

**ITEM VI-A: APPEAL OF PLANNING DIRECTOR'S DECISION – 411 LINCOLN STREET - McRAE OPERA HOUSE - FILE # 2012PL-067 (APP-000003).**

**REQUEST**

The appellant is appealing a condition on an approved Minor Design Review Permit (MDRP) which states that occupancy of the proposed fence enclosure by patrons of the McCrae Opera House Saloon constitutes an expansion of an existing nightclub and is not permitted without approval of a Conditional Use Permit, per the City's Downtown Code.

**SUMMARY RECOMMENDATION**

The applicant applied for a Minor Design Review Permit (MDRP) to construct a fenced enclosure at the rear of the Opera House Saloon at 411 Lincoln Street in the City's Historic District. The proposed wall/fence was to provide additional security at the rear of the building which is adjacent to Guava Alley.

The property owner's intent is to now use this enclosed space as a patio area for patrons of the Opera House Saloon. Condition No. 3 of the approved MDRP prohibits this. As discussed in more detail below, use of the space by patrons of the Opera House Saloon is considered an expansion of the existing Nightclub use, requiring approval of a Conditional Use Permit, per the City's Downtown Code, Chapter 7.4.B.2 and Chapter 19.74 of the City's Zoning Ordinance. Additionally, occupancy of the enclosed space by patrons of the Opera House Saloon cannot occur without approval of a building permit. A building permit is required to ensure that 1) the space does not exceed California Building Code (CBC) occupancy limits, 2) the space meets CBC requirements for egress from the building, and 3) CBC requirements for accessibility are met.

Based on the discussion above, the Planning Division recommends that the Planning Commission take the following actions:

A. Adopt the following three Findings of Fact:

1. The McCrae Opera House, (Opera House Saloon) at 411 Lincoln Street was previously recognized as a Pre-Existing Nightclub.
2. Per the City's Downtown Code, Nightclubs located north of Main Street in the DT-4 district are Conditionally Permitted and require approval of a Conditional Use Permit (CUP).
3. Occupancy of the proposed fenced enclosure by Opera House Saloon patrons is considered an expansion of the existing Nightclub use and therefore, would not be permitted without approval of a Conditional Use Permit and building permit.

B. Deny the Appeal.



## **BACKGROUND**

The McRae Opera House, (Opera House Saloon) at 411 Lincoln Street is recognized as a Pre-Existing Nightclub (see Attachment 1), meaning that it was in operation prior to adoption of a December 1999 Zoning Ordinance Amendment (Ordinance No. 3450) that added Chapter 10.49 to the Zoning Ordinance which established Nightclubs as a Conditionally Permitted Use (see Attachment 2). Per the City's Downtown Code, adopted in April 2009, Nightclubs located north of Main Street in the DT-4 district are Conditionally Permitted and require approval of a Conditional Use Permit (CUP).

Since the Opera House was operating as a nightclub prior to the Nightclub Ordinance and adoption of the Downtown Code, it was considered a Nonconforming Use and was allowed to continue to operate, in its existing size and configuration, as a Nightclub, with no additional permit requirements. Per Zoning Ordinance Chapter 19.24.020 B.3., expansion of a nonconforming use requires approval of a Conditional Use Permit.

The Downtown Specific Plan (DTSP) was adopted in April 2009. In order to encourage development in the DTSP area, the Downtown Code allows for all projects to be reviewed through the Minor Design Review Permit (MDRP) process. The MDRP process allows for projects found consistent with the Downtown Code to be approved administratively.

In June 2012, the property owner requested a Zoning Interpretation regarding a proposed enclosed outdoor patio/bar area at the rear of the McRae Opera House Building. Based on the historical information and Zoning Ordinance/Downtown Code standards discussed above, the Planning Director made a determination that the proposed patio enclosure would be an expansion of the McRae Opera House building's Nightclub use at 411 Lincoln Street, and would require approval of a CUP.

