not demonstrated in an administrative proceeding to be a public

nuisance would deprive the business owner of its property without due process. Allowing the business time to depreciate its investment alleviates that problem. The issue is different where a new ordinance does not require closure of a business, but merely imposes a regulatory requirement that reduces the value of the business in some way. In those instances, it is less clear whether an amortization period is required to protect the constitutional due process right, so long as the new requirement does not make it impossible for the business to make any profit.

The Measure may reduce profits (and hence, the value of the business) by reducing the number of hours affected businesses may collect revenues. However, it cannot be presumed that the reduction in hours will in every instance reduce profits or the value of the overall business; it is entirely possible that the affected businesses could and would adapt to the new hours and find other ways to increase revenues, such as offering different menu choices, raising prices, reducing overhead and the like. It is also possible that the value of the overall business would be unaffected by the reduction in operating hours. Hence, the degree of financial burden here, if any, is both uncertain and fact dependent.

Further, the Measure does not require immediate adherence to the new hours; as noted above, the Measure includes a form of amortization that allows for an incremental reduction in hours over time affording affected businesses an opportunity to recoup their investments should that be constitutionally necessary.

If a business contends that the amortization schedule in the chart on page 2 is insufficient, that business bears the burden of demonstrating that the reduction in hours will significantly impair its ability to fully depreciate its investment in the business. In my view, this would be a difficult burden, considering that the Measure does not require the affected businesses to close and gives them time to make adjustments to adapt to the new hours. To meet that burden, the business would likely need to demonstrate that its operation is not sustainable without the lost hours and that the ordinance causes (1) extreme economic hardship; (2) based upon a financial investment or commitment; (3) which was irreversible; and (4) made prior to effective date of provision. If the affected business owns the underlying property, it would be even harder to meet the evidentiary burden so long as there are reasonable alternative uses of the property.

The Measure itself offers no relief to the business owner that is able to satisfy this evidentiary burden. As applied to such an owner, the Measure could be unconstitutional. However, in order to avoid an unconstitutional result, it is possible that the City could provide relief to the owner by extending the amortization schedule and allowing a longer phase-in of the new hours. This would have to be done on a case-by-case basis. In view of the fact that an initiative passed by vote of the people cannot be amended except by another vote of the people, there is some question whether provision of this sort of relief on a case-by-case basis would constitute an unlawful amendment of the Measure.

California case law holds that a business operating under a use permit possesses a fundamental vested right to continue its operations unless it is creating a nuisance. A municipality ordinarily must provide a business with due process prior to depriving it of the right to operate on nuisance grounds:

“Where a permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled. When a permittee has acquired such a vested right, it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted, or if there is a compelling public necessity. A compelling public necessity warranting the revocation of a use permit for a lawful business may exist where the conduct of that business constitutes a nuisance.”

O’Hagen v. Board of Zoning Adjustment (1971) 19 Cal.App. 3d 151, 158.

California law distinguishes between total deprivation of a vested right (i.e. closure of the business) versus modification of the operating conditions of an existing business. Provided that the new operating conditions are not oppressive or that the amortization period for phasing in the new operating conditions is reasonable, modifications to operating conditions do not violate vested rights even if they result in a diminution in profits or a reduction in value of the overall business. While the law does not allow total destruction of a business absent particularized findings of nuisance or sufficient amortization, it does allow for compelled modifications in operations that merely reduce revenues. Mere diminution in the value of a business does not constitute an unconstitutional taking of property; the regulation must deprive the owner of substantially all reasonable use of the property. “It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment. Incidental damages resulting from property use restraints imposed by the government are not considered a taking or compensable damage.” *People v. Byers* (1979) 90 Cal. App. 3d 140, 147.

A similar situation arose here in Hermosa Beach in the early 1990s when the city enacted an ordinance requiring that existing businesses selling alcohol for off-site consumption obtain a conditional use permit in order to continue operating. Two grocery stores applied for and obtained conditional use permits, subject to conditions, among them a condition regulating hours of operation. The business owners then challenged the ordinance on several grounds, including an allegation that the requirement violated their equal protection rights. In the case entitled *Bocato v. City of Hermosa Beach* (1994) 29 Cal. App. 4th 1797, the court rejected the argument and upheld the City’s right to require a CUP and to impose restrictive operating hours on pre-existing businesses.

