MEMORANDUM OF LAW

DATE: December 21, 1988

TO: Richard Enriquez, Business Manager, Park and Recreation Department

FROM: City Attorney

SUBJECT: Regulation of and Restrictions on Use of Park and Recreation Parklands and Facilities for Political Purposes

You have asked for our views concerning uses of Park and Recreation Department parklands and facilities for political purposes, and charging a use fee. You indicated that it has been departmental practice to allow the use of park facilities and outdoor park areas for political rallies and forums, and to charge fees only to a partisan forum that is not open to all candidates or their representatives. No fee is charged if a partisan event is conducted outdoors in an area where there is no established fee, however.

Due to the significance of this issue and its recurring nature, we shall attempt to comprehensively address all issues commonly associated with the uses of park areas and facilities for political purposes raised by your inquiry.

CONCLUSION

Our analysis of your inquiry leads us to conclude that partisan political organizations are entitled on an equal footing basis with nonpartisan organizations to the use of park areas and facilities that are traditional fora, and to be charged the same fees as are applied to other organizations. The right to such use includes the right to partisan political oratory and the distribution of political literature. Conversely, partisan political organizations are not entitled to the use of non-traditional fora, even though nonpartisan political organizations may be allowed such use. Political fund raising (whether partisan or nonpartisan) is legally permissible within the traditional public fora, but not within buildings or facilities used for government administration. Any use fees charged should be based on a content-neutral, rationally justified classification such as a "for profit" versus nonprofit status, rather than whether the organization is partisan or non-partisan oriented.

ANALYSIS

Regulation and restriction of political speech activity requires one to first address the nature of the particular forum

for expression of speech. Depending upon the classification of the fora, certain rules can then be expressed regarding the form of the speech (e.g., distribution of literature, oratory, fund raising) and the partisan or nonpartisan nature of the sponsoring organization.

To a certain extent, the principles and analysis herein also complement the conclusions recently reached in City Attorney Opinion 88-2 dated September 23, 1988 concerning seasonal displays of religious symbols in Balboa Park under first amendment rights of freedom of expression.

I. The Nature of the Forum and its Relation to the First Amendment.

The protection accorded to the expression of speech by the first amendment to the United States Constitution is not, in all cases, absolute. As noted in Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Srv., 812 F.2d 1194, 1196 (9th Cir. 1987), "the nature of the forum selected by the speaker determines which rule governs."

In Monterey County, a partisan political group challenged a U.S. Postal Service regulation which allowed voter registration on postal premises only by certain groups, and banned partisan political groups from using the premises. The Democratic Committee was denied permission to seat voter registration personnel along a covered walkway adjacent to the Post Office. The Post Office denied the permit on the basis of avoiding appearances of political favoritism in the delivery of public services. The Ninth Circuit held that the walkway was not a traditional public forum; as against the committee's contention that it was deprived of first amendment rights, it then held that the Post Office's regulation rationally served a governmental purpose.

The following quotation from Monterey County best describes the three classifications of fora and permissible use restrictions based on fora selection:

> Fora are grouped into three categories. The first includes places which "by long tradition or government fiat" have been utilized for assembly and debate. Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Public fora typically include streets, sidewalks and parks. Id. Government authority to regulate speech in these "quintessential" public fora is greatly limited. Id. In such places, communication

may not be entirely prohibited. Content-based exclusions are impermissible unless justified by a compelling state interest narrowly tailored to achieve that end. Id. The government may enforce content-neutral regulations concerning time, place and manner of expression which are narrowly drawn to serve "a significant government interest, and leave open ample alternative channels of communication." Id.

A second category of forum includes public property opened and designated by the state for the public as a place of expressive activity. Id. The government does not create a public forum through unconscious, unspoken practices or by permitting limited discourse, but "only by intentionally opening a non-traditional forum for public discourse." Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985). Courts refer to such fora as "limited" public fora, Perry, 460 U.S. at 48, 103 S.Ct. at 956, or public fora "by designation." Cornelius, 105 S.Ct. at 3450. First amendment questions involving these places are controlled by the rules applicable to traditional public fora.

Public fora by designation often will be narrowly defined. Thus, when limited discourse is permitted by select groups, a public forum open to indiscriminate use by all is not created. Cornelius, 105 S.Ct. at 3449. In such instances a limited public forum results, extended only to the original recipients of the government's permission and

to entities similar in character. Perry, 460 U.S. at 47-48, 103 S.Ct. at 956-57. Once opened, a limited public forum is not guaranteed an indefinite existence; the government may choose to close it and devote the property exclusively to its preexisting purposes. 460 U.S. at 46, 103 S.Ct. at 955.

