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MEMORANDUM OF LAW

DATE: August 12, 1996

TO: Jack Krasovich, Deputy Park and Recreation Director, Central Division

FROM: City Attorney

SUBJECT: Park Entertainment Permits - Balboa Park

Introduction

You have asked us several questions regarding the propriety of permits issued for individuals wishing to entertain in certain areas of Balboa Park. You stated that permits are issued on a daily basis and, as an equitable way of allocating space, sites are chosen by lottery. You sent us a copy of the

permit currently used. We have added some suggestions for improving the permit which reflect the conclusions of this Memorandum of Law. A copy is attached for your information with our suggestions in bold. Please note that a description of an appeal process must be inserted at the end of the permit.

We will answer your questions in the order in which they were presented. We have combined the analysis on the first two questions, since the same discussion applies to both.

Questions Presented

1. Does the Park and Recreation Department have the legal authority to permit or prohibit street entertainers and to cite those who violate permit requirements?

2. May the Park and Recreation Department limit the number of entertainment sites available and also limit the number of individuals allowed per site?

3. Can the Park and Recreation Department make judgments regarding types of "entertainment"? In other words, are fortune telling, jewelry making and other activities to be regarded as entertainment, or can there be some limits imposed?

4. Can the issuance of permits be refused based on the contents of the performance? For example, if an entertainer uses language that generates complaints from the public, can they be denied a permit?

5. Does the Department have the authority to suspend entertainers for periods of time for failure to follow written policies?

6. Can the Department prohibit use of certain items during performances? Examples include knives, chainsaws, fire or very loud musical instruments?

Short Answers

1 and 2. The Park and Recreation Department ("Department") does not have legal authority to totally prohibit "street entertainers" from performing in Balboa Park ("Park"). The Department may, however, require permits for certain uses of the Park. "Permit systems are the embodiment of time, place, and manner restrictions that have long enjoyed the approbation of the Supreme Court." Kroll v. U.S. Capitol Police, 847 F. 2d 899, 903 (D.C. Cir. 1988).

3. In general the Department may not make judgments concerning the types of entertainment allowed in Balboa Park, with the exception of certain health and safety considerations discussed below.

4. As discussed in our answer to question 3, an expression of speech may not be denied based on its content, but must be content-neutral. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (city ordinance provisions giving mayor unfettered discretion to deny permit for placing newspaper dispensing devices on public property held to violate Federal Constitution's First Amendment); Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981).

5. The Department may suspend a permit provided certain minimum procedural safeguards are followed.

6. In most cases, the Department may prohibit the use of items such as knives, chain saws, and fire during performances.

Background

Sections 63.0102 (b)(13) and (14) of the San Diego Municipal Code ("SDMC") prohibit solicitation and sales in the

Park without the City Manager's permission. SDMC section 63.0103 outlines the permit process and the requirements that must be met in order to obtain a permit. The section also outlines the process that the City Manager must follow in granting or denying permits.

It is our understanding that the Department currently issues up to thirty-one "Daily Outdoor Permits" for entertainers and other speakers who wish to perform in the central area of the Park. Each permit is issued for a particular spot in the Park and, since some spots are more desirable than others, they are awarded in a kind of "lottery system" in order for the process to be fair and unbiased. The permit system is imposed for the purpose of allocating space in an already crowded area of the Park, and to ensure safe and convenient public access.

The Department is also authorized to cite violators who do not comply with the permit requirements. SDMC section 12.0201 provides: "A violation of any of the provisions or failing to comply with any of the mandatory requirements of the Code shall constitute a misdemeanor. . . ." Section 12.0202 provides that provisions of the Municipal Code may be enforced by injunction and assessment of a civil fine.

Discussion

I.Permit Requirements

A. General Principles

The First Amendment to the United States Constitution prohibits government from making any laws that abridge freedom of speech, and extends to all forms of expression designed to communicate speech. For example, entertainment such as dancing and theatrical performances are within its protection. See Barrows v. Municipal Court, 1 Cal. 3d 821 (1970); In re Giannini, 69 Cal. 2d 563 (1968), cert. denied, 395 U.S. 910 (1969)). In Balboa Park, a traditional public forum, the rights of the state to limit expressive activity are sharply circumscribed.

