

## MEMORANDUM OF LAW

DATE: January 24, 1995

TO: Sergeant Bob O'Donnell, Police Department

FROM: City Attorney

SUBJECT: Authority to Deny Free Police Services Under Special Events Ordinance (SDMC Section 22.0207(d)(5))

### Question Presented

By memorandum dated September 14, 1994, you asked for an interpretation of San Diego Municipal Code ("SDMC") section 22.0207(d)(5), pertaining to the City Manager's authority to provide free police services for certain special events. Specifically, you ask whether the City Manager, or his delegate the Police Chief, may deny an organization a request for a waiver of up to \$3,000.00 in City fees for police services, if that organization does not provide a "tangible benefit to the community."

### Background

The question arises in part because the Special Events Unit of the Police Department ("Unit") has been directed to review its operating procedures and consider ways to reduce costs. It also arises in part because a citizen has questioned whether an applicant for a special events permit which purports to be a non-profit tax exempt organization is in fact a non-profit tax exempt organization. If it is indeed such an organization, the applicant is eligible for a waiver of costs for services the City provides to support a non-commercial special event. That particular organization held two special events in the past year and received roughly \$5,000.00 in free services from the Unit. That same organization recently applied for a permit to hold another event which you estimate will cost the City approximately \$4,000.00 in support services.

The Unit investigated this organization and found that it has not used any of the profits from the previous two events to "benefit the community." Since the applicant organization has been unable to demonstrate that its prior special events provided "tangible benefits to the community," you query whether the Unit may deny the organization's request for a waiver of costs for City services for the upcoming special event.

### Short Answer

The City Manager may deny an applicant's request for a cost waiver

if there will be no tangible benefit to the public resulting from the applicant's non-commercial special event, so long as that criterion is applied uniformly to all applicants requesting a cost waiver.

#### Analysis

The City of San Diego Special Events Ordinance ("the Ordinance") is located at SDMC section 22.0207. Among other things not relevant to your question, the Ordinance makes it unlawful to conduct, promote, manage, aid, solicit attendance at, or participate in, any special event or demonstration without a written permit from the City Manager. SDMC Section 22.0207(d)(1).

SDMC section 22.0207(d)(5) states that "issuance of the permit pursuant to this section does not obligate or require the City Manager to provide City services, equipment or personnel in support of an event." Section 22.0207(d)(5) also authorizes, but does not require, the City Manager "to provide City services, equipment or personnel in direct support of a non-commercial special event the costs of which do not exceed \$3,000.00, without Council authorization, if within budget limitations, provided the City Manager finds that a public purpose will be served."

#### 1. Effect of budget limitations

Under the above-quoted portion of SDMC section 22.0207(d)(5) pertaining to budget limitations, neither the Manager nor his delegate the Police Chief, is ever required to grant a waiver of costs for special events. To the contrary, the authority to grant a waiver exists only if "budget limitations" allow it. If the Unit is under a directive to curb costs for budgetary reasons, this Ordinance provides full authority to (perhaps even creates an obligation in) the Manager and the Police Chief to deny an applicant's request for waiver of costs. We caution you, however, that if budget limitations require denial of one applicant's request for a waiver of costs, then all applicants' requests for waivers during the same time period should be denied. To deny one applicant's request for budgetary reasons only and to grant others' requests in the same time period despite the same budgeting constraints would possibly create a constitutionally defective treatment of applicants.

#### 2. Meaning of phrase "non-commercial special event"

Assuming budget limitations allow, SDMC section 22.0207(d)(5) authorizes the Manager to waive City costs only for non-commercial special events. Although not clearly shown to apply to SDMC section 22.0207(d)(5), the phrase "non-commercial special event" is defined in part in the Ordinance to mean any special event organized and conducted by an organization that qualifies as a tax exempt non-profit organization. SDMC Section 22.0207(n)(1)(b). For purposes of the Ordinance, a "tax exempt non-profit organization" means an organization "that is exempted from payment of income taxes by federal or state law and which has been in existence for a minimum of six (6) months

preceding the date of application for an event." SDMC Section 22.0207(c)(5). For purposes of establishing eligibility for consideration as a non-profit tax exempt organization,F

If you obtain evidence that an organization is misrepresenting its tax exempt status or misrepresenting other material facts in order to obtain a cost waiver, you should refer the matter to the Consumer and Environmental Protection Unit of the City Attorney's Criminal Division. You may verify an organization's federal tax exempt status by obtaining a copy of its tax exemption letter, or by telephoning the Internal Revenue Service at (213) 894-2289 or (213) 894-2336. You may verify an organization's state tax exempt status by telephoning the California Franchise Tax Board at

1-800-852-5711.

the applicant

for a special events permit is required to submit only a copy of its tax exemption letter. SDMC Section 22.0207(f) (1)(iv).

