Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 5533-5800

DATE: February 8, 2024

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: First Amendment Protection of Expressive Merchandise and Performances in Public Spaces in San Diego

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INTRODUCTION

The First Amendment to the United States Constitution, which applies to the actions of states through the Fourteenth Amendment, protects an individual's right to free speech and to peaceably assemble. U.S. Const. amend. I; U.S. Const. amend. XIV, § 1. The California Constitution also protects the right of every person to "freely speak . . . his or her sentiments on all subjects" and provides that no law may "restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2.

On October 5, 2023, the San Diego City Council (Council) Committee on Community and Neighborhood Services (Committee) considered proposed amendments to the San Diego Municipal Code (SDMC or Municipal Code) intended to balance the public's First Amendment rights against the City of San Diego's (City) interest in public safety and access to public facilities, including City parks and sidewalks. Specifically, the Committee focused on the sale of merchandise and performances in City parks, on City sidewalks (collectively, Parks regulations), and the Sidewalk Vending Ordinance (SVO) (San Diego Municipal Code sections 36.0101 – 36.0116). Both the Parks regulations and the SVO currently exempt from the SVO any vendor or individual "engaged solely in artistic performances, free speech, political or petitioning activities" or who is vending "items constituting expressive activity protected by the First Amendment." SDMC § 36.0113(a)(1).

The proposed amendments create a new Division of the Municipal Code that regulates expressive activity by individuals and small groups[1], including the sale of merchandise and performances occurring on City property.[2] SDMC §§ 63.03 – 63.50. The proposed amendments would clarify which activities by individuals constitute expressive activity and would continue to be exempt from the SVO.

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[1] A "small group" means a group of persons under 75 people. A group larger than 75 people is governed by the Special Events Ordinance. *See* SDMC § 22.4003(a).

[2] Government regulation of large groups engaged in speech protected by the First Amendment, such as protests and parades, is subject to its own set of rules and regulations supported by established case law and goes beyond the scope of the proposed amendments to the Municipal Code and this memorandum.

Since the proposed amendments to the SDMC primarily address activities occurring in City parks and sidewalks, this memorandum focuses on regulation of speech in those traditional public fora[3] and provides guidance on the most common scenarios of regulation of expressive activity in the City.[4]

I. CITY CAN REGULATE EXPRESSIVE ACTIVITIES

Cities can impose "reasonable regulations governing the time, place or manner of speech" despite the broad protections afforded speech guaranteed by the United States Constitution and the California Constitution. These regulations cannot be based on the content of speech. *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009).

To pass constitutional scrutiny, the City may adopt reasonable regulations on the time, place, or manner of how someone engages in speech activities in traditional public fora that are:

- content neutral;
- narrowly tailored to serve a significant government interest; and
- leave open ample alternative channels for communication of the information.

Berger, 569 F.3d at 1036.

Further, "the government bears the burden of justifying the regulation of expressive activity in a public forum . . ." *Berger*, 569 F.3d at 1035. *See* City Att'y MOL No. 2016-8 (May 19, 2016) (attached to this memorandum as Attachment A), which has a full discussion of these factors.

II. CERTAIN SALES ACTIVITIES ARE EXPRESSIVE AND THEREFORE FULLY PROTECTED SPEECH SUBJECT ONLY TO TIME, PLACE, AND MANNER REGULATION

The chart below describes some common activities occurring in City parks and on City sidewalks and identifies whether the activities are protected by the First Amendment, or not, and the relevant legal authority.

[3] "The protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora." *Berger*, 569 F.3d at 1036.

[4] This memorandum does not address all regulations applicable to First Amendment activity. For instance, a street performer or vendor engaged in fully protected expressive activity under the First Amendment may still be required to obtain a Business Tax Certificate under the Municipal Code (Chapter 3, Article 1, Division 1), or other types of certificates and licenses, depending on the activity.

Activity	Protected Speech?	Legal Citation
A performer making balloon sculptures, face painting, performing magic tricks, dancing, performing as a human statue, and other forms of expressive entertainment.	Yes.	*See Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009); *Santopietro v. Howell*, 73 F.4th 1016 (9th Cir. 2023).
A performing musician, including the musician who sells their own recordings.	Yes.	*See Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009); *Santopietro v. Howell*, 73 F.4th 1016 (9th Cir. 2023).
An individual or group passing out pamphlets, flyers, newspapers, or other written material. This activity may include sales of related materials furthering the message being conveyed.	Yes.	*See Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990).
An individual who provides henna tattoos.	Possibly. Traditional tattoos, which are permanent in nature, are protected speech. The courts have not addressed whether a henna tattoo, which is temporary and more like face painting, is protected.	*See Anderson v. City of Hermosa Beach,* 621 F.3d 1051 (2010); *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009); *Santopietro v. Howell*, 73 F.4th 1016 (9th Cir. 2023).