Perry Educ. Assoc. v. Perry Local Educator's Assoc., 460 U.S. 37, 45 (1983). However, the U.S. Supreme Court has held that, "╒Tσhe government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Non-Violence, 468 U.S. 288, 293 (1984).

B. The Regulation Must Be Content Neutral

One of the criteria used to determine if a permit requirement will be upheld as a reasonable time, place, and manner restriction is whether the restriction is "based upon either the content or subject matter of the speech." Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640, 648 (1981). The government's purpose in adopting regulations is the controlling consideration. "A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791.

In Heffron, the Supreme Court upheld the state's authority to restrict to booths at assigned locations the sale and distribution of literature and solicitation of funds at a state fair. There were a limited number of booths available, which were assigned on a first-come, first-served basis. The Court found that the regulation was not content-based since it applied "evenhandedly to all who wish to distribute and sell written materials or to solicit funds." Heffron, 452 U.S. at 649.

The Balboa Park permit system is based on concerns about overcrowding and safety, and, with a few exceptions, the content of the speech is not considered.

C. The Regulation Must be Narrowly Tailored to Serve A Significant Government Interest.

he Supreme Court has held that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Ward, 491 U.S. at 799, quoting U.S. v. Albertini, 472 U.S. 677, 689 (1985). The Court clarified that the regulation need not be the least restrictive or least intrusive means of achieving the governmental interest. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 800.

A forum's particular attributes are important considerations since the "significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640, 650-51 (1981). In Heffron, the principal justification in support of a regulation that confined solicitation to booths was the "need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair." Heffron, 452 U.S. at 649-50. The Court found that the state's interest in the orderly movement and control of such an assembly of persons is a substantial consideration. Id. at 650. In addition, the Court noted that "it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." Id.

Here, the government's interest in public safety and crowd control is similar to that approved in Heffron. The permit system is the most equitable method to enable entertainers and visitors to co-exist in the crowded areas of Balboa Park which are most desirable to entertainers, and the requirements are not broader than necessary to achieve that purpose.

D. The Regulation Must Allow For Ample Alternative Avenues of Communication.

In order for the Department's permit system to be a valid time, place, and manner restriction, "it must also be sufficiently clear that alternative forums for the expression of . . . protected speech exist despite the effects of the ╒permit systemσ." Heffron, 452 U.S. at 654. In Clark, 468 U.S. at 288, the Court found that a National Park Service regulation prohibiting camping in certain areas of Washington, D.C. was a valid time, place, and manner restriction, since other camping areas were available.

Likewise, the Department's permit system in Balboa Park is not a total ban on entertainment, but rather a regulation, based on legitimate governmental interests, which limits the location and number of sites available. There is no constitutional violation if a speaker is not allowed to perform at a specific location, where his or her name was not chosen in the random lottery. The sites are assigned on an equitable basis and there are other forums throughout the City of San Diego where entertainers may perform.

E. The Regulation Must Not Allow For Unlimited Discretion Of Licensing Officials.

Finally, for a permit requirement to be upheld, the system must not confer overly vague, overly broad, or unlimited discretion on government officials entrusted with the grant or denial of a permit. "The Supreme Court has indicated that it is the unguided discretion of those issuing permits which renders the requirement unconstitutional." United States Labor Party v. Oremus, 619 F.2d 683, 688 (7th Cir. 1980). See also Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach, 14 Cal. App. 4th 312, 325 (1993). Courts have consistently condemned licensing schemes which "vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places." Poulos v. New Hampshire, 345 U.S. 395, 408 (1953). A permit procedure must provide "narrow, objective, and definite standards to guide the licensing authority . . . ."

