



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Community Special Events
Ordinance

DATE: August 9, 2012

RECOMMENDATION

Approve an ordinance to add Chapter 13.14, repeal Chapters 13.12, 13.16, and 13.22, and amend Chapter 13.44 of Title 13 of the San Jose Municipal Code, in order to establish comprehensive regulations pertaining to outdoor special events on or at City streets, parks, paseos and plazas.

OUTCOME

Approval of the ordinance would establish comprehensive regulations related to the permitting and use of City streets, parks, paseos and plazas (excluding City Hall Plaza) for outdoor special events, create a consistent process applicable to these various locations, and repeal the separate ordinances that currently govern parades, temporary street closures, and paseo and plaza use. The proposed ordinance would also make conforming changes to the Parks Ordinance in Chapter 13.44 of Title 13 of the Municipal Code, to provide that the permit process for park special events is governed by the new ordinance and that the existing permit process in the Parks Ordinance applies only to areas such as picnic areas and athletic fields that are designated for specific uses.

BACKGROUND

The City's current special event permitting ordinances are located in several chapters of Title 13 of the Municipal Code and are administered by different departments -- the Police Department for parades and temporary street closures, the Department of Parks, Recreation and Neighborhood Services ("PRNS") for special park use, and the Office of Cultural Affairs ("OCA") for downtown paseo and plaza use. Because separate chapters enacted at different times have governed events on streets, parks, plazas and paseos, respectively, the permit process has varied based on the venue. These ordinances are also decades old and require updating.

ANALYSIS

Community Special Events Ordinance

Under case law interpreting the First Amendment of the U.S. Constitution, public property such as streets and parks are areas that have traditionally been open for free expression (referred to as a "traditional public forum"). Permit requirements for use of a traditional public forum for expressive activity are considered restraints on speech and must be sufficiently limited and justified. A permit requirement is constitutional if it is a reasonable "time, place and manner" regulation, meaning that the requirement: (a) is not based on the content of the message, (b) serves a significant governmental interest, (c) is narrowly tailored to serve that interest, (d) leaves open ample alternative means for communicating messages, and (e) does not delegate overly broad discretion to a government official.

The proposed ordinance would establish a special event permit process that meets this standard as expressed in developing case law, consolidate the existing ordinances into one comprehensive ordinance, and bring greater uniformity to the procedural requirements applicable to special events at the City's various outdoor event locations. The ordinance incorporates provisions of event ordinances from the cities of Santa Monica and Long Beach that in recent years have been upheld by the Ninth Circuit Court of Appeal.

While bringing consistency to the process, the ordinance would leave in place the current administration of the permits for streets, parks, and paseos and plazas. The responsible departments for permit issuance would continue to be the Police Department for streets, PRNS for parks, and OCA for paseos and plazas. This ordinance would not apply to the City Hall Plaza, which would continue to be governed by the City Hall Plaza Ordinance (Chapter 13.22 of Title 13 of the Municipal Code) and managed by the Department of Public Works.

A summary of the proposed ordinance's key provisions and changes follows.

Activities Requiring an Event Permit

An event permit would be required only for "special events" as defined under the ordinance. Any event on a street that requires the street to be closed or where participants do not follow the normal traffic rules and regulations would require a permit. This is consistent with the City's existing ordinances. In parks, paseos and plazas, events that involve 150 or more persons **or** any of the following activities would be considered a special event requiring a permit:

- Placement of equipment or structures (other than one table and two chairs), including but not limited to a booth, tent, canopy, stage, barricade or fencing

- Cooking, preparation of food or beverages for sale, sale or commercial distribution of food or beverages, or sale of commercial merchandise
- Use of live animals, fireworks, pyrotechnics, electrical power and cabling, or equipment or materials creating a substantial risk of injury or property damage
- Distribution of food to the public involving 50 or more persons

These provisions largely reflect existing ordinances. The primary changes are the addition of a numerical threshold (150 persons) as an independent basis for requiring a permit and allowance for a limited amount of equipment (one table and two chairs) without a permit.

Simple Assemblies

Similar to the City Hall Plaza Ordinance, the proposed ordinance would expressly allow for people to gather (simple assemblies) on a plaza or park without a permit, so long as the simple assembly did not include the activities typical of a special event, such as cooking or the placement of equipment/structures, as described in the definition of special event. This exception to the permit requirement would allow for simple assemblies, even of groups larger than 150 persons, to gather at an unreserved park or plaza and engage in demonstrations, rallies and other expressive activity without having to apply for and wait for the issuance of a permit. This is important as the ability for groups to engage in speech activities promptly to respond quickly to unfolding political events has been a significant consideration for courts reviewing local permit laws affecting the exercise of free speech.

