

MARY T. NUESCA  
ASSISTANT CITY ATTORNEY

PAIGE E. FOLKMAN  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO  
**MARA W. ELLIOTT**  
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:** March 8, 2017 Revised<sup>1</sup>

**TO:** Honorable Mayor and City Councilmembers

**FROM:** Paige E. Folkman, Deputy City Attorney

**SUBJECT:** Proposed Amendments to the Burglary and Panic Alarm Systems Ordinance, San Diego Municipal Code Chapter 3, Article 3, Division 37

**INTRODUCTION**

The San Diego Police Department (Police Department) regulates the residential and commercial use and operation of burglary and panic alarm systems within the City of San Diego (City) by requiring an alarm user to obtain a police permit. Under the City's Burglary and Panic Alarm Systems Ordinance (San Diego Municipal Code (Municipal Code or SDMC) Chapter 3, Article 3, Division 37) it is unlawful for any alarm user to operate, activate, or control any alarm system unless the alarm user has a current, valid permit issued by the Chief of Police for that alarm system. SDMC § 33.3706.

Recently the Police Department reviewed the regulations in the alarm ordinance, analyzed regulatory costs, and investigated best practices for regulating alarm systems. As a result, the Police Department proposes amending the regulatory permit fee, the penalty structure and fee schedule for false alarms, and the term of the alarm permit. This Office reviewed the proposed amendments to ensure they comply with legal standards.

One of the amendments allows an alarm user to request a hearing with the Chief of Police if he or she either receives a notice of violation of a false alarm or has been assessed a fine or penalty fee. This same amendment requires an alarm user to produce evidence to rebut a presumption that an alarm activation is false if there is no evidence of an emergency situation. Another amendment implements a new penalty structure for false alarms that applies to alarm

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<sup>1</sup> Revised from the MOL dated March 3, 2017. The proposed escalating fines for each false alarm were corrected. (MOL pg. 3) The MOL dated March 3, 2017, is depublished.

users with existing alarm permits. This Memorandum addresses these amendments in the alarm ordinance, and provides an overview of the applicable law.

### QUESTIONS PRESENTED

1. Does a hearing with the Chief of Police of a notice of violation for a false alarm or assessment of a fine or penalty fee satisfy constitutional due process requirements?
2. When law enforcement officers respond to an alarm, and on finding no evidence that an emergency situation was the cause of the alarm, presume it to be false, does the burden on the alarm user to rebut the presumption conform with due process?
3. Can the City transition existing alarm users to the new penalty structure?

### SHORT ANSWERS

1. Yes. An agency hearing officer is presumed to be an impartial decision maker, unless bias is clearly established; combining investigative and adjudicatory functions in a single agency does not on its face violate due process.
2. Yes. The burden on an alarm user to produce evidence complies with due process because there is a strong connection between the existence or non-existence of an emergency situation and whether there was a false alarm. A substantial factual element of a false alarm violation is the cause of the alarm activation. The alarm user has the burden to bring forth evidence that there was an emergency situation or other information that would show the alarm activation did not meet the definition of a false alarm. This information is more readily available to the alarm user. The Chief of Police may then amend the violation based on the evidence presented.
3. Yes. The transition of current alarm users to the new penalty structure ensures that all alarm users are given notice of the new penalty structure while effectuating the important interest of reducing the number of false alarms by implementing an escalating penalty structure thereafter.

### BACKGROUND

The purpose of the alarm ordinance is to preserve public health, safety, and welfare by regulating alarm systems. Proposed SDMC § 33.3701. It also reduces the cost and annoyances associated with false alarms, establishes reasonable expectations of alarm businesses and alarm users, encourages alarm users to maintain their alarm systems in good working condition and to use them properly, and ensures that alarm users are held responsible for their alarm systems. *Id.* A vast majority of responses<sup>2</sup> to alarm systems by law enforcement are false alarms. *Id.*

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<sup>2</sup> California Government Code section 845 states that a police department shall not fail to respond to an alarm call solely on the basis that the user does not have a city permit.

The alarm ordinance defines a false alarm as any activation of an alarm system that results in a call for service where an emergency situation<sup>3</sup> does not exist.<sup>4</sup> Proposed SDMC § 33.3702. Excessive false alarms unduly burden law enforcement resources. Proposed SDMC § 33.3701. Most false alarms are the result of improper maintenance or careless use of an alarm system. *Id.* Police officers responding to false alarms are not available to carry out other law enforcement duties. *Id.*

Consistent with Proposition 26,<sup>5</sup> the Police Department proposes to amend the alarm ordinance and associated fee schedule to help reduce false alarms. *See* The Police Department's Executive Summary to City Council Report No. 17-014, February 17, 2017 (Report No. 17-014).