A Zoning Interpretation letter was sent to the applicant on June 25, 2012 advising that the McRae Opera House building is recognized as a Pre-Existing Nightclub and that it could continue to operate in its existing size and configuration, as a Nightclub, with no additional permit requirements. The letter also advised that expansion of the use (outdoor patio/bar) would require approval of a CUP (see Attachment 3).

The subject property has a zoning designation of Historic District/Special Area-Downtown Specific Plan (HD/SA-DT). The McRae Opera House building is located in the City's Downtown Specific Plan area within the Historic District (DT-4), north of Main Street (see Figures 1 & 2). Per the City's Downtown Code, Nightclubs located north of Main Street in the DT-4 district are a Conditionally Permitted use and require approval of a Conditional Use Permit (CUP).

Planning staff has met with the property owner (Appellant) on multiple occasions to discuss the concept of a fence/wall enclosure and patio area at the rear of the Opera House building. The property owner has stated that, in his opinion, the patio area created by construction of the fence/wall enclosure is an expansion of the Bar (first floor operation), and not the Nightclub, since the Nightclub, from the applicant's perspective, is on the second floor of the building.



Figure 2

As discussed below under Evaluation and Conclusion, the Planning Department has maintained that the business operating at the site is a single entity (a Nightclub); therefore, the patio created by construction of the enclosure would be an expansion of the Nightclub use, requiring approval of a CUP. There are residences on the north side of Guava Alley, approximately 70 feet from the patio area, that would be impacted by use of an outdoor patio associated with the Nightclub operation (see Figure 1).

On July 19, 2012, Planning staff met with the applicant to discuss the proposed patio and the wall/fence enclosure. It was determined that the Downtown Code's MDRP process could be used for review and approval of the wall/fence enclosure, provided the enclosure would be constructed only for additional security at the rear of the Opera House building. However, the area was not to be used by patrons of the nightclub without approval of a CUP, as this would be considered an expansion of the Nightclub use. Based on these conditions, the applicant withdrew the request for a Zoning Interpretation via email later that day.

The applicant verbally agreed to the stipulation regarding the patio's use and submitted the MDRP application in July 2012 to construct a wall and fence for increased security at the rear of the Opera House Saloon (see Figures 1 & 3). A project evaluation meeting was held on August 29, 2012 to review draft departmental comments and conditions with the applicant. Planning comments regarding use of the enclosure by patrons and the requirement for a Conditional Use Permit were included in the draft comments/conditions.

Staff subsequently met with the applicant at the project site in September 2012 to review design standards for the fence/wall, as required by the Downtown Code. Written comments regarding the design standards were sent to the applicant via email on September 25, 2012 (see Attachment 4). Revised project plans were submitted in April 2013.

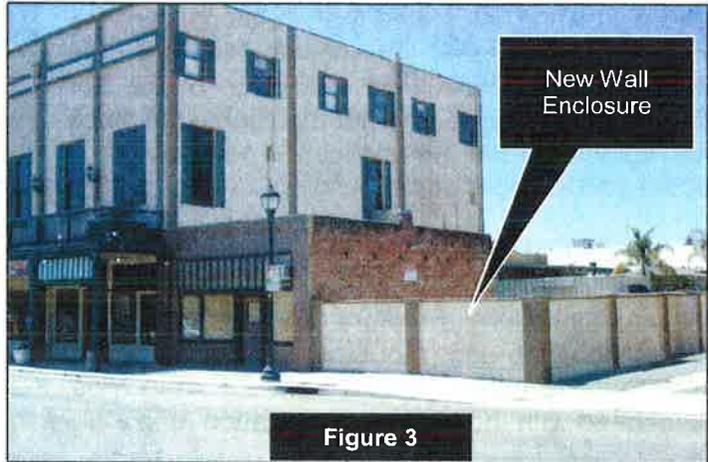
The revised plans referred to the enclosure as a Patio Enclosure and did not reflect use of materials as discussed in September 2012. On April 23, 2013, staff sent a letter to the applicant advising that use of the enclosed area as a patio would be considered expansion of the nightclub use, and that fence/wall materials needed to conform to Downtown Code Standards (see Attachment 8). Revised plans correcting the patio reference and showing correct materials were subsequently submitted.