Activity	Protected Speech?	Legal Citation
An individual who provides fortune telling, tarot card reading, and similar activities.	Yes.	*See Adams v. City of Alexandria,* 878 F.Supp.2d 685 (2012).
An artist drawing caricatures or creating other art, including plein air and sidewalk chalk.[5]	Yes.	*See White v. City of Sparks,* 500 F.3d 953 (9th Cir. 2007).
An artist selling the artist's own original artwork, including paintings, photographs, and sculptures.	Yes.	*See White v. City of Sparks,* 500 F.3d 953 (9th Cir. 2007); *ETW Corp. v. Jireh Pub., Inc.,* 332 F.3d 915, 924 (6th Cir. 2003).
An author or poet selling or giving away the author's or poet's original written work.	Yes.	*See White v. City of Sparks,* 500 F.3d 953 (9th Cir. 2007)
A vendor selling mass produced jewelry, posters, t-shirts, mugs, or other merchandise (for example, with the name of a university, city, or with images or symbols).	No.[6]	*See Winter v. DC Comics*, 30 Cal. 4th 881 (2003); *White v. City of Sparks,* 500 F.3d 953 (9th Cir. 2007).
A vendor selling articles of clothing whether bearing a message or not.	No, unless the item sold is "inextricably intertwined" with political, religious, ideological, or other messages.[7]	*See Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990); *Winter v. DC Comics*, 30 Cal. 4th 881 (2003); *Cohen v. California*, 403 U.S. 15 (1971); *see* fn.5.

[5] Artwork created on public property that damages or defaces that property may be cited under state and local laws prohibiting defacement of public property. *See* SDMC § 63.0102(c)(5).

[6] The fullest extent of First Amendment protections may apply to sales of merchandise not generally considered expressive if the merchandise is "inextricably intertwined" with political, religious, ideological, or other messages. U.S. Const. amend. I.

[7] "Inextricably intertwined" means that the message is transmitted through the product. *Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990).

Activity	Protected Speech?	Legal Citation
A vendor selling soaps, oils, creams, salves (ointments), lotions, make-up, and other skin care products, whether mass-produced or handmade.	No.	*See Hunt v. City of L.A*, 638 F.3d 703 (2011).
A vendor selling tie dyed shirts made by the vendor or hats with images or patches added by the vendor.	No, unless the item sold is "inextricably intertwined" with political, religious, ideological, or other messages.	*See Cohen v. California*, 403 U.S. 15 (1971); *Winter v. DC Comics*, 30 Cal. 4th 881 (2003); *Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990); *White v. City of Sparks,* 500 F.3d 953 (9th Cir. 2007).
A vendor selling incense, sage smudges, or other related items.	No.	*See Hunt v. City of L.A.,* 638 F.3d 703 (2011).
A vendor selling jewelry, pottery, or metalwork that the vendor made themselves.	No.	*See Cohen v. California*, 403 U.S. 15 (1971); *Winter v. DC Comics*, 30 Cal. 4th 881 (2003).
An instructor teaching exercise, yoga, or dog training classes.	No.	*See City of Dallas v. Stranglin,* 490 U.S. 19, 25 (1989); *Daly v. Harris,* 215 F. Supp.2d 1098, 1108 (D. Haw. 2002).

III. COMMERCIAL SPEECH CAN BE REGULATED TO A GREATER DEGREE THEN EXPRESSIVE ACTIVITY WITHOUT A SOLELY COMMERCIAL PURPOSE

Commercial speech is not fully protected under the First Amendment and can be regulated. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (*quoting United States v. United Foods, Inc*., 533 U.S. 405, 409 (2001)); *Cent. Hudson Gas & Elec. v. Pub. Serv.*

Comm 'n of New York, 447 U.S. 557, 562-63 (1980). An example of commercial speech would be the promotion of a product, such as through a print advertisement or a television commercial. *Ariix, LLC v. NutriSearch Corp*., 985 F.3d 1107, 1119 (2021). Most sidewalk vendors are likely to be engaged in commercial sales, which involves speech "that does no more than propose a commercial transaction" and thus does not receive full protection under the First Amendment. When commercial speech is at issue, the time, place, or manner analysis of regulations on that speech do not apply. *Hunt,* 638 F.3d at 715. Rather, the *Central Hudson* test is used to analyze restrictions on commercial speech. Under the *Central Hudson* test, courts will determine:

(1) whether the speech concerns a lawful activity and is not misleading[8];

(2) whether the asserted governmental interest in regulating the speech is substantial;

(3) whether the regulation directly advances the governmental interest asserted; and

(4) whether the regulation is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 564; *see also Hunt v. City of Los Angeles,* 638 F.3d 703, 717 (9th Cir. 2011); 2011 City Att'y MOL 60 (2011-4; May 19, 2011) (discussing the *Central Hudson* standard with respect to corporate sponsorship regulations). In short, the City may adopt more restrictive regulations on commercial speech then fully protected expressive activity.

