



Northern
California

June 14, 2018

Via U.S. Mail and Electronic Mail

Fresno City Council
2600 Fresno St
Fresno, CA 93721

Re: Proposed Parades and Other Special Events Ordinance, Chapter 14, Article 24, §§14-2402 – 14-2419 of the Fresno Municipal Code

Dear Councilmembers:

I am writing on behalf of the American Civil Liberties Union Foundation of Northern California regarding the City’s decision to amend various sections of Article 24 of Chapter 14 of the Fresno Municipal Code. As the City is likely aware, my office has received several calls from people who encounter difficulties in obtaining the proper permits to hold a parade or demonstration in Fresno. Indeed, we have requested public records and expressed our concerns regarding the process based on those records we received from the City. Specifically, on October 25, 2016, we asked the City to establish and publicize free speech routes, create more transparency for individuals who apply for a permit, review and remove ambiguity regarding a fee schedule, comply with privacy standards, and comply with clear free speech rights under the state and federal constitutions to name a few issues.

We appreciate the City taking a closer look at the current Ordinance. The City has added language that mandates the City will notify individuals in writing whether their application was denied as well as specifically stating that expressive activity includes parades. However, we have several other concerns that have yet to be addressed with the introduction of this proposed Ordinance. We strongly urge the City to take a closer look at the proposed language before considering next steps.

Specifically, we urge you to take the following actions:

- 1. The proposed Ordinance must provide a more reasonable application timeline for residents interested in organizing a parade or demonstration.**

Currently, the City’s proposed Ordinance states “any person desiring to sponsor a parade, athletic event, or other special event... shall apply for a... permit... If the application is for a

parade or other special event along a parade route, the application should be filed not less than thirty calendar days before the date on which the event is to occur. All other applications shall be submitted not less than sixty calendar days before the event date.” § 14-2405(a). This timeline is not reasonable. It is hard to imagine why Fresno needs at minimum a 30-day and up to 60-day window for parades and demonstrations applications, when the Ninth Circuit has reasoned that “[a city] cannot legitimately argue that a 20-day advance notice requirement is the least restrictive means of protecting its [important government] interest.” *NAACP Western Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984). Indeed, “most cities are able to protect their interests in traffic control with advance notice periods of substantially less than 20 days.” *Id.* at 1356.

In addition, courts have consistently struck down “advance notice requirements on the ground that the length of the required notice period was too long.” *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1044 (9th Cir. 2006). In *Santa Monica*, the Ninth Circuit upheld a “two-day (seventy-two hour period)” advanced notice provision on the ground that the length was “nearly” the “shortest possible requirement” and contained an exception for spontaneous demonstrations.” *Id.* at 1045. Here, while the proposed Ordinance provides a carve out for spontaneous demonstrations, this does not apply to all other parades and demonstrations. § 14-2405(a). Thus, a 30-day to 60-day application window is not the “shortest possible requirement” for other parades and demonstrations. *See Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007).

While we appreciate that the City needs some notice, courts have been clear that advance notice requirements should be as short as possible. A 30 and possibly 60-day window seems to be a much longer window than needed.¹

2. The City should clarify and further analyze the standard for obtaining a fee waiver.

As it stands, the City has several provisions in the proposed Ordinance that guide how fee waivers are distributed. As an initial matter, the proposed Ordinance states that “Any indigent

¹ *See Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (upholding two-day notice requirement); *See also Jackson v. Dobbs*, 329 F.Supp. 287 (N.D. Ga.1970), *aff'd*, 442 F.2d 928 (5th Cir. 1971) (upholding ordinance requiring marchers to obtain a permit by 4:00 p.m. on the day preceding a march); *see also e.g., American-Arab Anti-Discrimination Committee v. City of Dearborn* 418 F.3d 600 (6th Cir. 2005) (striking down a thirty-day advance notice requirement for events in parks, on streets, or in other public areas; *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) (striking down a twenty-day advance notice requirement for parades).

natural person who cannot apply for a permit because of an inability arising from such indigence to pay the application fee **may not** be required to pay the fee.” § 14-2405(d). At later points in the proposed Ordinance, it seems that the City will waive fees if an “applicant qualifies as indigent.” See § 14-2414. But having conflicting or ambiguous language will inevitably continue to lead to problems with the proposed Ordinance. Indeed, the City is required to include an exception for individuals who are unable to pay for rallies and demonstrations. See *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1994).

Fee waivers should be guided by clear, reasonable, and definite standards. See *Forsyth County, Ga v. Nationalist Movement*, 505 U.S. 123 (1992). The calls we have received from individuals who have had trouble navigating the permit process also demonstrate that the City’s fees are much higher than many individuals can pay. While the City currently has a waiver if an individual is indigent, the normal fees associated with organizing a parade or demonstration should not be so high that it discourages individuals from participating in free speech activity. As it currently stands, they are too high for many individuals.

Further, the fee waiver is not available online. For those individuals who have called the City to obtain a copy of the application, they are not presented the option to “fill-out” a fee waiver. Most individuals are forced to draft a letter and guess whether they have included the necessary information for fee waiver approval. This is unacceptable and does not meet the requirements of “clear, reasonable, and definite standards.” Thus, the City should revise its proposed Ordinance to address these concerns.

