

Mayor's Office of Criminal Justice



Gavin Newsom
Mayor

Honorable Kevin V. Ryan
Deputy Chief of Staff
Director, Mayor's Office of Criminal Justice

From: Honorable Kevin V. Ryan
Deputy Chief of Staff &
Director, Mayor's Office of Criminal Justice
1 Dr. Carlton B. Goodlett Drive, Suite 496
San Francisco, CA 94102

Date: June 19, 2009

To: President David Chiu
1 Dr. Carlton B. Goodlett Drive, Suite 244
San Francisco, CA 94102

Dear President Chiu,

I write you to present some concerns surrounding your amendments to the nightclub legislation presently before the City Operations and Neighborhood Services Committee. As you know, this legislation, sponsored by Mayor Newsom and Supervisor Maxwell, is intended to decrease nightlife-related violence. Our aim remains to protect this socially vibrant and economically vital part of the city – to ensure that where and when individuals recreate, they do so safely. As originally presented before the Committee, this legislation is the product of over eighteen months of negotiation between my office, the Police Department, Entertainment Commission, City Attorney's Office and community stakeholders. It has been a respectful process, among sometimes opposing interests, in which we've all made significant compromises – because we all share a vision of nightlife in San Francisco that is diverse, enjoyable, prosperous and safe. The present fear is that the proposed amendments upset this balance and change the tenor of a carefully composed piece of legislation. I respectfully present these concerns below. I first outline my understanding of the amendments and some concerns specific to their formulation. I follow this with a set of more general concerns.

These amendments would restrict late night activities in the city. They would do so in two basic ways, both of which I believe to be flawed and unnecessary. First, in the case of nightclubs, which receive a fixed Place of Entertainment Permit (see Municipal Police Code Article 15 Section 1060.5), they would restrict the ability to get an Extended Hours Premises Permit (what allows them to stay open after 2 AM). If, year to year, the total number of Extended Hours Permits were to rise by fifteen percent or more, these amendments would place a one year moratorium on their issuance (see Appendix A).¹ I remind you that, of the 700 plus nightclubs in San Francisco, only roughly 100 have such permits. Importantly, most venues rarely exercise this option, as they must close the bar at 2 AM, per state law. To be clear, we are dealing with a small fraction of total nightclubs, which exercise this option relatively infrequently.

1 Dr. Carlton B. Goodlett Place, Suite 496

San Francisco, California 94102

(415) 554-6560
FAX (415) 554-6995

The second way in which these amendments would restrict late night events is through the capping of those One Time Event Permits with authorization to stay open after 2 AM (see Municipal Police Code Article 15 Section 1060.29). These permits allow groups or individuals to hold events at locations which do not hold fixed Place of Entertainment Permits. The Black and White Ball and 1906 Celebration are good examples. Per these amendments, if the annual issuance of One Time Event Permits with authorization to stay open after 2 AM rose by fifteen percent or more, there would be a cap in the following year, limiting the issuance to the historical average plus 10 percent. It could be alternatively capped at the 2008 baseline plus 10% (see Appendix B), if higher.² I remind you that, on average, there are only twelve One Time Events per year; and, of these twelve events, only half, on average, receive authorization to stay open after 2 AM. These are concentrated on New Years Eve, and, as with fixed Places of Entertainment, are barred from selling alcohol after 2 AM. The small number of these events leads me to question the arithmetic outlined in these amendments. For instance, if there were six events this year, and seven next year, the limitation clause in the amendments would be triggered; if we allow for rounding, with a historical average of six such events per year, there would be seven late night-authorized One Time Events allowed the following year (see Appendix B). It also leaves no room for the small uptick in events we see for non-annual events such as the Olympics or World Cup (in Johannesburg next year).

Having outlined my understanding of how these amendments would function, as well as some basic structural concerns, I respectfully submit a set of more general concerns. These concerns are relevant to both the moratorium on extended hours authorization for fixed Places of Entertainment and the parallel capping of One Time Events. First, these amendments would enact an automatic moratorium/limitation without respect to whether the increase in recreation has produced an increase in associated negative effects – crime, noise, congestion, refuse. In other words, the regulatory action is effectively decoupled from a prior analysis of whether there are any legitimate negative secondary effects. I further remind you that such events are considered, in the eyes of the law, constitutionally-protected expressions of free speech and free assembly. This also could pose a legal challenge, as it is, in effect, a “prior restraint” without the essential evidentiary record. Indeed, what evidence exists, on the record, to show that problems are related to places being open from 2 AM to 6 AM, rather than up until 2 AM? Moreover, even if we have a problem today, with respect to post 2 AM activities (which I do not believe we do), this does not mean that an increase would exacerbate this problem. Such a problem is inherent in any automatic moratorium (also see California Government Code Section 65858).