3. Meaning of the phrase "a public purpose will be served"

In addition to specifying that a waiver of City costs is available only for "non-commercial special events" and only if budget limitations allow, SDMC section 22.0207(d)(5) further requires that the Manager determine whether "a public purpose is or will be served" by the event. There is no definition of the phrase "public purpose" in the Ordinance. Although the Ordinance sets forth four factors (discussed below) the Manager must consider in determining whether a public purpose will be served by a particular event, thereby determining whether the event is eligible for a waiver of costs, it is instructive to review first the legal underpinnings of this phrase.

a. The legal doctrine prohibiting gifts of public funds and the "public purpose" exception

As pointed out above, there is no definition of the phrase "public purpose" in the Ordinance. Although the legislative intent of this phrase is not expressed in the Ordinance, this language may well be an attempt by the drafters to avoid running afoul of the legal doctrine prohibiting gifts of public funds. In brief, this doctrine prohibits gifts of public funds made for the benefit of private individuals, associations or corporations, unless there is a "public purpose" for the expenditure. This doctrine and its "public purpose" exception were explained at length in a Memorandum of Law, dated December 2, 1994, by Deputy City Attorney Kelly J. Salt, a copy of which is attached. That doctrine will not be reexamined here, except to stress the principle behind the "public purpose" exception. As stated in that Memorandum of Law, "if a public purpose is served through the use of public funds, no 'gift' has been made even though a private individual, association or corporation may benefit from the loan or expenditure."

As further pointed out in that Memorandum, "the determination of what constitutes a public purpose is primarily a matter left to

legislative discretion; and the courts grant great deference to legislative bodies in reviewing the exercise of that discretion." *Id.* at 4-5. In the present Ordinance, the City Council has exercised its legislative discretion by setting forth four factors that the Manager must use to determine whether a public purpose will be served by the proposed special event, thereby justifying a waiver of up to \$3,000.00 in City costs. These four factors are discussed below.

b. Application of four factors to determine whether public purpose is served

As pointed out above, the Ordinance contains no definition of this phrase, but rather it sets forth four (4) factors the Manager is required to consider in determining whether a public purpose is served, namely:

- (1) whether the event is organized and conducted by a tax exempt non-profit organization which operates from or provides services within the City or County of San Diego;
- (2) whether the event provides a benefit to the general public;
- (3) whether the event does or does not exclude participation by the general public (notwithstanding an admission or participation fee); and
- (4) whether the City services provided will result in improved crowd or event control and general public safety.

If the City Manager finds all of these four (4) factors to be met and if budget limitations allow, the City Manager may, but is not required to, waive up to \$3,000.00 of the City's costs for non-commercial special events.

The focus of your specific inquiry, however, is about whether the Manager may deny a particular applicant's request for a cost waiver for an upcoming event on the grounds that applicant had failed to show how two prior events the applicant held had benefitted the public in a tangible way even though cost waivers had been granted for both of those events. In response to this specific inquiry, we think first that the Manager's decision about whether to grant a cost waiver cannot be based on the City's experience with the applicant's two prior events. The Ordinance, particularly the second factor, requires the Manager to base his decision on the event for which the applicant is requesting a cost waiver. Second, we believe that the Manager, or his delegate the Police Chief, may reasonably interpret the second factor to require that some tangible, as opposed to intangible, benefit will result from the special event. If the Manager or the Police Chief were to adopt this administrative interpretation, then this interpretation should be applied uniformly to all applicants for a cost waiver in order for the interpretation to pass constitutional muster. Failure to apply the interpretation uniformly to all applicants may result in unlawful discriminatory treatment of applicants. To guard against disparate treatment of applicants, the Manager may wish to exercise his rulemaking

authority under SDMC section 22.0207(m) to adopt this interpretation. That rulemaking authority may be delegated to others, including the Chief of Police. SDMC Section 22.0207(p).

Conclusion

Under the City's Special Events Ordinance the City Manager may, but is not required to, grant someone a waiver of up to \$3,000.00 for costs of City services provided to support non-commercial special events, if several factors are met. SDMC Section 22.0207(d)(5). One of those factors is whether the event will provide a benefit to the general public. The City Manager, or his delegate the Police Chief, may reasonably interpret the phrase "benefit to the general public" to require that the special event provide a "tangible" benefit to the public. If such an interpretation were to be adopted, it should be applied uniformly to applicants for the fee waiver.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:pev:jrl:66(x043.2)

Attachment

cc: Joe Battaglino, Police Legal Advisor

John Vanderslice, Police Legal Advisor

Mary Nuesca, Police Legal Advisor

Bill Newsome, Head Deputy, Consumer  
and Environmental Protection

Carolyn Wormser, Special Events Administrator

Victoria Gilner, Assistant to Chief of Police

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