Limited Discretion in Approving or Denying Permit

The proposed ordinance sets out a list of the criteria that the applicant must meet in order to be issued an event permit, as well as a list of the grounds for permit denial or revocation. These provisions make it clear what factors will be considered by the permitting authority in making its decision and limit the permitting authority's discretion accordingly. Both of these elements are extremely important in establishing a constitutional permitting ordinance, as reviewing courts will look for whether a government decision maker has such discretion in deciding to issue or deny a permit that there is a possibility he or she will be able to discriminate based on the content of the message. Actual discrimination is not necessary; just the unchecked opportunity to make content-based decisions is sufficient for a court to strike down a permit ordinance governing use of public spaces such as streets, parks, paseos and plazas.

Timeframe for Application, Decision and Hearing

The various existing ordinances include different provisions for the time in which an application must be submitted by the applicant and a decision issued by the City and for

appeals of the City's decision. The proposed ordinance would bring greater consistency to the timeframe for application and decision, as well as appeal and hearing on the appeal.

For most events, the ordinance would require that an event application be submitted no later than 45 days before the event date. City staff would issue a decision on these applications within 20 business days. For small-scale events that involve limited equipment (up to 4 tables and 10 chairs, a podium and sound amplifier) or a limited street closure of one block, the application would be due 10 business days before the event date, with the City's decision issued within 5 business days. For such limited events in parks, paseos and plazas that are expressive activity, and for parades, the application would only be required 5 business days before the event and the City decision would be issued within a two business day expedited timeframe. A short notice period particularly for small expressive events and certain time for decision, appeal and hearing have been viewed as essential for a legal permitting process.

The proposed ordinance would allow for an appeal of a permit decision, which would be heard by the City Manager or her designee. The timeframe for filing an appeal and scheduling a hearing is set out in the ordinance.

Insurance and Indemnification

Insurance and indemnification would continue to be required for many events, particularly the large-scale events that create the most risk of liability, injury and property damage. Events of a smaller scale would not require insurance, specifically those that do not include:

- Placement of structures or equipment such as stages, barricades, fencing, booths, tents, canopies, floats, vehicles, generators, heating equipment, portable restrooms, dumpsters, carnival rides, or equipment/structure requiring a Fire Department approval or permit
- Display or use of live animals, operation of water stations, use of fireworks, pyrotechnics, or equipment or materials that create a substantial risk of injury or property damage
- Cooking, preparation, sale, serving or commercial distribution of food or beverages

In lieu of providing insurance, such smaller scale events would be required to enter into an indemnification and hold harmless agreement with the City. This requirement would not apply to expressive events.

Parks Ordinance

The Parks Ordinance, codified in Chapter 13.44 of the Municipal Code, includes a broad range of regulations governing use of City parks, only a few of which deal with special events within parks. Because the proposed Community Special Events Ordinance, if adopted, would govern special events within parks, it is necessary to make conforming changes to the Parks Ordinance to clarify that its permit procedures will not apply to special events generally and instead will only apply to areas such as picnic areas, athletic fields, water bodies, gardens, and trails and pathways, which are designated for specific uses, as well as buildings and indoor facilities within parks.

Other proposed amendments to the Parks Ordinance would reorganize certain sections, update the ordinance to reflect current practice and make procedural adjustments. The proposed amendments would modestly lengthen the time to process these permit or reservation requests from 10 calendar days to 10 business days from receipt of the application. If the Director of PRNS designates time periods within which permit/reservation requests will be accepted, such as for athletic field use, the ordinance would allow for a processing time of 20 business days for such applications.

More substantive changes include the addition of an appeal and hearing process for permit denial.

Finally, with respect to amplified sound, the ordinance would clarify that amplified sound may be permissible in parks under an agreement with the City or through issuance of a park use permit by PRNS. The ordinance would also specify the hours during which amplified sound may be used for most parks, from 8:00AM to 10:00PM, while reserving the permissible hours for specific large venue parks to be established in the Regulations.

PUBLIC OUTREACH/INTEREST

This memorandum and the proposed ordinance will be posted on the City's website for items to be considered by the City Council at its regular meeting scheduled for August 21, 2012.

COORDINATION

The proposed ordinance was coordinated with and reviewed by the Office of Cultural Affairs, the Department of Parks, Recreation and Neighborhood Services, the Police Department and Risk Management.

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CEQA

Not a Project. File No. PP10-068(c), Municipal Code amendments involving no changes to the physical environment.

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For questions please contact Sandra Lee, Deputy City Attorney, at (408) 535-1988.