IV. EXPRESSIVE ITEMS LIKE ARTWORK, NEWSPAPERS, AND MUSIC RECORDINGS THAT ARE SOLD RATHER THAN GIVEN AWAY ARE PROTECTED BY THE FIRST AMENDMENT

First Amendment protection of speech is not diminished because an item is sold rather than given away or because a donation is requested. *White*, 500 F.3d at 956. Further, "speech that solicits funds is protected by the First Amendment." *Berger*, 569 F.3d at 1053. Since solicitation of donations is protected speech, regulations on solicitation are subject to the same scrutiny as other forms of protected speech (i.e., the City may adopt reasonable time, place, or manner regulations on solicitation activities to address a legitimate government concern). In San Diego, the City already regulates solicitation that is coupled with aggressive behavior. SDMC §§ 52.4001 – 52.4006. However, solicitation itself is not banned.

V. THE CITY CAN REGULATE SPEAKERS BY USING DESIGNATED AREAS FOR EXPRESSIVE SPEECH

In *Berger*, the court assessed whether Seattle Civic Center's "Performance Location Rule," which placed performers in one of sixteen designated locations for expressive speech, constituted a reasonable time, place, or manner regulation of speech. Although the *Berger* court did not have sufficient evidence from the complaining performer to assess the constitutionality of the

[8] "Misleading" means "deceptive" and is "calculated to lead astray or to . . . give a wrong impression. *Misleading*. Black's Law Online Dictionary, https://thelawdictionary.org/?s=misleading (last visited January 18, 2024).

"Performance Location Rule," the *Berger* court approved of the City of Seattle's stated governmental interests in addressing territorial disputes among performers and providing safe access and paths of travel. *Berger*, 569 F.3d at 1049. The court also determined that the rule did not prevent the performers from reaching their intended audience when performing. *Berger*, 569 F.3d at 1050.

In addition to the interests discussed in *Berger*, the City has an interest in balancing the use of public spaces and limiting confusion among the individuals exercising their free speech rights while ensuring the highest level of public safety throughout the City. The City may legally adopt expressive activity locations in parks and high-traffic areas where City staff determine there are significant concerns about competing uses and safe access to and travel within those areas. When adopting expressive activity locations, the City must ensure sufficient locations are created to allow speakers and performers to have reasonable access to their intended audiences. The City may also ask speakers and performers to comply with other generally applicable laws, including those prohibiting people from blocking pedestrian and vehicular paths of travel. If a speaker or performer attracts a crowd, enforcement officials may ask the speaker or performer to move to another area where the crowd will not block the flow of traffic or may ask the speaker or performer to request the audience be aware of their surroundings and not block the flow of traffic.[9]

VI. THE CITY CANNOT BAN AMPLIFICATION

Although a complete ban on amplification in City parks and sidewalks is unlikely to survive legal challenge, the City can adopt reasonable regulations limiting the use of amplification or the hours of its use in areas where it can demonstrate a significant public interest in regulating the use of amplification (for example, near residences where a municipality's interest in protecting its citizens from unwelcome noise "is at its zenith"). *Cuviello v. City of Vallejo*, 944 F.3d 816 (2019). In *Cuviello*, the court recognized the City of Vallejo's significant interest in protecting its citizens from unwelcome noise and from unsafe traffic conditions because of noise. *Cuviello,* 944 F.3d at 828. However, the court found that Vallejo's permit requirement was not sufficiently narrowly tailored because it applied the same noise level restriction to high noise level locations, like in front of a noisy theme park, and to low noise locations where people would go to seek peace and solitude. *Cuviello,* 944 F.3d at 830.

Based on *Cuviello's* holding, the City may adopt reasonable decibel restrictions in areas close to residences and other locations where the City has a significant interest in protecting citizens from unwelcome or excessive noise. Any regulations should be drafted to only apply in locations where noise is a concern. For example, the decibel restrictions could be more restrictive in areas that are close to residences, and higher decibel levels could be adopted for high-traffic areas of parks and boardwalks during daytime hours when higher noise levels are expected.

[9] Under the proposed ordinance, the City Manager may set aside expressive activity areas specifically for speakers or performers using equipment who are likely to draw a crowd. The City Manager may set aside certain designated areas specifically for those expressive activities likely to draw a crowd provided they are located in areas where the speaker or performer can still reach the intended audience.

VII. THE CITY CAN REGULATE THE USE OF TABLES AND OTHER EQUIPMENT

The City can regulate the use of tables, easels, and other equipment to facilitate dissemination of an expressive message if its regulations are reasonable and designed to address a significant City interest. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006). In *A.C.L.U. of Nevada,* the Court considered whether the City of Las Vegas' ordinance banning the use of tables was a constitutional time, place, or manner restriction on speech. The court stated that the use of tables on public sidewalks should be protected if it "facilitates" dissemination of its message (by, for example, serving as a place to display t-shirts bearing a message.) *A.C.L.U. of Nevada,* 466 F.3d at 798. However, the same cannot be said of the use of chairs, umbrellas, and boxes since those items do not facilitate dissemination of a message, but rather provide comfort and convenience to vendors. *A.C.L.U. of Nevada,* 466 F.3d at 799.