Similarly, in *Melton v. City of San Pablo* (1967) 252 Cal. App. 2d 794, 804, the city enacted a retroactive zoning ordinance amendment requiring portable vending establishments to obtain a use permit in order to continue operating. The court held that such an interference with the business’ vested rights was acceptable so long as the ordinance was not unreasonable. The state’s inherent sovereign power includes the right to interfere with vested rights whenever reasonably necessary to the protection of the health, safety, morals and well-being of the people. The court held that a zoning ordinance will not be defeated by even a vested interest providing that the ordinance is not unreasonable.

Although the issue arose in the context of an administrative nuisance abatement proceeding, the court's holding in *E.W.A.P. v. City of Los Angeles* (1997) 56 Cal. App. 4th 310, 325-327 is instructive on this point. The city reduced the operating hours of an adult business based on a substantiated record of nuisance conditions. The court notes that decisions that "result in restricting a property owner's return on his property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights." The court further observes that "[w]hether an administrative decision substantially affects a fundamental vested right must be decided on a case-by-case basis. Although no exact formula exists by which to make this determination ..., courts are less sensitive to the preservation of purely economic interests."

The business owner in the E.W.A.P. case argued that the reduction in operating hours would result in a 46 percent reduction of its hours of operation resulting in an estimated 25-30 percent reduction in revenue. The court, however, noted that the business did not provide factual evidence in the form of time-dated cash receipts or percentage of customers affected and concluded that the owner's estimate of a reduction in business was speculative.

There are numerous cases that similarly arise from an administrative proceeding that also hold that placement of an economic burden on an existing business that does not drive it to financial ruin does not interfere with vested rights. *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 305 (administrative decision requiring gas stations to install gasoline vapor recovery systems upheld because it impacted only economic interests. "We are not presented with the enforcement of a rule which effectively drives the Oil Companies out of business. At most it puts an economic burden on them increasing the cost of doing business. In weighing the relative importance to individuals in the life situation, it is manifest the Oil Companies' right to continue releasing gasoline vapors into the atmosphere is neither fundamental nor vested."); *Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 604 (regulatory decision reducing the capacity of an existing facility did not impact a fundamental vested right because "[t]here is no contention that Standard will be driven to financial ruin by the action of the District; there is not even a contention that this particular facility will be forced to operate at a loss and close."); *San Marcos Mobilehome Park Owners' Assn. v. City of San Marcos* (1987) 192 Cal.App.3d 1492.

Examples abound of regulatory requirements enacted to advance public health and safety that are constitutionally applied to existing businesses notwithstanding the possibility that they will cause a reduction in profits:

- Ban on smoking
- Ban on the use of polystyrene products and plastic bags
- Ban on the sale of certain firearms and ammunition
- Requirements for disabled access and facilities
- Requirements for noise reduction
- Requirements for locked display cases for certain products (such as spray paint)
- Imposition of new building code and health code requirements

The Measure will not affect an unconstitutional taking as long as it does not deny an owner of all economic use of its property or interfere with distinct investment-backed expectations. Mere

diminution of value does not constitute a taking. As the court notes in *Whaler's Village Club v. California Coastal Commission* (1985) 173 Cal. App. 3d 240, 253, “[t]here is no constitutional right to own property free from regulation.. Neither the state nor the federal Constitution guarantees any person absolute liberty of action.”

Finally, as noted above, the reduction in operating hours applies to all businesses in the downtown area, as defined, except for lodging (i.e. motels and hotels), emergency medical facilities, parking lots, business offices and stores that sell alcohol for off-site consumption. Hence, some businesses are treated more favorably than others. Land use regulations by their nature make distinctions and treat property and/or land uses differently for different purposes and reasons. The constitution does not require uniform treatment, only a reasonable or rational basis to support the classifications.