The MDRP was approved on May 23, 2013, and included Condition No. 3 confirming that the upstairs and downstairs businesses share a common liquor license and common ingress/egress. Therefore,

occupancy of the proposed fence enclosure by patrons would not be permitted without approval of a Conditional Use Permit and building permit (see Attachment 5 – MDRP Staff Report).

Since the proposed fence/wall enclosure was to be seven feet in height, the property owner was required to obtain a building permit prior to commencement of construction (California Building Code [CBC] requires a building permit for a fence exceeding six feet in height). On May 23, 2013, the property owner visited the City's Permit Center to apply for building permits for the fence/wall enclosure. After speaking with a City Plans Examiner, the property owner decided to construct the fence/wall at a height of six feet, which would not require a building permit. The Planning Department approved the requested change in height.

Although a building permit was not required for the six foot fence, the Building Department made notations on the fence/wall plans (see Attachment 6) stating, per the CBC, the fence/wall enclosure could not fully enclose the area at the rear of the building (no gates); however, a 32 inch opening for egress of the existing building must be maintained. If the fenced area was to be used for dining, drinking, or other assembly use, a building permit would be required to ensure that egress from the rear of the building meets CBC requirements.



The property owner verbally agreed to the Building Department's comments so construction of the fence could begin. On June 3, 2013 the property owner submitted an Appeal of the requirements for a building permit or CUP for construction and use of the rear enclosure at 411 Lincoln Street for outside bar usage.

## **EVALUATION**

**Pre-Existing Nightclub Use:** As discussed above, the McRae Opera House building is recognized as a Pre-Existing Nightclub (see Attachment 1).

**California Historical Building Code (CHBC):** In May 2012, the City's Building Official advised the Planning Director through a memorandum that the McRae Opera House building is in the City's Historical District which is on the state registry. The building and the area fall under the requirements of the 2010 California Historic Building Code (CHBC). The CHBC stipulates that it takes precedence over other state and local requirements in an effort to preserve and maintain productive use of historical properties (see Attachment 7).

Per Sections 8-102 and 8-302 of the CHBC, a nightclub is permitted in those areas where similar uses have been allowed in the past, provided that the building otherwise conforms to all applicable requirements of the CHBC. The McRae Opera House building has no history of outside activity. Historically, all activity at the site has occurred within the building.

Any alteration or expansion, such as the patio enclosure, is subject to current requirements of the 2010 State Building Code as well as other applicable local requirements (i.e., the City's Zoning Ordinance/Downtown Code).

**Downtown Code:** The City's Downtown Code, at Chapter 7.4.B.2 states that Nightclub uses desiring to locate within the Old Town Historic District north of Main Street will be required to obtain a Conditional Use Permit (CUP) as described in Chapter 19.74 of the City's Zoning Ordinance. A primary

consideration for the CUP requirement is the close proximity of residences to the buildings north of Main Street. The CUP process provides the opportunity for staff and the Planning Commission to review business/operational plans for a Nightclub use to determine the potential impact on the nearby residences and to include conditions to minimize any potential negative impacts.

**Nightclub Operation:** Planning Staff has visited the site on several occasions and has spoken with the property owner regarding the uses at the McCrae Opera House (now known as the Opera House Saloon). It is the Appellant's belief that there are two separate businesses operating within the McCrae Opera House building – an upstairs Nightclub and downstairs bar. Staff has also researched the Opera House Saloon's website and Facebook page to further evaluate the operational characteristics of the businesses located within the McCrae Opera House Building. This research indicates that the Opera House Saloon operates as a single business, with a single liquor license, and common ingress/egress.

**Website Information:** The Opera House Saloon's website and Facebook page (see Attachment 10) refer to the McCrae Opera House building's use as a Bar - Nightclub. Photographs displayed on the Opera House Saloon's website show both upstairs and downstairs operations and do not distinguish between the two. There are no references to indicate that the Nightclub and Bar are separate operations, nor that patrons are restricted to either upstairs or downstairs only access. To the contrary, the website and Facebook references advertise both nightclub activity (dancing/live entertainment) and bar (Happy Hour, etc.) operations as a single entity within the same web page.