The City can adopt reasonable regulations related to an individual speaker's use of equipment to address a significant government interest (such as ensuring safe and accessible paths of travel in those City parks with high volumes of visitors and narrow walkways). One method to regulate the use of equipment in those situations could require individuals who use equipment to limit their expressive activities to established expressive activity areas to ensure the speakers are not blocking walkways, accessible routes, or safety paths. Additionally, the City may adopt reasonable equipment size requirements for those individuals using them to support their speech.

CONCLUSION

The proposed amendments to the San Diego Municipal Code are intended to provide City staff and the public with guidance regarding the First Amendment as it pertains to the sale of merchandise, speeches, and performances under the SVO and under the Municipal Code in public spaces. This Office is ready to assist as needed.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/*Catherine C. Morrison*
Catherine C. Morrison
Deputy City Attorney

CCM:jvg
MS-2024-1
Doc. No. 3558087
Attachment A: First Amendment Issues Related to the Regulations of Fitness and Yoga Classes in City Parks and Beaches
cc: Charles Modica, Independent Budget Analyst
Andy Field, Director of Parks and Recreation
Michael Ruiz, Chief Park Ranger

ATTACHMENT A

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

HEATHER M. FERBERT
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

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

MEMORANDUM OF LAW

DATE: May 19, 2016

TO: Stacey LoMedico, Assistant Chief Operating Officer
Herman Parker, Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: First Amendment Issues Related to the Regulation of Fitness and Yoga Classes in City Parks and Beaches

INTRODUCTION

San Diego Municipal Code section 63.0102 regulates conduct and activities in the City's parks, plazas, beaches and beach areas (parks and beaches). Municipal Code section 63.0102(b)(24) specifically prohibits groups of fifty persons or more from engaging in certain activities in the parks and beaches without prior written consent. The constitutionality of this section was challenged by a yoga instructor, who alleged the large group regulation violated speech rights protected by the First Amendment to the United States Constitution. City staff has requested advice from the Office of the City Attorney about the First Amendment protections available to fitness and yoga classes and what steps the City may take to regulate such classes held in the parks and beaches.

QUESTIONS PRESENTED

1. Are fitness and yoga classes protected by the First Amendment when conducted in the City's parks and beaches?

2. What alternatives are available to the City to address fitness and yoga classes in the parks and beaches?

SHORT ANSWERS

1. No. A reviewing court would likely find fitness and yoga classes to be conduct that is not generally protected by the First Amendment.

2. The City may enforce the permit requirement in Municipal Code section 63.0102(b)(24) for fitness or yoga classes of fifty or more persons in the City's parks and beaches. If the City desires to regulate fitness and yoga classes of a smaller size, the City could adopt regulations or a permitting program applicable to those fitness and yoga classes.

BACKGROUND

The Municipal Code prohibits certain activities in City parks and beaches "in the interests of protecting the enjoyment and safety of the public in the use of these facilities, as well as the natural resources of the City." SDMC § 63.0102(a). Subsection (b)(24) prohibits certain activities by large groups and states:

> (24) Large Groups. Except as otherwise required or permitted by Chapter 2, Article 2, Division 40 of this Code, it is unlawful for any group of persons consisting of fifty or more persons to hold, conduct or participate in any celebration, parade, service, picnic, exercise, or other special event in any park, plaza, or beach without having first obtained a permit from the City Manager.

Written consent for a large group activity is issued, in the form of a permit, by the Permitting Official[1] "if there is capacity for the proposed activity." SDMC § 63.0103; *see also*, City Att'y MS 2015-2 (Feb. 2, 2015).

Municipal Code section 63.0102 was recently challenged with respect to the City's regulation of large group activities in *State of California v. Hubbard*. Mr. Hubbard challenged infractions issued to him for violation of Municipal Code section 63.0102(b)(24), arguing that his conduct was protected by the First Amendment. Y000678 and Y000679, Statement of Decision dated Feb. 6, 2014, (San Diego Superior Court). Mr. Hubbard was cited for conducting yoga classes in a City park that exceeded fifty people without a permit. *Id.* Hearing the infraction trials, the Commissioner found Mr. Hubbard not guilty and found Municipal Code section 63.0102(b)(24) "unconstitutional on its face and as applied" because the ordinance "run[s] afoul of . . . *Long Beach Area Peace Network v. City of Long Beach* (9th Cir. 2008) 574 F.3d 1011 in requiring a permit for gatherings exceeding 50 people." *Id.* at 3. The Commissioner further found Municipal Code section 63.0102(b)(24) unconstitutionally vague and to have a chilling effect as applied to Mr. Hubbard, but did not address whether Mr. Hubbard's conduct was protected by the First Amendment. *Id.*

The Commissioner's findings are conclusive with regard to the specific citations and allegations at issue in Mr. Hubbard's case, but do not apply to future citations issued by the City because they are not binding legal precedent. *See Sanderson v. Niemann*, 17 Cal. 2d 563, 575 (1941); *Sanders v. Walsh*, 219 Cal. App. 4th 855, 869-70 (2013).

