MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

PEDRO DE LARA JR.
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: July 7, 2009

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Waiver of Application Fees for Hardship Variance from Water Restrictions Due to Religious Beliefs

INTRODUCTION

At a City Council meeting on May 12, 2009, Council discussed the adoption of Drought Response Level 2 water use restrictions. In short, the process imposed a three-day, ten minute watering schedule (Sunday, Tuesday and Thursday, or Saturday, Monday and Wednesday) on certain users. An issue arose related to restrictions on those who cannot turn switches and use their water systems on Saturdays because of religious beliefs.

A request was made to the City Attorney to research the legality of waiving a fee associated with processing a hardship variance when religious organizations or individuals request a waiver of the fee for religious reasons. The proposed fees would range from $25 to $100.

QUESTION PRESENTED

Must the City waive fees for a hardship variance application based on religious beliefs?

SHORT ANSWER

No. If a law is "neutral" and "generally" applicable, and burdens religious conduct only incidentally, the Free Exercise Clause of the United States Constitution offers no protection. In the case of the proposed hardship variance fees, the fees do not suppress the free exercise of religion and do not create or impose any burden upon religious beliefs. The fee is generally applicable to all citizens of the community and the hardship variance provides accommodating alternatives. The economic hardship of the fee is minimal.

ANALYSIS

By Memorandum of Law dated June 27, 2001, this office opined that 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. A copy of the Memorandum of Law is attached.

Cities may exercise some land use control over religious organizations or individuals through zoning ordinances. *Christian Gospel Church Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990). [1] In 2000, the United States legislature enacted the Religious Land Use and Institutionalized Persons Act of 2000 [RLUIPA] (codified as 42 U.S.C. § 2000cc *et seq.*) codifying the limitations on land use control. 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 (a)(1), (2). If a religious group proves a land use regulation substantially burdens them, RLUIPA requires the government to show that the regulation furthers a compelling government 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 non-religious groups. 42 U.S.C. § 2000cc (b)(1).

In *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), the College filed an application with the City seeking approval of a zoning amendment to change the allowable uses on the property from a hospital to an educational facility. The City denied the College's rezoning application due to the College's failure to comply with the City's application requirements. The College subsequently filed a complaint and requested injunctive relief on the basis that the City's zoning process violated the First Amendment of the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 [RLUIPA]. 42 U.S.C. § 2000cc *et seq.*

The court held that in regard to the Free Exercise of Religion issue, "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 1030. (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). If the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion. *San Jose Christian College*, 360 F.3d at 1030-1031. A law is one of neutrality and general applicability if it does not aim to "infringe upon or restrict practices because of their religious motivation," and if it does not "in a selective manner impose

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[1] Religious organizations may also qualify for a waiver of permit application fees under San Diego Municipal Code section 112.0203 (b) as long as the expenditure of public funds serves a public purpose. However, to the extent the waiver is available only to residential religious customers, it is an unlawful gift of public funds and likely a violation of the establishment clause.

burdens only on conduct motivated by religious belief." (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U. S. at 533-534). The court held that the city's zoning ordinance applied throughout the entire City, and there was not even a hint that the College was targeted on the basis of religion for varying treatment in the City's application of the ordinance. Hence, the incidental burden upon the College's free exercise of religion was not violative of the First Amendment. *Id.* at 1032.

In *C.L.U.B. (Civil Liberties for Urban Believers) v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001), several churches sued the city, challenging an ordinance requiring a special use permit. The court held that the Zoning Ordinance as a whole and the special use provisions were neutral, generally applicable laws because the object of the Zoning Ordinance and special use provisions is to regulate land use and development. Moreover, the Zoning Ordinance is generally applicable since it did not "impose burdens only on conduct motivated by religious belief," i.e., the use regulations impact or "burden" all land owners within the City who seek a special use permit. *Id.* at 914-915.

Plaintiffs in *C.L.U.B* maintained that they had suffered hardship and inconvenience in their attempts to secure a location in which to celebrate their faith. Plaintiffs argued the Zoning Ordinance process was an economic hardship on smaller churches because these churches lack the funds and resources to apply for and receive a permit. The court asked: "Must the City waive the application fees for churches?" Must the government expedite special use permit applications filed by churches?" The court answered: "[N]o, because such obstacles face all similarly situated applicants." The court noted: "[W]hatever specific difficulties [the church] claims to have encountered, they are the same ones that face all renters, not merely churches." The "burden" - the requirement that an individual must go through the processes and meet the standards is a requirement imposed on all special use applicants, regardless of the character of the proposed use. Therefore, the court found the Zoning Ordinance and related provisions were valid, neutral and generally applicable zoning regulations that impose no substantial burden to the free exercise of religion. *Id.* at 915.

No published cases specifically address the waiver of processing fees in the context of free exercise of religion. However, in an unpublished opinion, in *Second Baptist Church v. Gilpin Township*, 2004 U. S. App. LEXIS 26858 (3d Cir. 2004), the court addressed a related issue. [2] In *Second Baptist Church*, the township passed an ordinance that required all buildings within 150 feet of a sewer line to "tap-in" to the sewer system. After extending the town sewer line to within 138 feet of the plaintiff church's property, the township notified the church that they would be required to "tap-in" to the sewer system. The church refused to comply, arguing that the burden imposed on the church was too great because it deemed the costs associated with the connection to be too onerous, and that enforcement would violate its rights to free exercise, among other rights.

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[2] Although this is an unpublished opinion and not binding, it serves as guidance on how a court may rule.

The court held that "[i]f a law is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." Id. at 618. The court found that the Ordinance was neutral as there were no facts that would support a claim either that the Ordinance was not generally applicable or that it directly burdened the Church's religious conduct. *Id.* at 618.

In the case of the proposed hardship variance processing fees, any fees associated with the processing and reviewing hardship variance applications are neutral because the object of the fee is to pay for the costs of processing the applications. There is no indication that the fee is intended to suppress the free exercise or celebration of religion. The fee is applicable to all citizens of the community. The requirement is imposed on all water use applicants, regardless of the character of the proposed use. It does not impose burdens only on conduct motivated by religious belief. Further, the economic hardship will be minimal, ranging from $25.00 to $100.00, depending on the size of the meter.

CONCLUSION

Based on the above, the City is not required to waive fees for a hardship variance for religious reasons. The proposed water restriction and processing fees, are not intended to suppress the free exercise or celebration of religion, and do not impose any burden motivated by religious beliefs. The fee is generally applicable to all citizens of the community.

JAN I. GOLDSMITH, City Attorney

By
Pedro De Lara Jr.
Deputy City Attorney

PDL:js:pev
Attachment
cc: Alex Ruiz, Assistant Director, Water Department
Andrea Tevlin, Independent Budget Analyst
ML-2009-6

ATTACHMENT

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

WILLIAM W. WITT
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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 ORGANIZATIONS 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.

CASEY GWINN, City Attorney

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By
William W. Witt
Deputy City Attorney

WWW:cdk
ML-2001-10
cc: Stephen M. Haase
Tina Christiansen