MEMORANDUM OF LAW

DATE: June 27, 2001

TO: Marcela Escobar-Eck, Deputy Director, Development Services Department

FROM: City Attorney

SUBJECT: Permit Fee Waivers for Churches

QUESTIONS PRESENTED

1. Do permit fee waivers provided in Land Development Code section 112.0203(b) apply to churches and other religious organizations?

2. Does it make a difference if the organizations are processing the permits for religious uses?

3. Are religious organizations otherwise exempt from paying permit processing fees?

SHORT ANSWERS

1. Yes. Permit fee waivers may be applied to religious organizations as long as the expenditure of public funds serves a public purpose. Under these circumstances, a waiver does not likely violate the California or federal constitutions.

2. Yes. Because a public purpose requires that a broad class of people benefit from the use of public funds, it makes a difference whether the organizations are processing the permits for religious uses. The City must evaluate fee waiver requests on a case by case basis.

3. No. Religious organizations are not otherwise exempt from paying permit processing fees because they likely cannot show that such fees impose a substantial burden on their exercise of religion.

ANALYSIS

I

DO PERMIT FEE WAIVERS PROVIDED IN LAND DEVELOPMENT CODE SECTION 112.0203(B) APPLY TO RELIGIOUS ORGANIZATIONS?

A. Municipal Code Provisions

Chapter 11, Article 2 of the City's Municipal Code [the Code], establishes the process for applying for permits, maps and approvals for development in the City. The Code authorizes the City to charge a fee for the application process. However, section 112.0203(b) creates fee waivers for certain types of permits and organizations:

> Processing fees or deposits for Conditional Use Permits and Neighborhood Development Permits are waived for nonprofit institutions or organizations whose primary purpose is the promotion of public health and welfare and who have qualified for federal tax benefits. *This waiver does not apply to institutions or organizations in circumstances in which the City is precluded by the California Constitution from making a gift of City funds*. [Emphasis added.]

In other words, the Code creates a conditional waiver. If the institution meets the philanthropic profile created by section 112.0203(b) and the waiver does not offend the state constitutional ban on gifts of public funds, the Code allows the waiver. This condition applies equally to all institutions, not just religious ones.

Article XVI, section 6 of the California Constitution sets out the ban on gifts of public funds. It states that the Legislature shall not "have the power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." Case law has held this provision inapplicable to chartered cities. *Los Angeles Gas and Electric Corporation v. City of Los Angeles*, 188 Cal. 307 (1922). But the reference to this ban in section 112.0203, along with a similar prohibition in section 93 of the San Diego City Charter, makes the prohibition applicable here.

An exception to the constitutional ban exists where the use of public funds serves a "public purpose." *California Housing Finance Agency v. Elliot*, 17 Cal. 3d 575, 583 (1976); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 745 (1971). When the loan or expenditure of public funds serves a public purpose, no gift is created even though a private group may benefit. *California Housing Finance Agency*, Cal. 3d at 583. Examples of public purposes found in case law include the promotion of low income housing, redevelopment of depressed residential areas, and the education of the young. *Winkleman v. City of Tiburon*, 32 Cal. App. 3d 834 (1973); *Board of Supervisors of The City and County of San Francisco v. Dolan*, 45 Cal. App. 3d 237 (1975); *Butler v. Compton Junior College District of Los Angeles*, 77 Cal. App. 2d 719 (1947). In other words, the public purpose exception most frequently occurs in situations where a broad class of people benefit. Additionally, what constitutes a public purpose is a matter for legislative discretion and will not be disturbed so long as it has a reasonable basis. *Board of Supervisors*, 45 Cal. App. 3d at 243.

A permit fee waiver is a gift of public funds to the organization that receives it. The City forgoes potential revenue from the organization while receiving nothing in return. Consequently, whether the California Constitution and the Code classify the waiver as a prohibited gift depends on whether it serves a public purpose. This in turn relies on a case by case evaluation of each potential fee waiver. In applying Code section 112.0203(b), staff must consider not just the nature of the applicant, but also the proposed development. Using the language of section 112.0203 for direction, a waiver for non-profit organizations and projects that promote the public health and welfare would likely serve a public purpose. The broader the class of people who benefit from the waiver, the more likely a court would find a public purpose.

Obviously, a case by case inquiry into whether a public purpose exists presents inherent difficulties. One way to clarify this process while fairly applying the fee waiver system is to amend the Code to identify the types of organizations and development the City finds serve public purposes. To assist this process, applicants could be required to include statements detailing how their proposed project will benefit the public health and welfare.

Whether a waiver is a prohibited gift is only part of the analysis. Although section 6 does not distinguish between religious and non-religious organizations, other state and federal provisions do focus on the nature of the group. As a result, before deciding if fee waivers apply to religious organizations under the Code, it is also necessary to determine whether fee waivers would be permissible under state and federal constitutional requirements.