Under the current ordinance and fee schedule, an existing alarm user<sup>6</sup> pays a fee of \$100.25 (residential) and \$173.25 (commercial) for a two-year permit. Report No. 17-014. The permit fee for an existing two-year alarm permit includes the cost of responding to at least one false alarm. Report No. 17-014. Upon a first false alarm, an alarm user receives a warning letter. SDMC § 33.3716(d). Thereafter, an alarm permit is revoked and an alarm user is fined based on the number of false alarms within a specified period of time, as follows: one false alarm in any 30 days; two false alarms in any 90 days; three false alarms in any 180 day period; and four false alarms in any one-year period. *Id.*

Under the proposed amendment, an alarm permit fee will cost \$10 and will expire after one year. Report No. 17-014. In addition, new alarm users<sup>7</sup> will be assessed an escalating fine<sup>8</sup> for each false alarm: \$100 for the first false alarm; \$200, \$300, \$400, and \$500, for the second through the fifth false alarms, respectively; and upon the sixth false alarm within the year of the

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<sup>3</sup> Emergency situation means any circumstance in which there is reason to believe that: (1) a person not authorized to do so entered or attempted to enter, or is entering or attempting to enter, any building or other structure protected by an alarm system; (2) a person committed or attempted to commit, or is committing or attempting to commit, an unlawful act within a building or other structure protected by an alarm system; or (3) there is an identifiable risk of harm to a person or property within or on the premises of a building or other structure protected by an alarm system. Proposed SDMC § 33.3702.

<sup>4</sup> A false alarm includes activations caused by mechanical or electrical failure, malfunction, improper installation, sensor sensitivity, accidental tripping, misuse, or negligent maintenance by an alarm business, alarm agent, or alarm user. It does not include activations caused by extreme weather conditions, telephone line problems, or any other extraordinary factors over which the alarm business, alarm agent, or alarm user has no direct or indirect control. It does not include activations where the call for service is cancelled by an alarm user, authorized responder, or alarm agent, and law enforcement does not arrive at the alarm site. Proposed SDMC § 33.3702.

<sup>5</sup> Proposition 26 was a ballot initiative that amended provisions of articles XIII A and XIII C of the California Constitution by limiting the ability of local government agencies to impose fees and charges.

<sup>6</sup> Alarm users who have a two-year alarm permit issued under the current ordinance will be referred to as "existing alarm users" throughout this memorandum.

<sup>7</sup> Alarm users who will obtain a one-year alarm permit after the amended ordinance takes effect will be referred to as "new alarm users" throughout this memorandum.

<sup>8</sup> A "fine" means money assessed when an alarm system generates false alarms. Proposed SDMC § 33.3702.

permit, the permit will be revoked.<sup>9</sup> *See* Report No. 17-014, and Proposed SDMC § 33.3717. The purpose of an escalating penalty structure and fee schedule is to obtain compliance from alarm users and to encourage alarm users to remedy the cause of false alarms. *See* Report No. 17-014. Along with a fine for a false alarm, any alarm user whose alarm system generates a call for service<sup>10</sup> without first obtaining an alarm system permit will be assessed a penalty fee<sup>11</sup> for each call for service until the permit is obtained. Proposed SDMC § 33.3712(a).

An enhanced hearing process is also included in the proposed amendment. Proposed SDMC § 33.3725. An alarm user who has either received a notice of violation of a false alarm or has been assessed a fine or penalty fee may request a hearing with the Chief of Police.<sup>12</sup> Proposed SDMC §§ 33.3717, 33.3725. The hearing with the Chief of Police is an informal administrative review to determine if the notice of violation was validly issued, and formal rules of evidence and discovery do not apply. Proposed SDMC § 33.3725(d). At the hearing, the Chief of Police will only consider evidence that is relevant to whether the alarm activation triggered a false alarm or whether an alarm user had a valid alarm system permit at the time of the call for service. Proposed SDMC § 33.3725(e).