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[1] Municipal Code section 63.0102(b) authorizes the City Manager to grant permission or written consent for certain activities in the parks. Municipal Code section 63.0110 defines "City Manager" as including the City Manager, the Director of the Park and Recreation Department (Department) and any other person designated by the City Manager to carry out and enforce Chapter 6, Article 3, Division 1 of the Municipal Code.

This Memorandum will first provide a general overview of the First Amendment protections available to speech and speech-related conduct and will then discuss whether fitness and yoga classes are protected speech conduct and what legal restrictions apply to the City's ability to regulate fitness and yoga classes in the City's parks and beaches.

ANALYSIS

I. THE FIRST AMENDMENT PROTECTS CERTAIN SPEECH-RELATED ACTIVITIES, BUT SOME "TIME, PLACE AND MANNER" REGULATIONS MAY BE PERMISSIBLE

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. These provisions are applicable to actions of the states through the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1. The California Constitution also protects the right of every person to "freely speak . . . his or her sentiments on all subjects" and provides that no law may "restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2. As a threshold issue, whether a reviewing court would apply federal or state law to a claim challenging the City's regulation of activities implicating the expression of free speech would depend upon the legal theories presented by the plaintiff in the specific case.[2] Generally, the California Constitution and case law construing it gives greater protection to the expression of free speech than the United States Constitution. *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1025 (2002). California courts draw upon both state and federal law for their state constitutional analyses. *Id.* at 1025-26.

The City's ability to limit speech is dependent, in part, on the type of forum (i.e. the place) where the speech will occur. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Public parks have frequently been held to be "traditional public forums" where the First Amendment protections are at their greatest. *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009); 1996 City Att'y MOL 401 (96-42; Aug. 12, 1996); 1994 City Att'y MOL 809 (94-90; Nov. 14, 1994); *compare Kaahumanu v. Hawaii*, 682 F.3d 789, 800 (9th Cir. 2012) (declining to determine that all state beaches are traditional public fora).

A. Content Based and Content Neutral Regulations Compared

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Regulations implicating protected speech are

[2] A court usually will evaluate whether the conduct merits First Amendment protection if the constitutionality of the regulation as applied to the speaker is challenged. By contrast, if the challenge to a regulation was raised on its face – for example under the First Amendment's vagueness or overbreadth doctrines, discussed in Section II of this Memorandum – "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face" because of the potential chilling effect on legally protected speech. *Board of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 5774 (1987).

subject to different legal standards according to whether the regulation is a "content based" regulation or a "content neutral" regulation. A "content based" regulation is one that distinguishes favored speech from disfavored speech based on the ideas or on the identity of the speaker. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002). By contrast, a regulation is "content neutral" if it is based on something other than the content of the speech. *Long Beach Area Peace Network*, 574 F.3d at 1024. A permit system that is not directed specifically at communicative activity "but rather to *all* activity conducted in a public park" is content neutral. *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002).

The City's permitting requirements in Municipal Code section 63.0102 generally address all activity in the parks and beaches and do not distinguish activities that involve protected speech or the individuals requesting permits. In order to obtain a permit, Municipal Code section 63.0103(b) requires the applicant provide information "as to the proposed activity, the sponsoring person or organization, the number of persons expected to attend, the proposed park area to be used, the proposed date and time of the event, the duration in time, and the proposed alternate park areas and dates, if any." Additionally, according to information provided by the Department, the Permitting Official does not inquire into the content of the proposed activity or speech. Therefore, a reviewing court would likely find the permitting requirements in Municipal Code section 63.0102 to be content neutral and directed at all activities conducted in the parks and beaches, similar to the regulations upheld in the *Thomas* decision.

B. Content Neutral Time, Place and Manner Regulations

A content neutral time, place, and manner regulation is permissible if the following four criteria are satisfied: (1) the government interest in adopting the regulation is substantial; (2) the regulation is narrowly tailored to meet that government interest; (3) the regulation leaves open ample alternatives for communication; and (4) the regulation does not confer "unbridled discretion" on the permitting official. *Long Beach Area Peace Network*, 574 F.3d at 1024-25. "Regulations of the use of a public forum that ensure the safety and convenience of the people are not 'inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend." *Thomas*, 534 U.S. at 323 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). Consistent with case law, this Office previously has determined that the City may generally require permits to regulate use of the parks and beaches. *See* 1996 City Att'y MOL 401 (96-42; Aug. 12, 1996); 1994 City Att'y MOL 809 (94-90; Nov. 14, 1994) (addressing limitations on City regulation of sales and solicitation protected by the First Amendment).

