

CITY OF ALAMEDA
MEMORANDUM

Date: June 21, 2010

To: Mayor Beverly Johnson
And City Councilmembers

From: Teresa L. Highsmith
City Attorney

Re: Restrictions on Campaign Advocacy in Mayor's 4th of July Parade

Question

Given the fact that there is a general election this November, 2010, a question has arisen whether the Parade Committee may deny an entry in the Mayor's 4th of July Parade which expressly advocates for or against either a) a candidate for local office in Alameda, or b) a local ballot measure.

Answer

Yes. The Parade Committee reserves the right to deny an entry which does not serve the theme or purpose of the parade, as long as alternative channels of communication are available; additionally, because City funds cannot be used to advocate for a candidate or ballot measure, the Parade Committee may deny any entry which advocates for a candidate for local office or a local ballot measure.

Background

The Alameda Mayor's 4th of July Parade is touted as the second largest, and as having the longest route (at 3.3 miles), of any Independence Day parade in the nation. According to its official website, myalamedaparade.com, the Parade includes over 170 floats and 2,500 participants, and in recent years the number of spectators has reached 20,000. This year's Parade Theme is entitled, "Partners in Community Service."

It is traditional for Alamedans who reside along the Parade route to host front yard barbecues for friends and family, thus adding to the community feeling of the Parade. In 2007 and 2008, respectively, the Parade was voted as the "Best

Hometown Celebration" and the "Best Hometown Parade" by the Bay Area journal East Bay Express.

According to the Parade Committee, a nonprofit 501(c)(3) corporation, the Parade will accept the first 150 applicants to meet the Committee's standards. Although there is a list of rules for participants' behavior during the Parade and a warning that any entry deemed "unsafe" will not be permitted in the Parade, there are not any entrant standards as such listed on the Parade application. Instead, it merely provides that: "All entries are subject to review and approval by the Parade Committee. The Committee reserves the right to deny, limit, or condition entries, consistent with applicable law."

The Parade Committee is composed of the following persons:

Maria DiMeglio, a city employee of the Public Works Department; Carrie Doherty; Jared Kissack; Sam Sause; Christina Baines, a city employee of the City Manager's Department; Jim Franz; Barbara Price (who is serving as this year's Chair); Mark Sorenson; Nicole Santelina; Steve Helwig; Wendell Stewart; and Glen Anderson.

City employees who staff the Parade Committee do so as a component of their employment with the City, and are therefore compensated while transacting Parade Committee business. According to the staff of the City's Permit Processing Center, all Special Event Permit fees for the Alameda Mayor's 4th of July Parade are waived. Fees waived include an application fee of \$311.88 and a time and materials deposit of \$1,500. (Note: For all other parades, the Permit Center collects the \$1,500.00 deposit and returns the unused portion to the applicant.) All City services required to support the needs of the Parade, including Police, Public Works Maintenance, Parks and Recreation, and AMP services, as well as incidental services, are waived. For the first time in the Parade's history, the City Manager is donating \$10,000 in City funds to the Parade.

Discussion

A. The Mayor's 4th of July Parade is a Limited Public Forum

Participation in a parade while displaying a political sign is political speech protected by the First Amendment. Rutan v. Republican Party of Ill. (1990) 497 U.S. 62, 69. A parade has been held to be a limited public forum, if there are ample alternative channels of communication, such as attending the parade as a spectator and disseminating literature from the public sidewalk. Parkland Republican Club v. City of Parkland 268 F. Supp.2d 1349, 1354 (S.D.Fla. 2003).

The level of scrutiny a court will apply to a limited public forum used to be that a "content-based prohibition must be narrowly drawn to effectuate a compelling state

interest." More recently, the US Supreme Court has held that content discrimination is permissible if it preserves the purpose of the limited forum, but it is not permissible if it discriminates against speech that is otherwise within the forum's limitations. That is, the restriction is permissible if it falls within the limited forum's purpose while not discriminating against a particular viewpoint. Rosenberger v. Rector and Visitors of the Univ. of Va. 515 U.S. 819, 829 (1995).

In Parkland Republican Club v. City of Parkland, *supra*, witness testimony established that the purpose of the Parade was to provide for fellowship and to allow the citizens to get together in a fun, family-oriented, non-political atmosphere. To this end, the City of the City of Parkland had an unwritten policy of 37 years excluding all political floats from the annual community parade. Although marching bands, youth, and civic organizations were allowed to participate, the City excluded political organizations from participating (although political organizations were permitted to attend the parade and to pass out literature). When the Republican Club sought to participate in the Parkland Parade by entering a float which would bear a sign identifying the Club as the "Parkland Republican Club," the City Manager denied the application and the Republican Club sued the City for violation of its First Amendment rights of freedom of expression.