Additionally, an alarm user will have the burden of producing evidence<sup>13</sup> to rebut a presumption that an alarm activation is a false alarm if the responding law enforcement officer did not find evidence that an emergency situation was the cause of the alarm being triggered. Proposed SDMC § 33.3725(f). After an evaluation of the evidence presented, the Chief of Police may amend an alarm user's records to indicate that an alarm activation was not a false alarm or did not generate a call for service, and waive, reverse, or modify any fine or penalty fee. Proposed SDMC § 33.3725(g).

Once the proposed ordinance takes effect it will apply to existing and new alarm users. Proposed SDMC § 33.3726. This means existing alarm users will be subject to the new penalty structure. The Police Department proposes to transition the existing alarm users to the new penalty structure. *See* Report No. 17-014; SDMC § 33.3726. After the effective date of the amended alarm ordinance, for the first false alarm, an existing alarm user will be issued a warning letter. *Id.* The warning letter will notice the existing alarm user of the new penalty

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<sup>9</sup> A revocation of the permit can be appealed to the Mayor and a hearing is conducted by an independent hearing officer. Proposed SDMC § 33.3717(c)(3), SDMC §§ 33.0501, 33.0403(b)(4)-(8).

<sup>10</sup> "Call for service" means any call made to the Police Department requesting police services and includes officer initiated calls. Proposed SDMC § 33.3702.

<sup>11</sup> A "penalty fee" means money assessed when an alarm system without a permit generates a call for service. Proposed SDMC § 33.3702.

<sup>12</sup> "Chief of Police" means the Chief of Police of the City of San Diego, or any member of the Police Department of the City of San Diego designated by the Chief of Police to carry out the provisions of Police Regulated Occupations and Businesses (Chapter 3 Article 3 of the SDMC), including those assigned to the Vice Section of the Police Department. SDMC § 33.0201.

<sup>13</sup> In some cases it may be difficult to determine whether a particular presumption is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. To avoid uncertainty, it is desirable to classify as many presumptions as possible. Cal. Evid. Code § 660, West's Ann. Cal. Evid. Code § 660 Comments.

structure and fee schedule for future false alarms. *Id.* After the issuance of a warning letter, any further false alarm will be subject to penalties as set forth in the amended alarm ordinance. *Id.*

## ANALYSIS

### I. THE CHIEF OF POLICE MAY CONDUCT APPEALS OF FALSE ALARMS AND FINES, CONSISTENT WITH DUE PROCESS

#### A. Procedural Due Process Requirements

A person's right to due process is secured in both the Constitution of the United States and California's constitution. U.S. Const. amend. V, XIV; Cal. Const. art. I, § 7(a) (no person may be deprived of property without due process of law). Due process requirements apply to administrative hearings as much as to judiciary proceedings. *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 1024 (2002). Procedural due process is met so long as there is notice, an adequate description of the proposed action, and an ability to respond before an impartial hearing officer. *Burrell v. City of Los Angeles*, 209 Cal. App. 3d 568, 581 (1989) (quoting *Williams v. County of Los Angeles*, 22 Cal. 3d 731, 736-37 (1978)). "Beyond these broad outlines, however, the precise dictates of due process are flexible and vary according to context." *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, 57 Cal. 4th 197, 212 (2013); see also *Burrell*, 209 Cal. App. 3d at 576 (procedural requisites necessary for due process depends upon the importance of the interests involved). Even though due process does not require exactness of procedure, it does require a hearing officer to review the evidence submitted in a fair and impartial manner. *Haas*, 27 Cal. 4th at 1025.

#### B. The Chief of Police Satisfies the Requirements of an Impartial Decision Maker

A decision maker's impartiality is presumed unless concrete facts clearly establish significant bias against a party or the circumstances create a significant probability of actual bias. See *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 840-41 (2006), quoting *Gray v. City of Gustine*, 224 Cal. App. 3d 621, 632 (1990). Administrative adjudicators are given the benefit of the doubt that they are impartial unless there is "specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal. 4th 731, 741 (2009); see also *Gai v. City of Selma*, 68 Cal. App. 4th 213, 219 (1998) ("[t]he standard of impartiality required at an administrative hearing is less exacting than that required in a judicial proceeding.").

This presumption of impartiality also applies to hearing officers working in a government function. "[A]gency adjudicators are [presumed to be] people of 'conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Today's Fresh Start, Inc.*, 57 Cal. 4th at 222, quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). Nor does this presumption of impartiality overcome indicators of a possible financial bias. *Haas*, 27 Cal. 4th at 1026. When faced with a claim of bias arising from financial interest, it is not whether the adjudicator was in fact influenced, but rather "whether the

adjudicator's financial interest would offer a possible temptation to the average person as judge not to hold the balance nice, clear, and true." *Id.* at 1026, citing to *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). This bar against financially interested adjudicators applies with as much force to administrative adjudicators as to judicial officers. *Haas*, 27 Cal. 4th at 1027. "While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest." *Id.* at 1024.