1. The City Must Have a Substantial Government Interest in Regulating Parks and Beaches

The City's regulation of conduct in the parks and beaches must address a government interest that is "substantial and 'unrelated to [the] suppression of expression.'" *Long Beach Area Peace Network*, 574 F.3d at 1024 (citation omitted). Governments have a substantial interest in regulating competing interests and overlapping uses of parks and in the preservation of park facilities. *Thomas*, 534 U.S. at 322. Maintaining the orderly movement of crowds and protecting

the safety and convenience of persons in a public forum has also been upheld as a substantial government interest. *Heffron,* 452 U.S. at 650-51. Similar to the interests in the *Thomas* case, the City's stated intent in adopting Municipal Code section 63.0102 is "to regulate and prohibit certain activities in public parks and beaches within the City of San Diego *in the interests of protecting the enjoyment and safety of the public in the use of these facilities, as well as the natural resources of the City of San Diego.*" SDMC § 63.0102(a) (emphasis added).

2. The City Must Narrowly Tailor Its Ordinances to Achieve the City's Interests in Adopting the Ordinances

Narrowly tailored ordinances are those that do not "burden substantially more speech than necessary to achieve [the ordinance's] important goals." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1038 (9th Cir. 2006). A regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Although the regulation "'need not be the least restrictive or least intrusive means' available to achieve the government's legitimate interests, the existence of obvious, less burdensome alternatives is 'a relevant consideration in determining whether the 'fit' between ends and means is reasonable.'" *Berger*, 569 F.3d at 1041 (internal citations omitted). Courts frequently have upheld permit requirements for large group gatherings even when implicating protected speech activities in public parks because of the significant government interest in the safety and convenience of the public. *See Thomas*, 534 U.S. at 323 (upheld permit requirement for assemblies, parades, and other events involving fifty or more persons). To be considered narrowly tailored by the courts, these "permit requirement[s] must maintain a *close relationship between the size of the event and its likelihood of implicating government interests*." *Santa Monica Food Not Bombs*, 450 F.3d at 1040 (emphasis added). Generally, the government's interest in regulating use of public parks is implicated only for "quite large groups." *Id.* at 1042. Similar to the regulation at issue in *Thomas*, Municipal Code section 63.0102(b)(24) requires a permit for groups of fifty or more persons and was enacted to protect the public and the City's natural resources.[3]

3. The City Must Ensure that Its Ordinances Provide Ample Alternatives for Communication

A valid time, place, and manner regulation "must leave open ample alternatives for communication." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). "[T]he First Amendment requires only that the government refrain from denying a 'reasonable opportunity' for communication." *Santa Monica Food Not Bombs*, 450 F.3d at 1045 (quoting *Menotti v. City of Seattle*, 409 F.3d 1113, 1141 (9th Cir. 2005)). Regulations that require advance

[3] The Commissioner's ruling, by reference to *Long Beach Area Peace Network*, suggests that Municipal Code section 63.0102(b)(24) may not satisfy the narrow tailoring requirement for permits imposed on large groups because of its application to groups of fifty people. *Hubbard*, Statement of Decision at 3. The court in *Long Beach Area Peace Network* upheld a permit requirement applicable to groups of seventy-five people but found it to be "a close question" whether a group of that size was large enough to warrant an advance notice and permitting requirement. 574 F.3d at 1034. As discussed here, in *Thomas*, the Supreme Court upheld a permit requirement applicable to groups of fifty people.

notice and permits for large groups engaged in protected expression in public forums are generally scrutinized with respect to their impact on spontaneous speech. *Long Beach Area Peace Network*, 574 F.3d at 1036-37. "[A] permitting ordinance must provide some alternative for expression concerning fast-breaking events." *Santa Monica Food Not Bombs*, 450 F.3d at 1047. Certain large group activities traditionally associated with spontaneous speech, including parades and special events, are excepted from the large group permit requirement.[4] SDMC § 63.0102(b)(24); § 63.0103(i). All other activities conducted by groups of fifty or more persons would be required to apply for a permit "not less than ten (10) days" before the proposed activity; however, the Permitting Official may consider late filed permit applications.[5] SDMC § 63.0103(a).

4. The City Must Ensure that Permitting Officials do not have Unbridled Discretion in Regulating Protected Speech

A valid permit regulation imposed on protected speech generally does not delegate overly broad discretion to the permitting official or allow the permitting official to decide whether to restrict speech. *Long Beach Area Peace Network*, 574 F.3d at 1022. Permitting regulations may not "confer unbridled discretion on a permitting or licensing official" and should, instead, contain "narrow, objective, and definite standards" to guide the permitting decision and require an explanation of the permitting official's decision. *Id.* at 1025. The California Supreme Court explained that "ordinances requiring the issuance of permits for the exercise of First Amendment rights . . . 'will not offend the Constitution if they regulate only the time, place, manner and duration [of such expression] and if they are fairly administered by officials within the range of narrowly limited discretion.'" *People v. Fogelson,* 21 Cal. 3d 158, 166 (1978) (quoting *Dillon v. Municipal Court*, 4 Cal. 3d 860, 869-70 (1971) (alteration in original). Large group permits are issued pursuant to the procedure established in Municipal Code section 63.0103 and will be issued "if there is capacity for the proposed activity" at the requested location. SDMC § 63.0103(d). When there is not capacity for the proposed activity, the Permitting Official may propose an alternate date, time or location. SDMC § 63.0103(h).

