



COUNCIL AGENDA: 4-29-08
ITEM: 9.1(b)

Memorandum

TO: HONORABLE MAYOR, CITY
COUNCIL AND REDEVELOPMENT
AGENCY BOARD

FROM: Debra Figone
Harry S. Mavrogenes

SUBJECT: SEE BELOW

DATE: April 11, 2008

Council District: 3

SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING TITLE 6 OF THE SAN JOSE MUNICIPAL CODE BY AMENDING CHAPTER 6.58 AND CHAPTER 6.60 TO ADD NEW SECTIONS, AND ADDING A NEW CHAPTER 6.62, TO REQUIRE PROMOTERS TO BE PERMITTED OR LICENSED PRIOR TO PROMOTING EVENTS IN PUBLIC ENTERTAINMENT VENUES OR PUBLIC DANCEHALLS AND REQUIRING THE OPERATORS OF EVENTS AT THOSE VENUES TO USE ONLY PERMITTED OR LICENSED PROMOTERS, AND TO CLARIFY THAT PERSONS REQUIRED TO BE PERMITTED OR LICENSED UNDER THE PROVISIONS OF THESE CHAPTERS, BUT NOT SO PERMITTED OR LICENSED, ARE ALSO SUBJECT TO THE PROVISIONS OF THESE CHAPTERS

RECOMMENDATIONS

- (a) Approval of an ordinance by the City Council:
- (1) Amending Chapter 6.58 of Title 6 of the San Jose Municipal Code (Code) to require operators of public dancehall venues to use permitted or licensed promoters and to hold persons required to be permitted under Chapter 6.58 of the Code, but not so permitted, responsible for violations of Chapter 6.58 of the Code; and,
 - (2) Amending Chapter 6.60 of Title 6 of the Code to require operators of public entertainment business venues to use permitted or licensed promoters and to hold persons required to be permitted or licensed under Chapter 6.60, but not so permitted or licensed, responsible for violations of Chapter 6.60 of the Code; and,
 - (3) Adding a new Chapter 6.62 to Title 6 of the Code to require promoter business permits and promoter ownership licenses and setting regulations and conditions on promoter permits and licenses.

- (b) Adoption of a resolution by the City Council amending the Administrative Citation Schedule of Fines for Certain Violations of the Code to amend fines for violations of Code Chapters 6.58 (Public Dancehalls) and 6.60 (Public Entertainment Permit) and to add fines for violations of Code Chapter 6.62 (Event Promoters), and Repealing Resolution No. 74033, to be effective July 1, 2008.

OUTCOME

Approval of the proposed ordinance would assist the City in identifying those persons that promote events in the City, as more specifically spelled out below, and increase accountability of the management of these promoted events. Approval of the ordinance would also result in clarifications needed to Chapter 6.58 and Chapter 6.60 of the Code to ensure that all persons engaging in the business of public dances and public entertainment be held to the same standards of operations. The goals of this ordinance are to legitimize the entertainment industry and create greater accountability, while encouraging a music culture and a business friendly environment.

BACKGROUND

Over the last three years a number of stakeholder groups have been formed to address issues related to Downtown nightlife. These groups include the Urgency Ordinance Task Force (2005), the Downtown Working Group (2006) and the Hospitality Zone Assessment (2007). These community-based groups have worked on various elements of the Downtown entertainment life to promote a safe and vibrant environment for residents, employees and visitors. Permitting/licensing promoters has been one of the top priorities identified by these three groups.

On June 19, 2007, the City Council approved the 60-Day Status Report from the Downtown Working Group and directed staff to develop a process to regulate promoters to increase accountability of the management of promoted events.

ANALYSIS

The proposed ordinance is the result of many months of meetings with City staff and the business community to ensure a fair and equitable process that would enhance nightlife activity in the Downtown. To create a balanced ordinance that would regulate and bring greater accountability to event promotion while at the same time encourage a live music culture and increase business opportunities for local venues, a number of considerations have been taken into account.

The proposed ordinance will greatly assist the City by providing a means to regulate promoter businesses to ensure they do not conduct business in a manner that threatens the public health, safety or welfare, as set forth in the reports from the Downtown Working Group's Status Report. It requires that promoters be identified by legal name and provide contact information where promoters can be easily reached, holding promoters accountable for the activities they conduct in the City.