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

Courts which have struck down permit requirements found that the licensing official had unbridled discretion which appeared to allow a permit decision to be based on the content of expression. "╒Wσithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763-64 (1988); Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1066 (9th Cir. 1990), cert. denied, 504 U.S. 914 (1992); Carreras v. City of Anaheim, 768 F. 2d 1039, 1049 (9th Cir. 1985) ("The California Liberty of Speech Clause requires that the` standards in such permit ordinances 'must provide definite, objective guidelines for issuance or denial.' ╒Citations omitted.σ"). The California Supreme Court held in People v. Fogelson, 21 Cal. 3d 158, 166 (1978): "'╒Aσny procedure which allows licensing officials wide or unbounded discretion in granting or denying permits is constitutionally infirm because it permits them to base their determination ideas sought to be expressed.' ╒Citation omitted.σ" See also In re Whitney, 57 Cal. App. 2d 167 (1943).

In Heffron, the Court found that the rule which required certain protected speech activities to be conducted only at a limited number of assigned booths did not vest a government official with overly broad discretion. Since the system of allocating space was on a first-come, first-served basis, it was not open to the kind of arbitrary application that has been consistently condemned by the Court.

Here, the Park Director's discretion to grant or deny permits is not overly broad. Similar to Heffron, the limited number of permits available are issued through a lottery system and are not open to discriminatory application, nor is there any requirement that the speaker disclose the nature of the speech. The permit application form states when, where, and how permits are issued. The standards are narrow, objective, and definite, nor are they subject to the decision maker's discretion, and are therefore constitutionally sound.

II.What Constitutes "Entertainment"

Generally, if a government makes "judgments" regarding the type of entertainment which is allowed in a public forum such as Balboa Park, the "judgment" will most likely be considered an unconstitutional content-based regulation. In the context of activities within a public park, a content-based regulation violates the First Amendment. The U.S. Supreme Court has emphatically protected speech in public forums:

> Streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." ╒Citation omitted.σ In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Perry, 460 U.S. at 45.

In addition, if the Department makes determinations based on the types of entertainment permissible, and denies permits on that basis, it will appear that the Director has unlimited discretion and overly broad authority. Courts have consistently struck down similar permit systems. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750; Gaudiya Vaishnava Society v. City of San Francisco, 952 F.2d 1059.

You also asked if some activities, such as jewelry making, palm reading, and fortunetelling, could be prohibited or whether

they must be allowed as entertainment. The California Supreme Court has specifically held that fortunetelling constitutes speech and that "╒tσhe essence of the issue whether an activity falls within the constitutional protection of 'speech' is whether the 'speaker,' by engaging in the activity, is communicating information of any sort." Spiritual Psychic Science Church v. City of Azusa, 39 Cal. 3d 501, 508 (1985). The court discussed the City of Azusa's ordinance, which prohibited fortunetelling, and continued:

> ╒Fortunetellingσ involves the communication of a message directly from the fortuneteller to the recipient. That words are used is not critical; the key is that the words convey thoughts, opinions and, sometimes, fiction and falsehoods. This communication between persons, however, is at the very core of what is known as speech . . . but it is manifest that speech does not lose its protected character when it is engaged in for profit.

Id. at 508-09.

The desire to protect the public from fraudulent fortunetelling does not save a prohibition on fortunetelling. "It is true that a state may protect its citizens from fraud. ╒Citations omitted.σ Yet 'Broad prophylactic rules in the area of free expression are suspect. ╒Citations.σ Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" Id. at 515. Regarding the protection of the public from fraud, the court said:

> A law prohibiting fraud in fortunetelling could be written; indeed, it exists. Penal Code section 332 provides that "Every person who by . . . pretensions to fortunetelling, trick, or other means whatever . . . fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of

property of like value."

Id. at 518.

The court also discussed California law, holding, "┌wσe rely on article I, section 2, of the California Constitution, which declares in part that 'Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty or speech or press.'" Id. at 519.

