



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Response to 02/01/06 ACLU
letter concerning Urgency
Ordinance No. 27602

DATE: February 7, 2006

BACKGROUND

In a letter faxed to the Mayor and City Council dated February 1, 2006, the ACLU raised a number of concerns alleging procedural due process defects in Urgency Ordinance No. 27602. For the reasons set forth below, this Office believes that the Ordinance meets constitutional procedural due process requirements.¹

The Ordinance allows for summary suspension of a license or permit if the Chief of Police² determines that there is an imminent threat to the health, safety or welfare of the public at the licensed or permitted premises or on any parking site or similar facility used by customers of the business or used as part of the licensed or permitted business operation. In the case of a Public Entertainment Permit or Ownership/Management License issued pursuant to Chapter 6.60 of Title 6 (the Public Entertainment Permit Ordinance), the Chief of Police may consider an imminent threat to the health, safety or welfare of the public which exists within one hundred (100) feet of the licensed or permitted premises or on any parking site or similar facility used by customers of the business or used as part of the licensed or permitted business operation.

The Police Department's determination that there is an imminent threat to the public health, safety or welfare must be based on one or more of the following:

1. There is an urgent need to take immediate action to protect the public from an imminent threat of injury or harm;

¹ The Urgency Ordinance also amends the grounds for denial, suspension and revocation of a license or permit issued pursuant to Title 6. Since the ACLU doesn't appear to challenge this amended provision, it will not be discussed here except to state that the grounds are content and viewpoint neutral, make no attempt to affect the types of entertainment presented at the businesses that are subject to regulation under Chapter 6.60 (the Public Entertainment Permit Ordinance) and are clearly and directly related to the City's compelling interest in protecting the public health, safety and welfare.

² Chapter 6.02 refers to "department head" because the City Council has delegated the task of administering the business regulation ordinances under Title 6 to several different City Departments. However, since the Public Entertainment Permit Ordinance is administered by the Police Department, for convenience, this memorandum will refer to the Chief of Police or Police Department.

2. There has been a violation of a permit or license condition or other requirement of this Code that creates an imminent danger to the public health, safety or welfare; or
3. There has been a violation of Municipal, State or Federal law, in connection with the operation of the licensed or permitted business, that creates an imminent danger to the public health, safety or welfare.

The summary suspension cannot remain in effect for more than thirty (30) days.

The Ordinance requires the Police Department to provide the permittee or licensee with a written notice of summary suspension before the summary suspension can take effect. The notice must include:

1. The length of time the summary suspension shall remain in effect;
2. The grounds and reasons upon which the summary suspension is based;
3. That the licensee or permittee aggrieved by the summary suspension may immediately request relief from the summary suspension by requesting a hearing and the method for requesting such a hearing; and
4. A statement that the Chief of Police must respond to a request for a hearing by providing the licensee or permittee with a hearing within five (5) days of the request unless the licensee or permittee requests an extension of time for the hearing.

If the licensee or permittee wishes to be relieved of the summary suspension, the licensee or permittee may request a hearing.³ The Chief of Police must provide a hearing to affirm, modify, or overrule the summary suspension within five (5) days of the licensee's or permittee's request, unless the licensee or permittee stipulates to a longer period of time within which the hearing can be held. At the time of the hearing, the licensee or permittee is given the opportunity to present evidence to rebut the grounds for which the summary suspension was issued or demonstrates that the reason or reasons leading to the summary suspension have been mitigated or corrected.

After the hearing is concluded, the hearing officer must issue a decision that affirms, modifies or overrules the summary suspension. In connection with a modification of the summary suspension, the hearing officer may impose additional conditions on the license or permit if those conditions were reviewed at the hearing and the conditions are

³ It is the practice of the San Jose Police Department for the Chief to delegate the hearing officer function at the Deputy Chief of Police level or below. The hearing officer is chosen from a Department Bureau that is not involved in the investigation or prosecution of the administrative case. The Chief's designee acts as hearing officer for the administrative hearing. The hearing officer's decision is not subject to review by the Chief of Police. The Municipal Code authorizes deputies or designees of a public official or employee to exercise the power or duty granted by the Charter or the Code to that public official or employee (SJMC Section 1.04.080).

aimed at protecting the health, safety and welfare of the public or preventing the conduct or condition leading to the summary suspension. The hearing officer must issue an oral decision within 24 hours of the conclusion of the hearing. This must be followed within five (5) days of the hearing with a written confirmation of the decision that is mailed to the licensee or permittee at the address provided at the hearing. The licensee or permittee may seek judicial review of the decision if the licensee or permittee so desire.