The ordinance would also help the owners and operators of entertainment businesses and dancehalls by ensuring that the promoters with whom they are working have been appropriately identified and have gone through a background check by the Police Department. In addition, the ordinance requires that promoters have a simple contract with the person hiring them, including the owners and operators of entertainment businesses and dancehalls, which addresses the type of entertainment the promoter is promoting, and includes event details and management responsibilities of the promoters. This would provide the entertainment business community the opportunity to rely on the ordinance as a basis for requiring the promoters they hire to adhere to higher standards of operation. City staff would be available to assist in the development of the contract required by the ordinance.

DEFINITIONS:

The ordinance generally defines an entertainment promoter as any person (a) who is responsible for organizing the event (including contracting with the principals, selecting entertainment, advertising or holding out an event to members of the general public) and (b) who shares in the revenue from the event that person is promoting.

During the outreach to potentially affected stakeholders and in drafting the proposed ordinance, concerns were raised regarding two instances where the definition of promoter could unintentionally include situations that should not be captured by the ordinance because of the existence of alternative entities and/or persons that could be held accountable for the promotional activities: entertainers or performers who were promoting and sports-related events.

Entertainers or Performers Who Promote Their Own Event

- An entertainer or performer who engages in promotion for his event, but is paid solely for performing at an event is not considered a promoter. If the entertainer or performer promotes his event and does receive compensation for that promotion, he would be covered under the definition of promoter. However, staff recognized that there would be situations where the entertainer or performer, for a variety of reasons (including the fact that the entertainer or performer was a traveling entertainer or performer, was based outside of the City, or had a last minute booking) would not in a position where he could easily or readily apply for and obtain a promoter permit or license prior to the event he was promoting. To address this issue, staff created an exemption to the promoter permitting and licensing requirements that provides that if the owner or operator of the venue where the event is scheduled to occur has an entertainment permit or dancehall permit and agrees, by written contract, to be legally responsible for any damage, injury or losses sustained by persons or property which arise from the promotion of the event, the promoting entertainer or performer need not be permitted or licensed. Thus, entertainers and performers that are being paid to entertain and promote could do so without being licensed, as long as the venue with which they contract accepts all liability.

Sports-Related Events

- If a sports team wants to promote a certain venue for an “after-hours” party and the team is not promoting any “activity” requiring an entertainment permit or public dancehall permit, they are not defined as a promoter and do not need to be licensed. Activities that would require an entertainment permit or a dancehall permit are defined, respectively, as follows:
 - Entertainment at a venue where alcohol is being served and one of the following is occurring:
 - Dancing,
 - Singing,
 - Audience participation in the entertainment, or
 - Live entertainment
 - A public dance where patrons attending the dance are charged for admission to the dance.
- If a sports team wants to also promote one of the above listed activities and the team is getting compensated for promoting that activity, the team would be subject to the ordinance, unless, as above, the team entered into a written agreement with the owner or operator of the venue where the venue owner or operator would accept all of the liability and responsibility for any damage, injury or losses sustained by person or property which result from the promotion of the activity. Thus, sports teams that are promoting one or all of the above listed activities could still do so without being permitted or licensed.

PERSONS REQUIRED TO BE PERMITTED OR LICENSED

The proposed ordinance also requires every business promoting public dances and public entertainment, as defined by Chapter 6.58 and 6.60 of the Code, in public dancehalls and public entertainment businesses in the City and receiving compensation for that promotion to obtain a promoter business permit. The ordinance further requires every person engaging in promotional activities and receiving compensation for that promotion to obtain a promoter license. To address stakeholders concerns, a number of exceptions to this requirement have been carved out of the proposed ordinance.

For example, while staff believes that licensing managers of promotion businesses would be an important tool to hold the promoter businesses responsible for their promotional activities, the proposed ordinance eliminates that requirement to ease the perceived burden on promoter businesses. This exception will assist the promoter business by easing the financial aspects of having to pay the fees associated with licensing each manager.

The ordinance also does not require promoters of downtown special events or promoters promoting events at City-owned or operated facilities to obtain a permit or license because pursuant to contracts with the City or its agents, the operators of those events and the operators of those venues are subject to specific indemnification requirements, insurance requirements, security requirements and performance standards which make them liable for the type of activities this ordinance is aimed at regulating. The City does not have the same type of contractual agreements with private venues using promoters; therefore, staff believes this proposed ordinance is necessary.

