



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Downtown Nightlife: Cost-
Sharing

DATE: February 6, 2009

SUPPLEMENTAL

Item 3.4(i) on the City Council agenda for February 10, 2009 is a recommendation that the City Council direct the City Attorney to prepare an ordinance amending the Public Entertainment Ordinance to authorize a change in the fee methodology for the Public Entertainment Business Permit charged to Public Entertainment Businesses operating in the Downtown Entertainment Zone. The purpose of this memorandum is to provide supplemental information on the proposed ordinance. Approval of the recommendation would result in the City Attorney drafting an ordinance changing the fee methodology to recover costs associated with police enforcement of the Public Entertainment Permit Ordinance ("Entertainment Ordinance") in the Downtown Entertainment Zone.

BACKGROUND

The Entertainment Ordinance is a regulatory ordinance which requires a business to obtain a Public Entertainment Business Permit ("Entertainment Permit") if that business is open to the public, selling alcohol on the premises and providing or allowing one or more of the following activities at the premises:

1. Dancing;
2. Singing;
3. Audience participation in the entertainment; or
4. Live entertainment

Businesses not required to obtain Entertainment Permits are those where public entertainment is offered but it is offered in accordance with any of the following criteria:

1. At an outdoor public property owned or controlled by the city;
2. In city owned or controlled facilities, including, but not limited to, the Convention Center, the Center for Performing Arts, the Montgomery Theater, the Civic Auditorium Complex, the Arena, and city park facilities;
3. As an incident to the operation of a bona fide public eating establishment as defined under and in accordance with Title 20 of the San Jose Municipal Code; or

4. As an incident to the operation of a hotel or motel under the conditions specified in Title 20 of the San Jose Municipal Code.

Together, the Entertainment Ordinance and the Entertainment Permit include provisions which regulate Public Entertainment Businesses, requiring them to operate in a manner consistent with maintaining public health, safety, and welfare. Among other things, Public Entertainment Businesses are required to do the following:

1. Ensure that they do not conduct their business in a manner that creates or results in a public nuisance (i.e., disturbances of the peace, illegal drug activity, public drunkenness, illegal gambling, prostitution, acts of violence, public urination, acts of vandalism, acts of lewd conduct, loitering, etc.);
2. Have an adequate number of security personnel on staff to deal with problem patrons;
3. Ensure that the security personnel does not consume illegal substances or alcoholic beverages while on duty;
4. Ensure that if the security personnel are armed while on duty, they are identified to the Police Department;
5. Ensure that they are not serving obviously intoxicated individuals;
6. Comply with specific noise restrictions;
7. Queue waiting lines so as not to interfere with the public's right of way;
8. Refuse the admission of persons under twenty-one (21) years of age;
9. Comply with occupancy restrictions set by the Fire Marshal;
10. Hire only event promoters that are permitted by the City or agree to legally accept all responsibility for events promoted by those event promoters; and
11. Immediately communicate with the Police and Fire Departments when there is an imminent threat to public safety.

To enforce the provisions of the Entertainment Ordinance and the Entertainment Permit, the City is authorized by law to charge a regulatory fee which can be tied to the Entertainment Permit. The general rule of law is that, "a regulatory fee cannot exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought. These costs include all those incident to the issuance of the permit, investigation, inspection, administration, maintenance of a system of supervision and *enforcement*." City of Oakland v. Superior Court, (1996) 45 Cal.App.4th 740, 762 (emphasis added). Moreover, "regulatory fees in amounts necessary to carry out the regulation's purpose are valid despite the absence of any perceived "benefit" accruing to the fee payers." Sinclair Paint Company v. State Board of Equalization, (1997) 15 Cal.4th 866, 876. In Sinclair, the Supreme Court upheld a state statute which required manufacturers whose products exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community, describing the statute as a "mitigating effects" measure; likening it in character to "similar police

power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.” Id., at 877.

Currently, the fee for the Entertainment Permit reflects cost recovery for the services related to the Entertainment Permit on the front end, such as review of the application for the Entertainment Permit, investigation of the individuals applying for the Entertainment Permit and inspection of the entertainment business premises. The current fee does not include administration of the system, maintenance of a system of supervision or, any type of enforcement. In this instance, the proposed change in the fee methodology would allow an increase in the Entertainment Permit fee to include the cost of enforcement of the provisions of the Entertainment Ordinance and the Entertainment Permit.

RICHARD DOYLE
City Attorney

By 
Angelique Gaeta Nedrow
Deputy City Attorney

cc: Debra Figone

For questions, please contact Angelique Gaeta Nedrow, Deputy City Attorney,
at (408) 535-1991.