ANALYSIS

1. Summary administrative action is constitutionally justified in emergency situations.

Generally, under both the California and United States Constitutions, procedural due process requires *adequate notice and a meaningful opportunity to be heard* before governmental deprivation of a significant property interest.⁴ *Mohilef v. Janovici* 51 Cal.App.4th 267, 286 (1996) *review denied*, (1997). However, the United States Supreme Court has long recognized that in emergency situations, pre-hearing administrative action may be justified. E.g., *Hodel v. Virginia Surface Mining and Reclamation Assn.* 452 U.S. 264, 300 – 303 (1981). In *Hodel*, the Supreme Court upheld the immediate cessation order provisions of the Surface Mining Control and Reclamation Act. The Act created within the Department of the Interior the Office of Surface Mining Reclamation and Enforcement (OSM). The Act instructs the Secretary of the Interior to immediately order total or partial cessation of mining operations whenever the Secretary determines, on the basis of a federal inspection by OSM inspectors, that the operation is in violation of the Act or a permit conditions required by the Act and that the operation creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

A mine operator aggrieved by an immediate cessation order may immediately request temporary relief from the Secretary, and the Secretary must respond to the request within five days of its receipt. The Act further authorizes judicial review of a decision by the Secretary denying temporary relief. Cessation orders expire automatically after 30 days, unless a public hearing is held.

The Supreme Court in *Hodel* noted that it had upheld against due process challenges standards for summary administrative action in other statutes that were quite similar to those contained in the Urgency Ordinance. This includes statutes authorizing summary administrative action when a product is dangerous to health or would be in a material respect misleading to the injury or damage of the purchaser or consumer, when the regulated individual "is unsafe or unfit to manage a Federal savings and loan

⁴ The ACLU, without any reference to legal authority implies that due process "requires" a hearing, even if the person who is subject to the administrative order doesn't wish to contest the order. (See top of page 5 of ACLU letter.) Procedural due process requires only a meaningful opportunity to be heard. It cannot force a hearing upon a person who doesn't wish to contest the administrative action.

association” or is in imminent danger of becoming impaired, or when there is an emergency requiring immediate action in respect to air safety in commerce.⁵

2. The Ordinance doesn't improperly shift the burden of proof.

The ACLU is incorrect in its interpretation that the Ordinance impermissibly shifts the burden of proof to the permittee or licensee. Prior to issuing a notice of summary suspension, the Police Department must have sufficient evidence that there is an imminent threat to the public health, safety, or welfare. That determination must be based on facts sufficient to prove one of the three criteria set out in SJMC Section 6.02.250(B). Pursuant to SJMC Section 6.02.250(D) the notice of summary suspension must itself contain “The grounds and reasons upon which the summary suspension is based.” Staff is fully aware that in an administrative hearing seeking to suspend or revoke a license or permit, the City bears the burden of proof. The language of the Ordinance which gives the licensee or permittee the opportunity for an administrative hearing does not state otherwise.

3. An administrative hearing conducted by the Department charged with Enforcement of the Ordinance does not violate the due process right to a fair administrative hearing.

The ACLU is incorrect in its claim that state or federal due process requirements preclude the agency to which a legislative body commits enforcement of a regulatory statute from also conducting the hearing.⁶ The United States Supreme Court⁷ and California Courts have repeatedly held that the combination of investigative and adjudicative functions by the administrative hearing officer or body does not by itself create an unconstitutional risk of bias in administrative adjudication.

California and federal decisions have uniformly refused to adopt a standard of disqualification of administrative hearing officers based upon an “appearance of bias” standard. **Instead California state courts require that a party seeking to show bias**

⁵ The Supreme Court further noted that the statute in *Hodel*, which provided a 5-day period for the Secretary of the Interior to respond to requests for temporary relief from the immediate cessation orders, was reasonable and further observed that there was no evidence to show that a shorter time period was administratively feasible.

⁶ The primary case on which the ACLU bases its claim of appearance of bias, *Nightlife Partners, Ltd. V. City of Beverly Hills*, 108 Cal.App.4th 81 (2003), is distinguishable because it concerns a conflict of interest within a City Attorney's Office caused by the shifting role of an attorney acting as both advisor to the administrative hearing officer and as advocate on behalf of the city department that was prosecuting the case. This and other similar cases stand for the proposition that in quasi-judicial administrative hearings, when a public agency's attorneys serve both the prosecuting department and advise the administrative hearing officer (or board or commission), the attorney's office must have an appropriate screening policy providing for separation of the advocacy and advisory functions in quasi-judicial administrative hearings. This line of cases are separate and distinct from the case law involving bias by the hearing officer, board or commission. The other cases cited by the ACLU are similarly distinguishable.

⁷ *Withrow v. Larkin*, 421 U.S. 35 (1975)

or prejudice on the part of an administrative decision maker must prove actual bias or prejudice, or that circumstances exist, such as personal or financial interest, which strongly suggest a lack of impartiality. A party's unilateral perception of an appearance of bias cannot be a ground for disqualification.

RICHARD DOYLE
City Attorney

By 
Carl B. Mitchell
Senior Deputy City Attorney

cc: Les White
Mark Linder
Robert Davis