An appeal of a false alarm or related fine to the Chief of Police conforms with due process, unless there is a specific claim of bias, or a showing that the Chief of Police has a financial interest that could lead to an unfair and biased decision.

### **C. Combining Investigative and Adjudicatory Functions**

In addition, an appeal to the Chief of Police is permissible because combining investigative and adjudicatory functions in a single agency does not, by itself, violate due process. *Morongo Band of Mission Indians*, 45 Cal. 4th at 737. Due process permits "a legislature [to] adopt an administrative procedure in which the same individual or entity is charged both with developing the facts and rendering a final decision." *Today's Fresh Start, Inc.*, 57 Cal. 4th at 221. Nevertheless, a hearing must be conducted by a fair decision maker and therefore requires "some internal separation between advocates and decision makers to preserve neutrality." *Morongo*, 45 Cal. 4th at 737, quoting *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal. 4th 1, 10 (2006).

Procedural fairness only "require[s] some internal separation between advocates and decision makers to preserve neutrality," and a prohibition against ex parte communication. *Morongo Band of Mission Indians*, 45 Cal. 4th at 737-38 (quoting *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal. 4th 1, 10 (2006)). "To prove a due process violation based on overlapping functions thus requires something more than proof that an administrative agency has investigated and accused, and will now adjudicate" a particular matter. *Today's Fresh Start, Inc.*, 57 Cal. 4th at 221.

The Chief of Police may carry out the investigative functions relating to the regulation of alarms and preside over a hearing to decide whether the alarm activation triggered a false alarm, so long as there is some separation, and no ex parte communication, between the police personnel who issued the violation for a false alarm and the police personnel who preside over the appeal hearing. We recommend the Chief of Police adopt administrative procedures consistent with this memorandum.

## **II. A REBUTTABLE PRESUMPTION THAT AN ALARM ACTIVATION IS A FALSE ALARM SATISFIES DUE PROCESS**

Legal presumptions arise from considerations for public policy or to force one party to whom certain information is more easily accessible to make it known. Cal. Evid. Code §§ 603-05. Presumptions are not "evidence" but are conclusions that the law requires to be drawn (in the absence of a sufficient contrary showing) when some other fact is proved or

otherwise established in the action. Cal. Evid. Code § 600, West's Ann. Cal. Evid. Code § 600 Comment Assembly Committee on Judiciary.

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied. Cal. Evid. Code § 603. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Cal. Evid. Code § 110, *People v. Rekte*, 232 Cal. App. 4th 1237, 1244–45 (2015), citing to *People v. Atwood*, 110 Cal. App. 4th 805, 811 (2003), *Tusher v. Gabrielsen*, 68 Cal. App. 4th 131, 145 (1998).

A presumption is either conclusive or rebuttable. Cal. Evid. Code § 601. A rebuttable presumption can be a presumption affecting the burden of producing evidence. Cal. Evid. Code § 601. A rebuttable presumption is one that can be disproved by evidence to the contrary. Under a rebuttable presumption, if evidence sufficient to negate the presumed fact is presented, the presumption disappears and has no further effect, although inferences may nevertheless be drawn from the same circumstances that gave rise to the presumption in the first place. *Coffey v. Shiimoto*, 60 Cal. 4th 1198 (2015).

Inferences and presumptions are a staple of our adversary system of factfinding... The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.

*County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 156 (1979), also see *People v. Mendoza*, 24 Cal. 4th 130, 180 (2000) (in criminal prosecution cases, where the burden of proof is beyond a reasonable doubt, so long as a permissive inference is based in reason and common sense, due process is not violated).

Here, an alarm activation is presumed false if the responding law enforcement officers did not find evidence that an emergency situation was the cause of the alarm being triggered. Proposed SDMC § 33.3725(f). The application of a rebuttable presumption abides by due process because it is specific to a substantial element of the false alarm violation: the cause of the activation. The presumption can be rebutted by evidence showing there was indeed an emergency situation or that the alarm activation did not meet the definition of a false alarm because there was another cause beyond the alarm user's control (i.e., extreme weather conditions, telephone line problems). It is the alarm user's burden to supply such evidence, as it is not otherwise readily available to the responding police officer. The Chief of Police can then amend the alarm user's false alarm history in accordance with evidence presented. Proposed SDMC § 33.3725(g).