We note that San Diego County Code section 41.137, which you mentioned in your report, is similar to the ordinance that the court in Spiritual Psychic Science Church found unconstitutional. The County ordinance, as presently worded, may be found to violate constitutional protections of free speech.

You specifically mentioned jewelry making in your question about types of activities considered that may be "entertainment."
Webster's Encyclopedic Unabridged Dictionary of the English Language (1989 ed.) defines entertainment as: "1. the act of entertaining; agreeable occupation for the mind; diversion; amusement. Something affording diversion or amusement, especially an exhibition or performance of some kind." We have already discussed how commercial speech may be protected if it is combined with noncommercial speech; therefore, activities such as jewelry making and the like may enjoy First Amendment protection if they are an expression of ideas. The activities you mention come within the range of protected activity if they meet the definition of speech delineated above.

III. Denial of Permits Based on Content

A permit requirement must serve a purpose unrelated to the content of the performance. Ward, 491 U.S. at 791. Complaints

from the public regarding offensive language may not be the basis for denial of a permit. In finding that a requirement to obtain a permit in order to speak in a public park was unconstitutional, the court in In re Whitney, 57 Cal. App. 2d 167, 174 (1943), stated:

> Freedom of speech is one of those rights which is vital to the maintenance of a democratic form of government, and an ordinance which prohibits the right of public speech upon public grounds, except by special permit, simply because of the stated reason that citizens have been annoyed, is therefore insufficient and unconstitutional.

Even a speaker's language that is profane or offensive may not serve as a basis for denial of a permit, since it is protected by the First Amendment and may not be suppressed. Regulations aimed at limiting speech of objectionable matter are generally found to be unconstitutional. States may not regulate public utterance of certain expletives to maintain what the states regard as a suitable level of discourse.

> Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a show-ing that substantial privacy interests are being invaded in an essentially intolerable manner.

Cohen v. California, 403 U.S. 15, 21 (1971) (regarding prosecution for wearing epithet referring to the Secret Service System).

In Gooding v. Wilson, 405 U.S. 518 (1972), the Supreme Court reversed a conviction under a statute prohibiting the use of "opprobrious words or abusive language, tending to cause a breach of the peace." Id. at 519. The Court first found that the statutory prohibition did not fall within the fighting words exception of Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) in which the Court had held:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . ╒Sσuch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Further, the Court in Gooding found that the state courts had not given the statute in question a limiting construction, and struck it down because it "makes it a 'breach of the peace' merely to speak words offensive to some who hear them, and so sweeps too broadly." Id. at 527.

Similarly, in Plummer v. City of Columbus, 414 U.S. 2 (1973), the Court held that a city ordinance which prohibited "menacing, insulting, slanderous, or profane language" was vague and overbroad, and "facially unconstitutional because not limited in application 'to punishing only unprotected speech' but is 'susceptible of application to protected expression.'" Id. at 2-3, citing Gooding v. Wilson, 405 U.S. 518 (1972).

Therefore, the Department may not include prohibition of certain language as part of the entertainment permit

requirements. Nor may the Department deny permits based on the language used by the speaker, even if members of the public have complained about such language.

IV. Authority to Suspend Entertainer Permits

Rather than subject a non-conforming violator to the criminal courts, or attempt to obtain a civil judgment, pursuant to SDMC section 12.0201 the Department has chosen instead to take the less drastic step of temporarily suspending the permit of an entertainer who violates written permit requirements. The sanctions for violation of these requirements must be reasonable and clearly spelled out on the permit itself.

While it is permissible to suspend a violator's permit, it is important that persons whose permits are suspended be given the opportunity to appeal such a suspension. In United States Labor Party v. Oremus, 619 F.2d 683 (7th Cir. 1980) (holding no protected right to solicit in road intersections), the Seventh Circuit Court of Appeals, while holding that notice and hearing prior to revocation are not constitutionally required, stated:

> The Supreme Court . . . has continually held that an individual deprived by state action of a liberty or property interest is entitled to some procedure to determine if the individual has been treated fairly. As a threshold, however, state action must impinge a liberty or property interest of an individual. After the deprivation of an individual's liberty or property interest is established the application of the Mathews v. Eldridge, 424 U.S. 319 (1976), balancing analysis determines the process to which the Constitution entitles the individuals . . . . ┌Aσ licensing arrangement which impinged First Amendment rights demands strict procedural safeguards.