The third category consists of non-public fora. In describing the government's powers to regulate these places, the Supreme Court

has stated: "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Id.

Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Srv., 812 F.2d at 1196.

From the foregoing outline, one may generally classify the open park spaces of Balboa Park as traditional public fora, although there may be some exceptions. Park administration buildings normally fit within the "non-public fora" category because of their governmental administration function. Those buildings or facilities or portions thereof that are commonly used for both public assembly and recreation purposes may fit into either a public or limited public fora classification, depending on past use and the restrictions that have governed such use. Ordinarily, however, facilities used principally for recreation purposes with only occasional speech related activities would not thereby become public fora.

II. Political Speech Activity

Political speech (oratory) could not be prohibited in traditional public fora. The fact that the speech or its form of expression may be partisan in nature, directed to the attainment of a particular political end or the election of a particular person, is related to the content thereof. As such, within the public fora, "content-based exclusions are impermissible unless justified by a compelling state interest narrowly tailored to achieve that end." See, Monterey Cty. Dem. Cent. Comm., 812 F.2d at 1196.

Normally, we could not perceive a compelling state interest to permissibly arise and be associated with partisan political speech in a public fora. Therefore, we would conclude that partisan political speech in open park areas could not be prohibited, and any regulation thereof would have to be related to a content-neutral regulation concerning the time, place and manner of such expression narrowly drawn to serve a significant government interest. Id. at 1196. We may observe that regulations addressed to the volume of amplified sound (if content-neutral) are permissible within this category. (Cf., San Diego Municipal Code section 59.5.0201, et seq. regarding noise abatement.)

III. Distribution and Display of Political Literature

The distribution or display of literature is another form of protected speech expression. Jews for Jesus, Inc. v. Board of

Airport Com'rs., 785 F.2d 791, 793 (9th Cir. 1986). Thus, regulations on distribution of political literature within the park should be based on the principles enunciated in Monterey County regarding the nature of the fora.

Distribution of literature, whether partisan or nonpartisan, cannot be prohibited in those areas classified as traditional or limited public fora. It may be prohibited in the non-traditional or non-public fora, however, so long as it is done in a reasonable manner and not merely to suppress unpopular types of speech. We believe that a prohibition on the dissemination of all political literature within this latter fora is also permissible. Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Srv., 812 F.2d at 1200.

However, if areas have been created within the non-traditional fora where non-City unofficial literature is allowed to be placed without restriction, such as bulletin boards or pamphlet racks, then you may have created a separate but "limited" public fora where only content-neutral, "time, place manner" restrictions may be applied. On the other hand, if the bulletin boards, racks or areas are not made available to the general public for expression or dissemination of speech, then the display of political literature in those racks may be prohibited, whether partisan or nonpartisan, to avoid appearances of political favoritism in the use of such facilities.

IV. Fund Raising

We next turn to issues respecting political fund raising in the park. It is clear that fund raising is activity that is

subject to first amendment protection. See, Heffron v. Int'l Soc. for Krishna Consc., 452 U.S. 640, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981); Acorn v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986). However, we first need to analyze this particular aspect in the light of certain restrictions that appear in the City Charter.

San Diego City Charter section 31(b) provides as follows:

> Every municipal employee shall prohibit the entry into any place under his control occupied for any purpose of the municipal government, of any person for the purpose of therein making, collecting, receiving, or giving notice of any political assessment, subscription, or contribution.

Based on the attached memorandum from legal intern Lauri Stock dated November 4, 1988, we interpret the Charter restriction to apply to administrative offices and work spaces, public works facilities and other buildings or facilities

involved with a governmental function, and not to open park areas used by the public. We also do not include a public recreation or assembly facility located in the parks within that prohibition, unless that facility is also used for a governmental administrative function. We may, however, construe the Charter provision as a prohibition against fund raising throughout an entire building, even though only a portion of the building is used for a governmental function. To do otherwise would create the anomaly that an employee could not prevent political fund raising adjacent to his office when legally bound to prohibit such within the office itself.

This interpretation of Charter section 31(b) is legally consistent with Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, L.Ed.2d 567, 105 S.Ct. 3439 (1985), which held that fund raising could be restricted in non-public fora so long as a reasonable distinction is drawn that is viewpoint neutral. The Court there noted that the government had presented a facially neutral justification for its exclusion of a public advocacy group from fund raising within a non-public forum (the Combined Federal Campaign) in order to avoid appearances of political favoritism between that group and other public advocacy groups. See, 87 L.Ed.2d at 583. To do otherwise would have required the government to open a non-public forum to the fund raising efforts of exponents of all ideas, both political and non-political, including those who litigate against governmental programs and policy.