GENERAL REQUIREMENTS:

Under the provisions of the ordinance, the promoter would be required to:

- Ensure that a designated person representing the promoter be present at every event being promoted.
- Agree to indemnify the City in the event of an injury to person or damage to property resulting from the manner in which the promoter promoted the event.
- Post all promoter business permits and ownership licenses at the principle place of the promoter's business.
- Have an agreement with the person hiring the promoter which identifies the specifics of how the event will occur, the hours of the event, who will be present at the event on behalf of the promoter and how the promoter can be contacted in case of an emergency.
- Ensure none of the promoter's employees or agents under twenty-one years of age are present at the event being promoted, if alcoholic beverages are being served.
- Notify the Chief of Police if the promoter intends on retaining security personnel for the entertainment or performers the promoter is promoting.
- Ensure any security personnel retained by the promoter for the entertainers or performers are licensed by the appropriate state agency.

PROCESS FOR OBTAINING PERMIT

The process to obtain a promoter permit or license would be the same as that to obtain a public entertainment business permit or a public entertainment ownership license. Similarly, the same standards for denial, suspension, and revocation used for the public entertainment business permit and public entertainment ownership license would apply.

MODIFICATIONS TO ADDRESS VARIOUS CONCERNS:

In an effort to address comments from the business community, the following modifications to the proposed ordinance were made.

Entertainer/Performer Promoting Their Own Event

The ordinance will not to consider a performer/entertainer as a promoter if he is paid solely for his performance and not for promotional activities, provided the business venue accepts all liability and responsibility for using a promoter that is not licensed, so long as the agreement and responsibility has been documented in a simple contract and provide businesses a template of a contract that could be easily duplicated.

Sports-Related Events

Language was also modified to address a concern that sports teams and other similar groups will be required to register as promoters when they are advertising "after-event" celebrations at venues that are required to have an entertainment permit or public dancehall permit. The proposed ordinance is clear that if a sports team is not promoting an "activity" that triggers the definition of an "event" they are not considered to be promoting, as described above.

If the venue wants the sports team to promote those specific "activities" the sports team then falls under the definition of a promoter. However, the venue could decide to accept all liability and responsibility for any incidents that might come as a result of having that sports team act as a promoter as long as both parties enter into the same simple contractual agreement to memorialize this shift in responsibility.

Permit and License Fees

As initially drafted, the proposed ordinance provided that promoter permits and licenses would expire after one year; this would result in the permittee or licensee needing to renew his permit or license well before the termination of a year to ensure his permit or license did not lapse. It would also require the payment of any fees associated with obtaining and renewing the permit or license on an annual basis. Though the recommended fees are based on the staff's costs of processing the applications for a permit or license, including interviews, reference checks and criminal background checks, staff recognized that fees might unintentionally create a financial burden for some required to obtain a permit or license. Accordingly, staff made the following changes to the proposed ordinance:

- Extending the permit and license terms from 1 year to 2 years.
- Not requiring that managers of promoter businesses be licensed.

Insurance

As initially drafted, the proposed ordinance required that all promoters maintain insurance that would cover the promoter and the City in the event that some claim for personal injury or property damage was made against the City for activities related to the promotion of the event. Responding to the concerns of the stakeholders that this requirement would result in a great financial burden for promoters, this requirement was deleted from the proposed ordinance.

Hosts

Hosts are described by the entertainment community as those individuals that are paid a nominal amount of money or that receive some type of consideration from the organizer of an event to come to the event and bring as many people that he can bring to the event. As initially drafted, the proposed ordinance would capture these individuals because it was clear they would be promoting the event and were getting compensation for doing so. Stakeholders felt hosts should not be required to be permitted or licensed because the hosts were not truly the promoters of the event and instead were just the contract employees. To address this concern, the proposed ordinance was amended to carve out an exception for employees of a promoter that is permitted or licensed so that those employees need not also be permitted or licensed.

SCENARIO BASED QUESTIONS:

Following are some scenarios that have been raised during the outreach process. They are included here to illustrate how the proposed ordinance would work.

- What if a band touring in the Bay Area had a last minute ability to play at a venue in San Jose – would they need to get a promoter license?
 - If they are going to be compensated solely to perform, no.
 - If they are going to be paid to promote, yes. However, the venue could agree to take on all liability and responsibility for the event promotion by a contract with the band and the band would not need to be licensed.
- If a sports team advertises a post-game party and live entertainment at a venue in San Jose, would they be required to get a promoter license?
 - If the sports team is compensated for the promotion of the entertainment, then yes. But, if the venue enters into a contractual agreement with the sports team to take on all liability and responsibility for anything that might occur as a result of the promotion, then no.
- What if a single promoter wanted to promote events at various locations?
 - That promoter would need to be licensed and all of the people working for that promoter could utilize his license for the promotion.