**Liquor License:** Planning staff has researched the California Department of Alcoholic Beverage Control's (ABC) License Query System to determine if multiple licenses exist for the McCrae Opera House building at 411 Lincoln Street. Per ABC's license records, there is only one liquor license active for the McCrae Opera House building, meaning that the upstairs and downstairs businesses share a common liquor license. This license shows the business entity doing business as McCrae (see Attachment 11).

**Building Code:** The California Building Code (CBC Sec. 105 – Means of Egress) establishes the requirement for a building permit to fully enclose an area that serves as required egress for a building.

**Building Ingress/Egress:** The upstairs and downstairs business operations share a common ingress/egress. The single exit door at the rear of the building serves as the required rear egress for the entire building, for both the upstairs and downstairs uses.

## **CONCLUSION**

To protect nearby residents from noise and other impacts associated with nightclub operations during late night hours, the City's Downtown Code establishes a Nightclub use as a Conditionally Permitted Use within the Downtown Specific Plan (DTSP) District DT-4 (Historic District north of Main Street). Therefore, approval of a CUP, as described in Chapter 19.74 of the Zoning Ordinance is required. The City's Zoning Ordinance states that a CUP shall be obtained prior to modification or expansion of a Conditionally Permitted Use and/or a nonconforming use .

Based on the above discussion, the patio area created by construction of the fence/wall enclosure is an expansion of the Nightclub use. Therefore, occupancy of the enclosure by patrons is not permitted without approval of a Conditional Use Permit, per the City's Downtown Code Chapters 2.3.2 and 7.4B.2, and approval of a building permit, per the CBC. The CUP will allow a thorough evaluation of outdoor activities in the patio area and for inclusion of operational restrictions to address impacts on adjacent residents.

**Environmental Determination:** The determination made by the Planning Director does not have the potential for causing a significant environmental effect, and therefore is not subject to CEQA pursuant to Section 15061(b) (3).

## **RECOMMENDATION**

The Planning Division recommends that the Planning Commission take the following actions:

- A. Adopt the following three Findings of Fact:
1. The McRae Opera House, (Opera House Saloon) at 411 Lincoln Street was previously recognized as a Pre-Existing Nightclub.
  2. Per the City's Downtown Code, Nightclubs located north of Main Street in the DT-4 district are Conditionally Permitted and require approval of a Conditional Use Permit (CUP).
  3. Occupancy of the proposed fenced enclosure by Opera House Saloon patrons is considered an expansion of the existing Nightclub use and therefore, would not be permitted without approval of a Conditional Use Permit and building permit.
- B. Deny the APPEAL OF PLANNING DIRECTOR'S DECISION – 411 LINCOLN STREET - McRAE OPERA HOUSE - FILE # 2012PL-067 (APP-000003).

## **ATTACHMENTS**

1. Map Showing Pre-Existing Nightclubs (dated 10/29/2009)
2. Nightclub Ordinance - Ordinance No. 3450 (Adopted December 15, 1999)
3. Zoning Interpretation Letter for McRae Outdoor Patio (dated June 25, 2012)
4. September 25, 2012 Email to Applicant
5. Downtown Specific Plan (DTSP) MDRP Staff Report Approving Security Enclosure
6. Fence/Wall Plans With Notations From Building and Planning Departments
7. Memorandum From Building Official to Planning Director Regarding McRae Opera House
8. Letter to Applicant – April 23, 2013 (Addressing Use as Patio Enclosure)
9. Opera House Saloon Website and Facebook Information
10. California ABC License Query Results for McRae Opera House Building
11. Nightclub and Bars and Drinking Places Use Type Classifications

**Note to Applicant and/or Developer:** Please contact the Planning Department staff at (916) 774-5276 prior to the Commission meeting if you have any questions on any of the recommended conditions for your project. If you challenge the decision of the Commission in court, you may be limited to raising only those issues which you or someone else raised at the public hearing held for this project, or in written correspondence delivered to the Planning Director at, or prior to, the public hearing.