II. THE CITY'S REGULATION OF SPEECH RELATED ACTIVITIES MUST BE WRITTEN IN A MANNER THAT IS NOT VAGUE OR OVERBROAD

The Due Process Clause of the Fifth Amendment to the Constitution requires a law prohibiting conduct be written in a manner that a "person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited" and provides "explicit standards for those who apply them" to prevent arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . Vague laws may trap the innocent by not providing fair warning." *Id.* When a statute interferes with the right of free

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[4] These types of events must comply with the Special Events Ordinance (Chapter 2, Article 2, Division 40), which contains certain exceptions for expressive activity. *See* City Att'y MS 2011-16 (Nov. 8, 2011).

[5] This Office has not reviewed any administrative guidelines or regulations governing late filed permits, but recommends clarification of the method by which the Permitting Official decides to accept late filed permits.

speech, a more stringent vagueness test applies and a greater degree of specificity and clarity is required. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. Generally, a statute is not vague if an "ordinary person exercising ordinary common sense can sufficiently understand and comply with its language." *City of Costa Mesa v. Soffer*, 11 Cal. App. 4th 378, 387 (1992). "A statute will be upheld against a claim of vagueness if its terms can be made reasonably certain by reference to other definable sources." *Id.* (citations omitted).

Even if a law is clearly and precisely written, the law may still be unconstitutionally overbroad if it prohibits or punishes constitutionally protected conduct. *Grayned*, 408 U.S. at 114. "The overbreadth doctrine is based on the observation that 'the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.'" *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1112 (9th Cir. 1999) (quoting *Forsyth County, Ga.*, 505 U.S. at 129). The phrase "chilling effect" generally refers to the impact of a law that is written so broadly that enforcement would not only result in the intended regulation, but also "deter or 'chill' constitutionally protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

III. APPLICATION OF LAW TO MUNICIPAL CODE SECTION 63.0102(b)(24)

A. As Applied –Fitness and Yoga Classes Would Not Likely be Considered Speech Protected by the First Amendment

The First Amendment generally protects expressive conduct that "'convey[s] a particularized message' and is likely to be understood in the surrounding circumstances," but not all conduct is protected by the First Amendment. *Kaahumanu*, 682 F. 3d at 798 (quoting *Spence v. Washington*, 418 U.S. 405, 409-411 (1974)); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995). "The linchpin of the inquiry is . . . the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* The courts have found that conduct such as recreational dancing and beach activities are not speech activities protected by the First Amendment. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *Daly v. Harris*, 215 F. Supp. 2d 1098, 1109 (D. Haw. 2002). In holding the recreational activities of dance hall patrons not protected by the First Amendment, the United States Supreme Court stated "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Daly*, 215 F. Supp. 2d at 1108. Similar to dancing, fitness and yoga are recreational and social activities. Yoga, for example, is defined as "a system of stretching and positional exercises . . . to promote good health, fitness and control of the mind." The American Heritage Dictionary of the English Language (5th ed. 2011). There is currently no case law specifically addressing the First Amendment protections that may be available to fitness and yoga classes; however, a court could reasonably conclude that fitness and yoga classes are similar to the activities at issue in *Stanglin* and *Daly* and not protected by the First Amendment.

B. On its Face –Vagueness and Overbreadth

In ruling on Mr. Hubbard's infraction trials, the Commissioner found Municipal Code section 63.0102(b)(24) unconstitutionally vague with respect to the terms "service" and "exercise." *Hubbard*, Statement of Decision at 3. In so ruling, the Commissioner stated the ordinance was unclear as to when a permit was required. *Id.* As discussed above, courts will generally uphold an ordinance against a vagueness challenge if an ordinary person can, using ordinary common sense, understand and comply with its language. *Soffer*, 11 Cal. App. 4th at 387. If the ordinance interferes with the right of free speech, courts will generally apply a more stringent vagueness test. *See Village of Hoffman Estates*, 455 U.S. at 499. Additionally, an ordinance will be read as a whole and the words construed "in context, keeping in mind the statutory purpose." *MacIsaac v. Waste Management Collection and Recycling, Inc.*, 134 Cal. App. 4th 1076, 1083. It is this Office's opinion that the Commissioner's decision is inconsistent with these legal principles.