Thus, prohibiting political fund raising only in non-public fora is consistent with Cornelius and Charter section 31(b) restrictions. Otherwise, to apply section 31(b) to include areas that are public fora would be contrary to Monterey County's injunction that one cannot prohibit protected speech activity in a public fora. 812 F.2d at 1196.

We may note, however, that funding raising activities can be fairly narrowly defined and, as a speech classification, the prohibition or regulation of such be supportable if a "compelling state interest" were determined to exist. Acorn v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986). We are not, at this time, aware that sufficient justification exists to make such a content based distinction, however. Therefore, since solicitation of funds is activity that is subject to first amendment protection, (see, Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. at 788), we are reluctant to categorically disallow such in the public fora by a partisan political activity. Id.; Monterey County, 812 F.2d at 1196.

V. Distinctions in Fees Charged, Based on Partisan

versus Nonpartisan Classifications

Differences in the fees charged to partisan versus nonpartisan political groups for the use of special facilities may raise "equal protection" issues under the Fifth Amendment to the U.S. Constitution. See, Monterey County, 812 F.2d at 1199-1200. In Monterey County, the Ninth Circuit maintained that regulation of partisan political speech in non-traditional fora does not violate the equal protection clause. The court then noted, 812 F.2d at 1199-1200, that:

> While distinctions between classes of speech may unconstitutionally burden equal protection rights, see, Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (ordinance unconstitutionally allowed labor picketing but prohibited non-labor picketing); Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (statute made unconstitutional distinction between peaceful labor picketing and other peaceful picketing), the viability of equal protection claims relating to expressive conduct is contingent upon the existence of a public forum. Perry, 460 U.S. at 55, 103 S.Ct. at 960. Only when rights of access associated with a public forum are improperly
>
> limited may we conclude that a fundamental right is impinged. Id. at 54, 103 S.Ct. at 959.

If the site is a public fora involving a "fundamental right" of use for speech purposes, (see, Monterey, 812 F.2d at 1200), then the rationale for charging different fees to partisan versus nonpartisan political activity - or, for political versus

non-political activity - is hard to justify, absent some "compelling state interest" justifying such a content-based difference within that fora.

Conversely, if the fora is not a traditional public fora, there is then no fundamental right to use it for speech purposes, such as would then create an equal protection argument. Id. However, it may also be harder to justify the more onerous fee based on classification of the organization because of the speech and ideas projected by or associated with that organization. Such content-based distinctions become constitutionally suspect, absent a rational basis. See, Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74

L.Ed.2d 794 (1983); Monterey Cty. Dem. Cent. Comm., 812 F.2d at 1196.

As we earlier stated, the municipal government may seek to limit or restrict political activity in non-traditional fora in order to maintain the public's confidence in civic administration and avoid appearances of political or doctrinal favoritism. Differential fees, in distinction to uniform fees, do not appear to serve this purpose.

VI. Additional Considerations Regarding Council Policy 700-11

We feel it is next appropriate to comment upon Council Policy 700-11 in a perspective with our analysis and discussion of the first amendment and political activities on parklands and facilities. Council Policy 700-11 provides generally that both partisan and nonpartisan political activity, other than open public debate by candidate at a "candidates' fora," is prohibited on land that is leased for less than fair market value. Council Policy 700-11 does not address political activity in parklands nor apply to operating permits and similar non-exclusive arrangements whereby no fees are charged to using groups.

However, many operating agreements and special use permits issued by the Park and Recreation Department contain similar restrictions on political activity within buildings operated for recreational assemblage purposes. These restrictions are consistent with the Council Policy.

Under these permit restrictions, such park buildings would not be considered traditional fora. See, Monterey County, 812 F.2d at 1196. Since the Council Policy does not prohibit political speech on an equal footing with other speech or activity when fair market value is paid, it avoids the stigma of public subsidy of politics, while allowing the use of such fora for recreational assemblage and other limited speech activity without creating a public forum.

We also note that the change to Council Policy 700-11 proposed by City Manager Report 88-574 (copy attached) is consistent with these views.

We shall be pleased to answer any further questions you may have that are prompted by your review of this memorandum.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:mrh:mb:301.1(x043.2)
Attachments
cc George I. Loveland

David Twomey
Jack Krasovich
Mary Anne Oberle
Terri Carroll
Lauri J. Stock
Harold O. Valderhaug
ML-88-108