B. The United States Constitution

Implicated when the City gives aid to religious organizations is the Establishment Clause of the First Amendment to the United States Constitution. This clause prohibits the government from making any law "respecting the establishment of religion." *Christian Science Reading Room v. City and County of San Francisco*, 784 F.2d 1010, 1014 (9th Cir. 1986). Although preventing either excessive governmental preference or entanglement in the activities of religious institutions, the clause still allows laws that confer indirect or remote benefits. *East Bay Asian Local Development Corporation*, 24 Cal. 4th at 693, 705 (citing *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771 (1973)). The United States Supreme Court has established a three part test to determine whether the government has violated the Establishment Clause. First, the government action must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion; finally, the action must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S 602, 612-13 (1971); *see*, *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that only the first two prongs of the *Lemon* test apply where the government gave aid to religious schools).

The Code sets out a secular purpose when it limits fee waivers to organizations that serve the public health and welfare. In addition, the fee waiver must necessarily serve a public purpose to satisfy the ban on gifts of public funds. Also, because the Code does not distinguish between religious and non-religious groups as long as a public purpose exists, fee waivers neither advance

nor inhibit religion. Finally, the fee waiver's indirect financial assistance creates no ties or influence over the religious organization. Therefore, fee waivers under the Code do not offend the Establishment Clause of the federal constitution.

However, while permit fee waivers to religious groups do not violate the Establishment Clause, the denial of waivers solely based on an organization's religious nature will offend the constitution. In *Christian Science Reading Room*, the San Francisco International Airport Commission evicted a longtime tenant because it felt that the lease to an admittedly religious group violated various constitutional prohibitions. 784 F.2d at 1011-1012. The appellate court analyzed the lease under both the Establishment Clause and state constitutional provisions, and found no violation of either. *Id*. at 1015-1016. Because the lease was lawful, the Airport Commission could not justify its classification of groups by religion, resulting in a violation of the Reading Room's right to be treated equally with non-religious groups. *Id*. at 1016. Similarly here, if a religious organization otherwise qualifies for a permit fee waiver, the City may not deny the waiver based on religion alone. As a consequence, despite the legality of waivers under the Establishment Clause, the federal constitution still requires the City to treat equally qualified religious and non-religious groups the same.

C. The California Constitutional Limitations

Article XVI, section 5 of the California Constitution states:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; . . . .

This section was intended to "insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes." *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 604 (1974) (citing *Gordon v. Board of Education*, 78 Cal. App. 2d 464, 472 (1947)). It not only bans the payment of public funds to religious organizations, but it also prohibits "any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." *Id*. at 606.

Although permit fee waivers for religious organizations appear to violate the plain meaning of Article XVI, section 5 of the California Constitution, case law does not require outright governmental hostility toward religion. When analyzing public funding under Article XVI, section 5, of the California Constitution, courts first look to "whether the aid is direct or indirect, and second whether the nature of the aid is substantial or incidental." *Sands v. Morongo Unified School* District, 53 Cal. 3d 863, 913 (1991) (Mosk, J., concurring). As long as the financial benefit is remote and incidental to a secular primary purpose, courts will uphold the funding under Article XVI, section 5, of the California Constitution. *California Educational Facilities Authority*, 12 Cal. 3d at 605. Significant factors include whether the aid is given

equally to both religious and non-religious organizations, whether a legitimate public purpose exists, and whether the funding gives rise to any governmental involvement in the institutions. *Id*. at 606; *East Bay Asian Local Development Corporation v. State of California*, 24 Cal. 4th at 721.

Applying these principles to this case, a permit fee waiver is unquestionably governmental aid. However, while the receiving organization gains a financial benefit, the waiver is neither a direct payment of public funds nor a complete financing of the institution's project. Instead of directly giving money to an organization, the City simply forgoes potential revenue. Additionally, the City does not give this financial assistance only to religious organizations. Both religious and non-religious groups qualify for permit fee waivers as long as a legitimate public purpose exists. Finally, permit fee waivers do not give rise to any governmental involvement in the institutions. The City gains neither control nor clout by making a fee waiver. Therefore, the permit fee waiver contained in section 112.0203(b) does not violate Article XVI, section 5, of the California Constitution.

The California Constitution also contains Article I, section 4, which guarantees the free exercise and enjoyment of religion "without discrimination or preference," and also contains the same prohibition as the Establishment Clause. *Christian Science Reading Room*, 784 F.2d at 1015. As explained above, permit fee waivers do not violate the Establishment Clause. However, like similar limits in the federal constitution, section 4 requires the City to treat similarly situated religious and non-religious groups alike. Fee waivers must be available to all qualifying groups without regard to their religious or secular nature.

