



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Recommendations By the  
Downtown Working Group  
(DWG)

**DATE:** March 22, 2007

## SUPPLEMENTAL MEMO

### BACKGROUND

On March 15, 2007, the Downtown Working Group (DWG) provided the Public Safety, Finance and Strategic Support Committee (PSFSS) with a report containing various proposals to improve the nightlife experience in downtown San Jose for residents, business owners and visitors alike. The report also included a recommendation that the City Council direct staff to return to Council within sixty days with specific recommendations on implementing the DWG's proposals. The purpose of this memo is to advise Council regarding some of the legal issues raised by these proposals. This Office will work with staff on the areas discussed below, as well as any additional issues that arise, as specific recommendations are developed.

### ANALYSIS

#### ***Entertainment Regulation:***

With regard to the type of entertainment offered in the downtown area, the DWG report recommends "revising the Conditional Use Permit (CUP) requirements to encourage a diversity of entertainment in the Downtown" and "Enforcing a 'no-tolerance' policy for problematic shows and promoters." These recommendations have since been clarified. The PSFSS Committee was orally advised that "diversity of entertainment" was intended to mean diversity of "venues" and the DWG was informed that "problematic shows and promoters" means those shows which have a history of placing a strain on the Police resources available to respond to problems arising from those events. The Council should be aware that any action it takes to address the type of entertainment permitted in the downtown area would be subject to the First Amendment of the United States Constitution. Specifically, the Council could not take action that would result in the regulation of the content of the entertainment offered in the nightclubs.

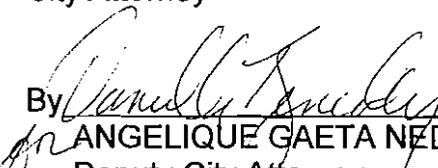
The DWG report also proposes that the City consider placing "a temporary moratorium on large, liquor-only clubs." The regulation of alcohol is vested with the State

Department of Alcoholic Beverage Control. In this regard, the City's ability to control the uses of downtown clubs is limited to the City's land use authority. This Office will work with City staff on whether a moratorium is possible or whether there may be other means to accomplish the goal of reducing the potential conflicts between the nightclubs and the downtown residential uses.

**"Soft Closings":**

The DWG report also reflects an interest in the implementation of "soft closings" which would, in effect, allow nightclubs and restaurants to remain open beyond "last call", thereby providing their patrons with a place to wind down the evening. While open to this approach, the Police Department has expressed concerns regarding the cost of additional Police services necessitated by these soft closings. To address that concern, the report recommends, "Creating an agreement where the Downtown clubs will assume a fair share of the additional police staffing costs directly associated with monitoring the clubs." The Council should be aware that contracting for Police services in order to address overtime issues can potentially present conflict of interest issues and possible violations of the Penal Code; especially, if the City permits its officers to directly contract with the nightclub owners/operators for these Police services. If the City decides to take on the role of contracting with the nightclub owners/operators directly, there would still be the potential for Fair Labor Standards Act (FLSA) issues, conflict of interest issues, and state licensing issues. This Office recognizes that there may be other tools available to provide the funding required for the Police services, such as regulatory fees, and will work with staff to explore all legally viable options.

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By   
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