Id. at 689.

We would be glad to work with you on ensuring that the permit form meets constitutional requirements.

V.Prohibition on Certain Items

A. Knives, chain saws, fire. The Department may prohibit use of certain dangerous items in the Park, notwithstanding the usual First Amendment protection of expressive conduct or symbolic speech.

In most cases, the use of an item in a certain situation will be considered symbolic speech if "╒aσn intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood." Spence v. Washington, 418 U.S. 405, 410-11 (1974). In United States v. O'Brien, 391 U.S. 367, 377 (1968), the Supreme Court set forth a test:

> ╒Wσe think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Thus, even if knives, chain saws, fire, and the like are considered to be symbolic speech, they are likely to be covered by the O'Brien test of allowable prohibition: first, regulating for the health, safety, and welfare of the public is clearly within the power of the government authority; second, the governmental interest in safety is an important governmental interest; third, the governmental interest in avoiding harm to

others is unrelated to the suppression of free expression; and fourth, the incidental restriction on First Amendment freedoms by prohibiting dangerous items is not greater than is essential to the furtherance of the governmental interest in preventing harm to others. Therefore, prohibiting dangerous items is not a violation of First Amendment protections.

B. Excessively loud musical instruments. The Supreme Court has held that "╒mσusic, as a form of expression and communication, is protected under the First Amendment." Ward, 491 U.S. at 790. Regulation of music is subject to First Amendment protections, but the government may, of course, impose reasonable time, place, and manner restrictions on music as on any other speech.

The Court in Ward found that a sound-amplification guideline imposed by New York City was a reasonable time, place, and manner restriction and the city's desire to control noise levels satisfied the content-neutral requirement. Id. at 792. Further, "╒Iσt can no longer be doubted that government 'has a substantial interest in protecting its citizens from unwelcome noise.'
╒Citations omitted.σ . . . . ╒Tσhe government may act to protect even such traditional public forums as city streets and parks from excessive noise." Id. at 796. The Court further held that reducing the volume of the music did not ban expression and therefore was constitutionally valid. Id.

However, the Court did strike down an ordinance which prohibited the use of amplification systems without the permission of a city's police chief. Saia v. New York, 334 U.S. 558, 560 (1948). The ordinance was held invalid on its face because it was subject to the police chief's uncontrolled discretion and was a standardless "previous restraint on the right of free speech." Id. at 559-60. The Court in Saia explained that less-restrictive alternatives were available, and that the ordinance could have been more narrowly drawn to prohibit only noise above a certain decibel level or to bar the use of sound devices at certain places and times. Id. at 562.

Therefore, the Department may limit the use of excessively

loud musical instruments provided that the regulations meet the time, place, and manner test. As required by Saia and Ward, the regulations should be aimed as specifically as possible at limiting sound volume. As the Court suggested in Saia, the Department may prohibit noise above a certain volume at certain times or in certain areas. However, the Department should not attempt to subject the use, rather than volume, of instruments to the Park Director's permission because such a policy is likely to be struck down both as prior restraint on speech and because it would vest the Director with unlimited discretion.

Conclusion

The current entertainer's permit system is, for the most part, constitutionally valid, with the exceptions delineated above. As stated, both the policy in effect, as well as the permit form currently being used, could be improved by modification. We will be happy to assist you in implementing these changes.

We trust this memorandum answers the questions you have asked. During the course of our research, we have found that the permits currently utilized could be clarified and improved by minor rewording. We will be glad to work with you as soon as possible on amending the permit form.

JOHN W. WITT, City Attorney

By
Mary Kay Jackson
Deputy City Attorney

MKJ:mb:263(x043.2)
Attachment:1
ML-96-42