In conclusion, permit fee waivers for religious organizations do not violate either the California or United States constitutions. This analysis, however, depends on the fee waiver falling under the public purpose exception to the state ban on gifts of public funds. As long as the use of funds serves a public purpose, permit fee waivers provided by the Code may apply to religious organizations. At the same time, where an institution otherwise meets the public purpose exception, the City may not deny a fee waiver for the sole reason that the group is religious in nature.

II

PERMIT FEE WAIVERS FOR RELIGIOUS ORGANI- ZATIONS MUST BE ANALYZED ON A CASE-BY-CASE BASIS

Provided a fee waiver serves a public purpose, Code section 112.0203(b) does not distinguish on the basis of religion. Whether the institution is processing the permit for religious uses, however, may affect whether the waiver serves a public purpose in the first place. As stated above, a public purpose serves a large class of people and contributes to the public health or welfare. In the context of religious uses, a public purpose likely exists where the underlying project or development benefits not just the members of the organization, but also the outside community.

To this end, users of the completed development should include members of the public

not associated with the religious institution. This does not prohibit all religious elements to the use. However, a project that is religious in nature should also have a secular impact for there to be a public purpose. Clear examples would include a school, a day care center for children, a hospital, or a homeless shelter. By the same token, a public purpose would be more difficult to find for either a temple where only religious services take place, or for office space exclusively dedicated to religious use. As a result, the public purpose analysis changes depending upon whether the organization is processing the permit for religious uses. However, care must be taken because any attempt to regulate fee waivers on the basis of religion alone may violate state and federal constitutions along with recently enacted federal statutes.

III

RELIGIOUS ORGANIZATIONS ARE NOT OTHERWISE EXEMPT FROM PAYING PERMIT PROCESSING FEES

Despite the requirements of the Code, some groups may argue that their religious character absolutely exempts them from paying permit processing fees. However, it is generally established that cities may exercise some control over religious groups through zoning ordinances. *Christian Gospel Church Inc. v. City and County of San Francisco*, 896 F. 2d 1221, 1224 (9th Cir. 1990). The Religious Land Use and Institutionalized Persons Act of 2000 [RLUIPA] (codified as 42 U.S.C. 2000cc) recently adjusted this general rule. Firmly rooted in the Free Exercise Clause of the federal constitution, RLUIPA creates a broad restriction on land use regulations that impose a "substantial burden" on religious exercise. 42 U.S.C. 2000cc. If a religious group proves a land use regulation substantially burdens them, RLUIPA requires the government to show that the regulation furthers a compelling governmental interest, and is the least restrictive means to further that interest. In addition, RLUIPA separately states that no regulation may either discriminate on the basis of religion, or treat a religious institution on "less than equal terms" with a non-religious group. 42 U.S.C. 2000cc.

Because Code section 112.0203(b) allows the City to make individualized assessments of proposed land uses by religious groups, RLUIPA applies to permit fee waivers under the Code. In fact, if section 112.0203(b) denied fee waivers based on religion alone, then RLUIPA would likely be violated. However, the application of the public purpose exception to both religious and non-religious institutions shows that the Code treats the two groups on equal terms. Nevertheless, religious groups may claim permit fees themselves impose a substantial burden on their exercise of religion. RLUIPA defines religious exercise broadly by including any exercise "whether or not compelled by, or central to, a system of religious belief . . . .The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be [a] religious exercise." 42 U.S.C. 2000cc5(7)(A)-(B). Since this broad definition likely includes any development that would bring a religious group under the fee waiver provisions of section 112.0203 (b), the only question is whether payment of permit fees creates a substantial burden.

No cases interpret RLUIPA because of its recent enactment. Permit fees, however, do little to affect the rights of religious institutions to use their land. By imposing permit fees, cities do not evaluate where and what churches can build. In addition, fees are imposed neutrally on all

groups wishing to obtain permits and without regard to the group's proposed use of their property. Even under the public purpose exception to the ban on gifts of public funds, the Code treats all groups alike. Also, if the City waives permit fees on the basis of religion alone, as previously discussed this will create a host of problems under the state and federal constitutions. As a result, religious groups are not otherwise exempt from paying permit fees because they likely cannot show that such fees substantially burden them under the terms of RLUIPA.

CONCLUSION

As long as the use of public funds serves a public purpose, permit fee waivers provided by the Code may apply to religious organizations. When a public purpose exists, a fee waiver would not violate the state ban on gifts of public funds, the ban on aid to religious groups, or the Establishment Clause of the federal constitution. Because the existence of a public purpose depends upon a broad class of people benefitting from the waiver, whether the organization is processing the permit for religious uses is a key inquiry. However, while religious groups may qualify for permit fee waivers under the Code, they are not otherwise exempt from permit fees because such fees do not substantially burden their free exercise of religion.

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