### **III. TRANSITIONING EXISTING ALARM USERS WITH A TWO-YEAR ALARM PERMIT TO THE NEW PENALTY STRUCTURE**

Under the City's current alarm ordinance, an alarm permit grants an existing alarm user the right to operate an alarm system within the City limits for two years. SDMC § 33.3709(a). Upon a first false alarm, a fine is not imposed; rather, an existing alarm user is issued a warning letter warning them of the false alarm. SDMC § 33.3716(d). After the warning letter for the first alarm, subsequent false alarms are counted towards the number of false alarms allowed before revocation of the alarm user's permit. SDMC § 33.3716(a). The proposed ordinance includes a new penalty structure where upon the first false alarm a fine is imposed instead of a warning letter, and the fine increases with all subsequent false alarms. Proposed SDMC § 33.3717. The alarm ordinance will apply to all alarm users upon its effective date.

The Police Department plans to give notice of the amended alarm ordinance by posting the information at all Police Department facilities, on social media platforms, and on the City's website. San Diego Police Depart. Report No. 17-014 (Feb. 17, 2017). The Police Department will work with representatives from the alarm industry to encourage notification of these changes to their customers. *Id.* In addition, the Police Department plans to notify existing alarm users of the amended alarm ordinance by including the information in subsequent notice of violations sent after the changes become effective. After the effective date of the alarm ordinance and upon an existing alarm user's first false alarm, a written warning will be issued referencing the application of the new penalty structure to future false alarms. Proposed SDMC §33.3726.

Use of an alarm system is police regulated and is subject to the City's police powers. SDMC § 33.0101(a). A charter city may make and enforce all ordinances and regulations in respect to municipal affairs, this includes legislation of the use and penalties applicable to police permits. Cal. Const. art. XI, § 5; *see Landau v. Superior Court*, 81 Cal. App. 4th 191, 208 (1998) citing to *Kenneally v. Medical Board*, 27 Cal. App. 4th 489, 497 (1994) ("No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers."); *Stroh v. Midway Restaurant Systems, Inc.*, 180 Cal. App. 3d 1040, 1052 (1986) ("[T]o the extent the license is subject to the state's police powers, it is not vested."); SDMC § 33.0309 ("The granting of a police permit does not vest any development rights in the property.").

An alarm user will be assessed a fine for false alarms and their alarm permit may be revoked upon a violation of any provision of the alarm ordinance. Proposed SDMC §§ 33.3717, 33.3718(a). The new penalty structure is applicable to false alarms occurring after the effective date of the alarm ordinance.<sup>14</sup> Afterward the new penalty structure will be applied to newly

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<sup>14</sup> The proposed alarm ordinance's new penalty structure is not ex post facto in application because a false alarm is currently a violation of the alarm ordinance and will continue to be under the proposed alarm ordinance, and the new penalty structure is only applied to false alarms that occur after the effective date of the ordinance. "A law is ex post facto 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Morris v. Castro* 166 Cal. App. 3d at 37 (citation omitted). Additionally, "[g]enerally, ex post facto proscriptions apply only in a criminal context." *Stroh v. Midway Restaurant Systems, Inc.*, 180 Cal. App. 3d at 1052 citing to *Morris v. Castro*, 166 Cal. App. 3d at 37.

issued, renewed, or reinstated alarm permits, and to existing alarm users after issuance of a written warning. Proposed SDMC §§ 33.3717, 33.3726.

The transition of current alarm users to the new penalty structure ensures that all alarm users are given proper notice of the new penalty structure while effectuating the important interest of reducing the number of false alarms by implementing an escalating penalty structure thereafter.

### CONCLUSION

In accord with due process, appeals of false alarms may be heard by the Chief of Police as long as there is an absence of financial or other personal interest in the matter by those adjudicating the matter, and when rules mandating internal separation of functions and prohibitions against ex parte communications are observed. The use of a rebuttable presumption affecting the burden of producing evidence allows for relevant evidence to be reviewed by the Chief of Police and conforms with due process. The new penalty structure for false alarms may be applied to existing alarm users after they are issued a written warning for a first false alarm.

MARA W. ELLIOTT, CITY ATTORNEY

By \_\_\_\_\_

Paige E. Folkman  
Deputy City Attorney

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cc: Shelley Zimmerman, San Diego Police Department