IMPLEMENTATION TIME FRAME:

If the proposed ordinance is approved, the Police Department anticipates beginning to accept applications for promoter permits and licenses beginning July 1, 2008. This would allow for staff time to educate the public, train additional staff, develop internal mechanisms to process the promoter permit and license applications. Staff has completed a cost-recovery analysis of the fee structure. Changes to the Schedule of Fees and Charges are expected to be included in the annual

budgetary process. A 60-day grace period is proposed to allow the promoters adequate time to apply for and obtain their permits and/or licenses so that promoters would be required to be permitted and/or licensed by September 1, 2008.

ADMINISTRATIVE FINES

Staff is also recommending the implementation of new fines for violations of the proposed ordinance as well as increased fines for violations of Chapters 6.58 (Public Dancehalls) and 6.60 (Public Entertainment Permit). The fines associated with Chapters 6.58 and 6.60, as well as those associated with the proposed ordinance, are set to act as a deterrent to violating the code and to ensure that entertainment businesses and promoters do not simply ignore the Code requirements as a "cost of doing business."

ADDITIONAL PROVISIONS OF THE ORDINANCE:

In drafting the Event Promoter section of the proposed ordinance, several issues that affect chapter 6.58 and 6.60 were identified. One of the most glaring concerns is that if a business or person operates without any of the permits or licenses required by these Chapters, they are not subject to the provisions of the Code in that the provisions currently apply only to those persons permitted or licensed. In order to correct this, chapters 6.58 and 6.60 need to be amended to include a provision which will make it unlawful for any person permitted or licensed, or required to be permitted or licensed, under the Chapters, to violate any of the provisions of those Chapters. Similar language was also included in Chapter 6.62, the promoter regulations included in the proposed ordinance.

EVALUATION AND FOLLOW-UP

To evaluate the success of the implementation of this ordinance, staff will work with the stakeholders to monitor the effect the ordinance is having on nightlife in the Downtown. This will include information concerning stakeholder's experiences in complying with the new ordinance, the impact on increasing live music and crime statistics associated with the Downtown Entertainment Zone. The Police Department will also maintain records of promoters that are operating in a responsible manner and promoters that engage in unlawful activities and any regulatory action taken against those promoters. Staff will assess the impact of the ordinance after two years to determine if the ordinance has positively impacted the issues associated with promoters.

POLICY ALTERNATIVES

1. One alternative to the proposed ordinance is to maintain the status quo. Doing so would fail to respond to the concerns about promoting activity in the Downtown Entertainment Zone identified by the Urgency Ordinance Task Force (2005), the Downtown Working Group (2006) and in the Hospitality Zone Assessment (2007). If the ordinance is not implemented, the City and entertainment venues would not have the capacity to identify promoters and hold them accountable for incidents caused by their promotional activities.

2. Another alternative would be to accept the original draft of the ordinance that would be a stronger regulatory document. However, the original draft may negatively impact the efforts to create and maintain a vibrant Downtown, including the expansion of live music opportunities.

PUBLIC OUTREACH/INTEREST

The outreach efforts for the proposed ordinance have been coordinated with the San Jose Downtown Association (SJDA). The proposed ordinance was discussed at the Downtown Working Group on November 16, 2007, and on February 11, 2008. There were public meetings in regard to the proposed ordinance on December 13, 2007, and March 3, 2008. The Police Department, SJDA, business owners/operators, promoters, musicians and members of the public were present at the meetings.

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
- ✓ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City.
- Criterion 3:** Consideration of proposed changes to service delivery, programs, or staffing that may have impacts to community services and have been identified by staff, the Board or Council, or a community group that requires special outreach.

COORDINATION

This memorandum was coordinated with the Police Department, Planning Building and Code Enforcement; City Attorney's Office and the Redevelopment Agency's General Counsel.

COST SUMMARY/IMPLICATIONS

The permitting and licensing process required by the ordinance would require the Police Department to develop, accept, and process applications for promoter permits and licenses. Once submitted, an application would require due diligence by the Police Department, including conducting assessments of criminal background checks, examining and verifying information provided on the application, and review of the application to ensure there have not been prior issues with the promoter business or owners within the City or other venues outside of the City.

There would also be staff hours associated with regulating the promoter businesses and owners to ensure they have been licensed and are in compliance with the ordinance. Staff has completed a cost-recovery analysis of the fee structure. Changes to the Schedule of Fees and Charges are expected to be included in the annual budgetary process. Any additional staffing required to process and regulate the permits will be recovered through the permit and license fees.

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CEQA

Not a Project.



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