A municipal ordinance carries with it a presumption of validity and will be upheld if under any circumstance it is supported by a rational basis. The existence of exceptions to a general rule will not invalidate the ordinance unless the resulting categories are so irrational as to be arbitrary; i.e., they fail to advance a proper public purpose. “[I]n the area of economics in land use regulation, the state does not violate the equal protection or due process provisions of the Constitution merely because the classification or regulation of use may be imperfect. If the regulation has some reasonable basis, it does not offend constitutional protections because it may result in some inequality or individual hardship.” *People v. Byers, supra*, 90 Cal. App. 3d at 148. So, the question is raised whether the exemptions provided for in the Measure can be reasonably explained.

Four of the exemptions are for businesses that do not contribute to the types of problems that the Measure aims to abate:

1. Hotels and motels need to operate 24/7 in order to accommodate their overnight guests and generally seek to accommodate their guests desire for nighttime quiet.
2. There is clear justification for allowing an emergency medical facility to operate 24/7 as medical emergencies can occur at any time.
3. Parking lots generally operate 24/7 so as to accommodate the needs of motorists who arrive or depart at unusual hours.
4. Business offices generally do not operate 24/7 but circumstances can obviously arise in any business where looming deadlines require employees to pull an all-nighter to, for example, complete a tax return or finish a brief to meet a court deadline. Further, offices do not create the types of impacts generated by restaurants and bars because they are not as accessible to walk-in traffic, particularly during late night hours.

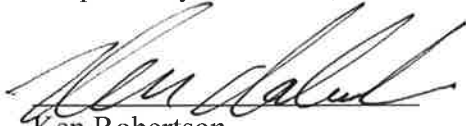
The fifth exemption for stores that sell alcohol for off-site consumption is less obvious, but appears to have been included in order to avoid the argument that the Measure is preempted as applied to off-sale retailers by Business & Professions Code Section 23790. *See Boccato, supra*, 29 Cal. App. 4th at 1807. Further, one could reasonably conclude that off-sale retailers do not

produce the late night impacts of bars and restaurants because their patrons are purchasing for consumption at some other location.

The Measure applies to some businesses that do not contribute to late night nuisance conditions. For example, the Measure imposes its closing times on general retail and service (i.e. hair salons, banks) establishments whose hours are currently not regulated. Retail and service establishments generally do not remain open after midnight and their inclusion in a broadly written ban on late night business operations would be reasonably calculated to accomplish the legitimate governmental objective of effectively shutting down and disbursing people from the downtown at an earlier hour in order to reduce crime, noise and law enforcement costs.

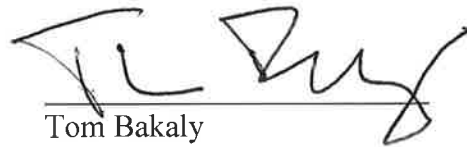
In conclusion, the Measure advances the legitimate governmental purpose of balancing the interests of businesses and nearby residential areas and the City's interest in abating late night nuisances and criminal behavior. The limitation of late night operating hours is a rational means of advancing that purpose. Should a particular existing business be able to demonstrate that application of the Measure will drive it out of business, the constitution would require an extension of the amortization period to avoid a "taking." However, the Measure does not expressly provide for such relief and it is legally uncertain whether the City may graft it on to an ordinance adopted by way of initiative. To avoid the potential for an unconstitutional taking, if the Measure passes, I would recommend that the City adopt a separate ordinance allowing for such relief.

Respectfully submitted,

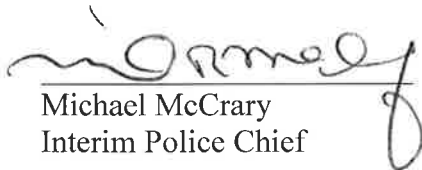


Ken Robertson
Community Development Director

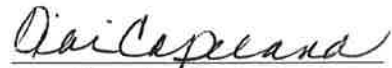
Concur:



Tom Bakaly
City Manager



Michael McCrary
Interim Police Chief



Viki Copeland
Finance Director



Michael Jenkins
City Attorney