Second, these amendments circumvent the Conditional Use process, presently managed by the Planning Department and Planning Commission. This process, which I believe to be effective, allows for the delimitation of an area in which given activities are given increased scrutiny in the permitting process. Indeed, there is presently a ‘CU’ on Late Night Events on Broadway (see Municipal Planning Code Section 714.27). Because of this, no new late night businesses/events have been permitted in the Broadway NCD in the last eighteen months, with the exception of one pizza parlor. To be clear, a CU changes the permit issuance from an ‘As-of Right’ process, to one in which the applicant must show that the business/event would be necessary or otherwise beneficial to the

neighborhood. Issuance of the permit requires four votes from the Planning Commission and the permittee cannot seek any entertainment permit without first going through the Planning Commission. Importantly, a CU can be put in place by the Planning Commission, Board of Supervisors or voters. All decisions are appealable to the Board.

There are multiple CU processes that could help here, all of which the Board can play a role in. One could: (1) identify those problem clubs presently under the CU and bring them before the Planning Commission, which can either revoke their permit or add conditions to it; (2) bring those who were 'grandfathered in' to the CU before the Planning Commission and add restrictions; and/or (3) add a CU requirement for bars (institutions with a type 48 license from the Alcohol and Beverages Commission) in the Broadway NCD and use that to raise the regulatory bar (no pun intended), via a standard set of "special conditions." Frankly, I do not believe that the Municipal Police Code is the best place to tackle land-use issues – this should be the province of the Planning Department, Planning Commission and Planning Code. In sum, I believe that the CU process, which is grounded in nuanced discretion and detailed review, is preferable to an automatic moratorium. And, as outlined above, there are many options yet to be exhausted in the planning arena.

Third, it is my opinion, as both a career law enforcement officer, and a life-long San Franciscan, that the late night activities outlined above do not substantively contribute to nightlife-related violence. In my view, nightlife violence is more than anything else a product of unregulated promoters, some unruly patrons and inadequate enforcement tools being given to the Entertainment Commission (this legislation would remedy this). With regard to the first point, the packet of nightclub legislation originally submitted to the Board contained a promoter regulation piece. I would look forward to a discussion of the merits and future of such legislation.

I detail some further concerns as bulleted below:

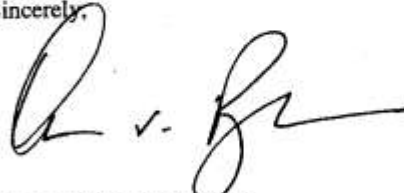
- Restricting night life in San Francisco could have downward effects on associated businesses – restaurants, bars, theaters and other activities which draw people into the city. In my opinion, we should not undertake any moratorium or separate restriction without a thorough understanding of potential downstream economic repercussions.
- The legislative amendments, as authored by the Mayor's Office, already have built-in controls for One Time Events on high-volume days. These were deemed sufficient by the SFPD and vetted by the City Attorney.
- There is no 'release valve' in these amendments, other than the six-to-eleven month review. It also provides neither direction nor funding for the review. This would likely require a serious, cost-benefit, economic analysis – not one which could be easily done by the staff of the Entertainment Commission. Moreover, without delineating where such funds would come from, this constitutes an unfair and unfunded mandate.

- o If there happen to be fewer events in any given year, that lower number would presumably become the baseline for triggering the moratorium/limitation. Decreased economic activity could therefore exert downward regulatory pressure on commerce.

Finally, I also have a serious concern regarding the proposed amendment requiring that on Thursdays and Sundays, in those areas with conditional use restrictions on late night activities, security guards be staffed on the basis of maximum occupancy. This would mean that if a bar or club has a maximum occupancy of 500, but only has 50 individuals in attendance, they would be required to staff security guards as if all 500 permitted occupants were in attendance. I believe this would constitute an unfair financial hardship. The legislation, without these amendments, would require that on those nights, they do not allow occupants to enter in excess of those allowed by security guard staffing. That is, if they have a permitted maximum occupancy of 500, and are required to have one security guard for every 50 occupants in attendance, but only have 100 individuals in attendance, they would only be required to have two security guards. However, they would be barred from allowing any more individuals until additional security arrived. Again, the legislation, in its present form, represents a compromise reached by all parties, including the SFPD.