The court held that the Parkland Days Parade is a limited public forum. In that forum, the City's restriction upon the Club's First Amendment rights must be reasonable in light of the purpose served by the forum and viewpoint neutral. The exclusion of all political organizations from a Parade whose purpose is to establish a fun, family-oriented, nonpolitical atmosphere is reasonable, and that the exclusion of all political organizations is viewpoint neutral. This policy leaves open abundant alternative channels of communication for the Club to exercise its First Amendment rights. The City's policy of excluding political organizations is clear and unambiguous and does not vest broad discretion in the City Manager.

The Second Circuit Court of Appeals recently reached a similar conclusion when it held that the Josie Robertson Plaza, the city-owned fountain plaza located at the center of the Lincoln Center performing arts complex in Manhattan, New York, is not a traditional public forum and that a policy of limiting expressive activities in the Plaza to artistic or performance-related events is constitutionally permissible because it is "viewpoint neutral and reasonable in relation to the forum's function and purpose." Hotel Employees & Restaurant Employees Union, Local 100 of New York, N.Y. & Vicinity v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 555-57 (2d Cir.2002). In Hotel Employees, the Union submitted an application requesting permission to hold a rally in the Plaza in support of food service workers employed by a food concessionaire operating in the Metropolitan Opera. *Id.* at 541-42. Lincoln Center for the Performing Arts, Inc., a non-profit corporation that manages the Lincoln Center property, denied the application because the proposed use "violated its policy against non-arts-related events in the Plaza." *Id.*

The Parade Committee of the Mayor's 4th of July Parade may restrict entries which advocate the election or reelection of a particular candidate or advocate for or against a local ballot measure, on the basis that such political advocacy is not consistent with the purpose of the traditional home-town, family celebration purpose of the Parade. A candidate for elected office or an advocate for or against a local ballot measure will still have an alternative forum for their political speech, as they are free to attend the parade as a spectator and in that capacity display signs or hand out leaflets supporting his or her campaign from the public sidewalk.

Should the Parade Committee determine to restrict entries in this manner, it should publish this restriction on the website for the Mayor's 4th of July Parade and on the application form for entries in the parade.

B. Prohibition on Expenditure of Public Funds to Advocate for Candidate of Ballot Measure

Government Code Section 54964 prohibits the expenditure of any city funds to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters. The principle behind this prohibition is that the use of public funds or resources is unfair to those members of the public with opposing views. See generally, Stanson v. Mott (1976) 17 Cal. 3d 206. Moreover, incumbent elected officials might otherwise be permitted to use their authority and position to gain an unfair advantage over other candidates for elected City office, through the expenditure of City funds (here, by supporting the 4th of July Parade) to support their candidacy. Given the City's contribution of funding to the 4th of July Parade this year and the fact that it is also a local election year, incumbent elected officials should avoid using the Mayor's 4th of July Parade as a campaign platform.¹ For example, signage advocating for the reelection of an incumbent should be avoided in order to avoid an actual or apparent violation of Government Code Section 54964. And because of this limitation on an incumbent candidate for office, equal access rules would demand that non-incumbent candidates would be similarly prohibited from using the Mayor's 4th of July Parade as a campaigning platform. (See Widmar v. Vincent (1981) 454 U.S. 263, 267-268.)

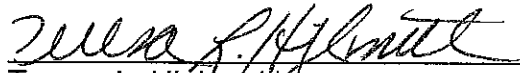
Finally, pursuant to section 82013 of the Political Reform Act, a person or group of persons making independent expenditures of \$1,000 or more in a calendar year to a political candidate are subject to campaign reporting requirements. Because the City's donation of \$10,000 to the Mayor's 4th of July Parade is not intended to benefit any political campaign, this is an independent ground for restricting entries advocating for a political campaign

¹ Although the Parade Committee is aware of one previous entrant that include campaign signage advocated his candidacy, we are informed that there was no direct contribution of public money that year.

Conclusion

The Parade Committee may restrict entries which advocate for a particular local candidate or ballot measure in the upcoming November election on the basis that campaign advocacy is not the purpose of the Mayor's 4th of July Parade, which is a traditional home-town family celebration. Because there are alternative channels of communication for campaign advocacy by attending the Parade (as opposed to being a participant in it), such a restriction would not violate the First Amendment rights of candidate entrants. Finally, the fact that the City of Alameda has committed public funds and resources to the Mayor's 4th of July provides an independent basis for the Parade Committee to determine that entrants who seek to advocate or campaign for or against any candidacy or ballot measure, in an election year, may be denied.

If you have any questions or need additional information, please contact me.


Teresa L. Highsmith

cc: Interim City Manager