In Municipal Code section 63.0102(b)(24), the terms "service" and "exercise" are two of several specifically identified activities that require a permit when conducted by groups of fifty or more persons in the parks and beaches. The dictionary contains several definitions of "service." Based on the context of the ordinance, the most relevant definition is "a religious ceremony or rite." Webster's II New College Dictionary, 1033 (2005); *see Village of Hoffman Estates*, 455 U.S. at 500-01 (relying on dictionary definition of terms of statute). "Exercise" is defined as an "activity requiring physical or mental exertion, [especially] when performed to maintain or develop fitness" and as "[s]omething practiced so as to increase one's skill." Webster's II New College Dictionary, 400 (2005). Based on the language in Municipal Code section 63.0102(b)(24) – prohibiting fifty or more persons from holding, conducting or participating in "any celebration, parade, service, picnic, exercise, or other special event" – a court could reasonably conclude that "exercise" refers to group exercise or fitness activities, including yoga.[6]

The Commissioner also found Municipal Code section 63.0102(b)(24) had a "chilling effect" and applied broadly to protected speech based on Mr. Hubbard's alleged attempt to limit class size. *Hubbard*, Statement of Decision at 3. According to the Statement of Decision, Mr. Hubbard issued tickets to the first forty-nine people arriving at the park to participate in yoga class and announced that those individuals without a ticket were excluded from his class. *Id.* at 2. Mr. Hubbard argued that he had no authority to forcibly remove anyone who lingered in the area of his yoga class or who engaged in yoga in the area without a ticket. *Id.* When a law is challenged as overbroad, the courts generally will look to whether the law reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates*, 455 U.S. at 495. If it does not, the overbreadth challenge fails. *Id.* A finding of overbreadth pursuant to the First Amendment is an exceptional remedy, requiring a "showing that a law punishes a 'substantial'

[6] Even if a court found the term "exercise" or "service" to be unconstitutional, the remainder of Municipal Code section 63.0102(b)(24) could be enforced and the invalid portion severed from the remainder of the ordinance. *See Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 613 (1999); SDMC § 11.0205.

amount of protected free speech, 'judged in relation to the [law's] plainly legitimate sweep.'" *Hicks*, 539 U.S. at 118-20 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Municipal Code section 63.0102(b)(24) applies to large groups recreational activities in the parks and beaches.[7] Since the First Amendment does not protect general recreational activities, a court could reasonably conclude that engaging in the activities listed in Municipal Code section 63.0102(b)(24) are not protected by the First Amendment and, therefore, section 63.0102(b)(24) is not unconstitutionally overbroad. *See Stanglin*, 490 U.S. at 25; *Daly*, 215 F. Supp. 2d at 1109.

IV. OPTIONS TO REGULATE FITNESS AND YOGA CLASSES IN THE CITY'S PARKS AND BEACHES

The City may adopt regulations for the use and protection of the City's parks and beaches. San Diego Charter § 55. There are several ways the City could address fitness and yoga classes in the parks and beaches including an ordinance specifically addressing fitness and yoga classes in the parks and beaches.[8] Such an ordinance could require all such classes obtain a permit without a minimum size requirement. Any such ordinance should be supported by factual findings setting forth the City's rationale for regulating the activities in the parks and beaches. Alternatively, the City could designate certain areas in the parks and beaches where fitness and yoga classes could be held. To address the Commissioner's concerns, Municipal Code section 63.0102(b)(24) could be amended to require a permit for all groups exceeding fifty persons without reference to specific activities or a requirement for controlling the behavior of others. For example, the City of Manhattan Beach requires any group of fifty or more using a park to obtain a permit and defines "group" as "individuals affiliated with each other either formally or informally using the park for a common purpose including but not limited to families, teams, associations, clubs, classes or instructional groups or other similarly affiliated collections of individuals." City of Manhattan Beach Municipal Code § 12.48.040.

CONCLUSION

The City may legally regulate the time, place, and manner of protected speech activities in the City's parks and beaches; however, based on First Amendment case law, a court would likely find yoga and fitness classes are recreational activities, not protected expressive conduct. Additionally, if the permit requirement in Municipal Code section 63.0102(b)(24) were challenged again on similar grounds, a court could reasonably conclude that the ordinance is not unconstitutionally vague or overbroad. If desired, the City may adopt reasonable regulations to specifically address fitness and yoga classes in the parks and beaches. This Office is available to

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[7] Parades and special events subject to the Special Events Ordinance are exempt from Municipal Code section 63.0102(b)(24).

[8] Several jurisdictions have adopted permit requirements for fitness instruction in public parks or beaches. *See* Encinitas Municipal Code § 6.14.010 - 6.14.100 (permit requirement for commercial or professional instruction in public property); Santa Monica Municipal Code § 4.55.030 (permit requirement for fitness or athletic instruction for compensation in parks or beaches); Los Angeles County Code of Ordinances, § 17.12.345 (permit requirement for physical fitness, exercising, yoga instruction in county beaches); City of Oceanside Municipal Code § 30B.1 – 30B.9 (permit requirement for commercial or professional instruction on public recreational property).

assist with any desired revisions to the Municipal Code or the adoption of any administrative regulations to address yoga and fitness classes in the City's parks and beaches.

JAN I. GOLDSMITH, CITY ATTORNEY

By */s/ Heather M. Ferbert*
Heather M. Ferbert
Deputy City Attorney

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