I thank you for your consideration of the above points and look forward to ongoing dialogue with your office.

Sincerely,



Honorable Kevin V. Ryan

Cc: City Attorney Dennis Herrera
Chief Heather Fong
Deputy Chief Kevin Cashman
Supervisor Sophie Maxwell
Supervisor Bevan Dufty
Supervisor Michela Alioto-Pier
Supervisor Chris Daly
Starr Terrell, Mayor's Liaison to the Board
Audrey Joseph, President, Entertainment Commission
✓ Robert Davis, Executive Director, Entertainment Commission

Appendix A

Calculation of moratorium on Extended Hours Premises for fixed Places of Entertainment, as outlined in proposed amendments to MPC 1070

Year to year change in the total number of Extended Hours Premises within the City & County of San Francisco, noted below as Δ_{EHP} , shall be calculated as follows:

$$\Delta_{EHP} = (n_{y_i} - n_{y_{i-1}}) / n_{y_{i-1}}$$

For the set of cases such that $\Delta_{EHP} \geq .15$, there shall be a moratorium placed on such events in the following year, noted as year $i+1$. m , the set of new Extended Hours Premises to be permitted in year $i+1$, would thus be:

$$m = \{ \}$$

alternatively,

$$m = \emptyset$$

alternatively,

$$m = \text{sorry, no permits}$$

Appendix B

Calculation of placement of cap on One Time Events with extended hours authorization, as outlined in proposed amendments to MPC 1070

Year to year change in the total number of One Time Events with extended hours authorization within City & County of San Francisco, noted below as Δ_{OTE} , shall be calculated as follows:

$$\Delta_{OTE} = (n_y - n_{y-1}) / n_{y-1}$$

For the set of cases such that $\Delta_{OTE} \geq .15$, there shall be a cap placed on events in year $i+1$. This cap, noted below as c , shall be calculated as the historical average for annual issuance of such permits, noted below as h , plus a factor of ten percent. If higher, it may alternatively be calculated as the 2008 baseline plus a factor of ten percent.

$$c = 1.1(h)$$

or

$$c = 1.1(n_{2008})$$

With h given as:

$$h = \frac{\sum_{i=0}^x (n_{y_0} + n_{y_1} + \dots + n_{y_i})}{x}$$

Example on following page.

(Appendix B, cont'd)

Example:

Given:

- *h*, the average annual number of permits issued for One Time Events with extended hours authorization, is equal to 6.
- There are 6 permits for One Time Events with extended hours authorization issued in one year (let the 2008 baseline also equal 6).
- There are 7 permits for One Time Events with extended hours authorization issued in the next year.

$$\Delta = (7 - 6) / 6$$

$$\Delta = .1\bar{6}$$

$$\text{as } .1\bar{6} \geq .15$$

∴

A limit on the number of permits issued in the following year shall be enacted. Per the proposed amendments, this would be calculated as the historical average, h, plus ten percent.

$$1.1(6) = 6.6$$

Rounded to the nearest integer,

$$6.6 = 7$$

¹ (b) If the calculation mandated by subsection (a) of this Section demonstrates an increase of 15% or more in any year in the number of Extended-Hours Premises Permits in existence, there shall be a City-wide moratorium on the granting of additional Extended-Hours Premises permits. In lieu of a City-wide moratorium, the Entertainment Commission shall have discretion to impose a moratorium applicable only to certain geographic areas of the City in which there is a concentration of Extended-Hours Premises Permits.

² (c) If the calculation mandated by subsection (a) of this Section demonstrates an increase of 15% or more in any year in the number of One Time Event Permits with authorization for the event to go beyond 2:00 a.m., there shall be a limit on the number of future One-Time Event Permits that may be granted with authorization for the event to go beyond 2:00 a.m., as follows: The number of such permits to be issued per year shall correspond to the average number that were issued per year since the inception of the One Time Event Permit or the number that were issued for events occurring in calendar year 2008, whichever number is higher, and adding a factor of 10%.