3. The City should revise its hold-harmless/indemnification agreement to comply with the First Amendment.

The City requires applicants to sign an “indemnification and hold harmless agreement” that requires the permittee to indemnify the City for any damages “arising or resulting from any damage or injury proximately caused by actions of the permittee/sponsoring organization in connection with the permitted event.” § 14-2412. The agreement also requires the permittee to pay the City’s costs and fees in any litigation. The Ordinance goes on to state that “merely join[ing]” the parade or event is not considered “under the control” of the permittee. *Id.*

While the City has tried to revise the proposed Ordinance in a way that limits who may be “under the control” of the permittee, the language is extremely broad. The City should clarify how it plans to implement the proposed Ordinance to distinguish an action that happened “in connection with the permitted event” as opposed to someone who “merely join[ed]” the event.

As it stands, this is a discretionary call. And broad indemnification clauses have been ruled unconstitutional. *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038-41 (9th Cir. 2009). Thus, the City should revise this indemnification agreement to conform with this holding.

4. The City should revise the application to comply with federal privacy act.

As a reminder, the federal Privacy Act generally prohibits local governments from requiring applicants for permits to provide their social-security numbers. *See Russell v. Bd. of Plumbing Examiners of Cty. of Westchester*, 74 F. Supp. 2d 339, 347 (S.D.N.Y.), *adhered to on reargument*, 74 F. Supp. 2d 349 (S.D.N.Y. 1999), and *aff'd*, 1 Fed. Appx 38 (2d Cir. 2001). The special-event application form contains a space for applicants to provide their social-security numbers, without any explanation. The City also asks for a driver’s license number, address, alternate contact information for the organizer, and a sponsor organization (along with the title and name of the person at that organization), without any indication as to whether all fields must be completed. The City should revise the form to comply with the Privacy Act. In addition, the proposed Ordinance could make clear whether information such as a social-security number or driver’s license is required.

Next, residents have a significant privacy interest in their personal information as articulated by the California Constitution. Cal. Const. Art 1. Sec.1. The privacy provision was added to specifically protect against “[...] the overbroad collection and retention of unnecessary personal information by government and business interests; [and] the improper use of information properly obtained for a specific purpose.” *Lewis v. Superior Court*, 3 Cal. 5th 561, 569 (Cal. 2017). While it is a problem that the City does not provide individuals with a copy of a fee waiver application, it should clarify in the proposed Ordinance what information is required to alleviate privacy concerns when individuals apply for a fee waiver.

As a policy matter, over the last year, there have been numerous demonstrations in Fresno regarding individuals’ residency status and immigration issues. By respecting privacy concerns, the City can create a space that will not permit individuals to participating in parades and without having provide unnecessary information for applications and waivers. If the City requires or leaves open to interpretation an “overbroad” collection of personal information, this will conflict with clear privacy concerns and send the message that Fresno’s policies discourage broad participation in demonstrations and protests.

Thus, we urge the City to take a closer review of these provisions.

5. The parade ordinance should give individuals more time to gather the additional items required by the City after a conditional denial.

Requiring individuals to produce required documents five days after a conditional denial is arbitrary. *See* § 14-2407. For example, the City may review and deny event applications 45 days before a planned event. Under the proposed Ordinance application procedure, those individuals would need to provide requested documents 40 days prior to the event to comply with the City's five-day requirement for additional documentation.

By setting an arbitrary deadline of five days after the denial, the City will inevitably create barriers to participation. Individuals who are planning an event while juggling multiple deadlines for other activities may miss this arbitrary deadline despite having originally submitted their application with ample time to make revisions. Instead, the City should unburden the application process by providing additional time to make corrections to an already filed application. Indeed, by allowing the deadline to count backwards from the actual event, event organizers retain greater flexibility to obtain the required permit in advance of their planned event. The City should be able to review additional items within three to four days of the proposed time for the event or demonstration as opposed to five days after the denial. The City should consider revising this deadline.

6. The City should establish and publicize the free-speech routes required by the Municipal Code.

The Municipal Code requires the City to establish free-speech routes for special events involving First Amendment expression. §§ 14-203(g), 14-2414(d). It must make a description of these routes and the fee schedule associated with them available to the public. § 14-2414(d). While this language is included in the proposed Ordinance, we are continuing to hear that people do not know where to find current free speech routes. Given that this is an immediate issue, the City should establish these routes and include a description of them and the applicable fees in the permit application packet and on its website.

7. The City should review its insurance requirements, and the instructions regarding them, to ensure that they are lawful.

In our previous letters, we have stated to the City that insurance requirements for parades can be unconstitutional unless they are sufficiently justified by a City's actual needs and do not allow third-party insurance companies to determine how much a parade organizer must pay. *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 340-41



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(1993) (invalidating requirements); *see Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1030 (C.D. Cal. 2002).

The City kept the insurance requirement, but now the waiver agreement puts the onus on the individual to guess at what criteria will comply with the “satisfactory evidence” standard to demonstrate that without insurance the event will be “precluded ...from occurring,” § 14-2413(c). Like a fee waiver, none of the current documents in the application packet reflect how this will look in practice. The City should consider clarifying some of these issues regarding its insurance requirements and the waiver provision in its proposed Ordinance.

We have outlined only some of the most troubling provisions of the Ordinance. Please let us know at your convenience whether you are amenable to making these changes. I would be happy to discuss any of this and can be contacted by email, at aconner@aclunc.org, or at 559.554.2994. Thank you.

Sincerely,

Abre' Conner
Staff Attorney

CC: Yvonne Spence, City Clerk
Lee Brand, Mayor
Wilma Quan-Schechter, City Manager
Doug Sloan, City Attorney