MEMORANDUM OF LAW

DATE: January 19, 1993

TO: George I. Loveland, Park and Recreation Director

FROM: City Attorney

SUBJECT: Entertainers' Permits

Your department, through the Deputy Director of Central Division, sent us a memorandum asking if the Park and Recreation Department can legally charge a fee for permits that are issued to entertainers in Balboa Park. The Deputy Director also asked if entertainers can legally accept donations in public parks. We will answer that question in a separate memorandum.

Presently the Park and Recreation Department issues no-fee permits to entertainers for use of certain areas in Balboa Park. Entertainers' use of the public parks is protected speech under the First Amendment of the United States Constitution, which is extended to the states by the Fourteenth Amendment. "Entertainment as well as political and ideological speech, is protected . . . and live entertainment such as musical and dramatic works, fall within the First Amendment guarantee." Schad v. City of Mt. Ephraim, 452 U.S. 61, 65 (1981).

In Balboa Park, a traditional public forum, "the rights of the State to limit expressive activity are sharply circumscribed." Perry Ed. Association v. Perry Local Ed. Assn., 460 U.S. 37, 45 (1983). Although state infringement on First Amendment rights is limited, reasonable time, place, and manner restrictions which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication are allowed. Id. In this case, the permits are necessary to regulate the number and location of entertainers; the City is not attempting to restrict speech, but merely to cover costs of administering necessary permits.

In determining whether or not such a fee may be imposed, the issues courts consider are whether the amount of the fee is reasonable, and whether the reason for imposing the fee is to defray expenses of policing the activities in question. Murdock v. Pennsylvania, 319 U.S. 105 (1943). The Murdock court indicated that a nominal fee could be imposed as a regulatory measure to

defray the expenses of policing the activities in question. Id. at 113-114. Courts have upheld such licensing fees as a five dollar ($5.00) processing charge on daily permits to operate sound amplification devices, United States Labor Party v. Codd, 527 F. 2d 118 (2nd Cir. 1975); and an administrative fee of three dollars ($3.00) per thousand feet on films to be screened under a municipal film preview program, Universal Film Exchanges, Inc. v. City of Chicago, 288 F. Supp. 286 (N.D. Ill. 1968). In each of these cases, the governmental agency had been able to demonstrate that the fees were necessary to cover the reasonable costs of the system and that the fees were used for no other purpose than to meet these costs. "The fee was held to be 'not a revenue tax, but one to meet the expense incident to the administration of the Act . . . . ' There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated." Cox v. New Hampshire, 312 U.S. 569, 577 (1940). "License fees are proper for the costs of administering an event . . . ." Central Florida Nuclear Freeze Campaign v. Walsh, 774 F. 2d 1515, 1523 (11th Cir. 1985).

However, courts have also held that inability to pay a fee should not infringe on a First Amendment right. International Society for Krishna Consciousness of W. Pennsylvania, Inc. v. Griffin, 437 F. Supp. 666 (W.D. Pa. 1977). "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock, 319 U.S. at 111; cited in Central Florida Nuclear Freeze Campaign, 774 F. 2d at 1524. In finding a five dollar ($5.00) fee constitutional, the court in United States Labor Party, 527 F. 2d at 119, held that

> even if a fee requirement involving a First Amendment right must be 'closely scrutinized' to see whether it is reasonably necessary to a legitimate municipal goal, citations omitted the five-dollar fee represents less than the actual cost of the municipal service required. It is, therefore, a reasonable fee in the absence of proof of indigence . . . such as to make payment of even this modest fee beyond its reach . . . . Without proof of indigence, there is no discrimination against anyone in the circumstances.

As long as the fee proposed by the City for an entertainers' permit can be substantiated as the actual cost of the municipal

service required, a person claiming that the fee is too high must provide proof of indigence before a waiver need be granted.

It is important to differentiate between a fee to recover the costs of administering a permit, and a flat tax imposed on entertainment. In prohibiting a tax on distribution of religious literature, the Murdock court held that a state may not impose a charge for the enjoyment of a right granted by the federal Constitution, and specifically held that the prohibited tax was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." Murdock, 319 U.S. at 113.

The permits for which the proposed fee would be required are granted by the City on a first-come, first-serve basis, so the content of the entertainment is not at issue; nor is a permit granted or denied on the basis of content. Likewise, as constitutionally required, if a person cannot afford the fee, it may be waived with proof of indigence.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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