AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

September 28, 2022

Via Email

Pacifica City Council
540 Crespi Drive
Pacifica, CA 94044
citycouncil@pacifica.gov

Re: Permit Requirements for Events, Special Events, and Major Events

Dear Members of the City Council:

I write on behalf of the American Civil Liberties Union of Northern California ("ACLU NorCal") to address First Amendment issues presented by the City of Pacifica's permit requirements for events, special events, and major events, which I understand have not been updated in recent years. For the reasons discussed below, these requirements likely violate the First Amendment with respect to protected expressive activity, such as demonstrations, marches, and rallies. Although these constitutional problems initially came to ACLU NorCal's attention as a result of the "March for Our Lives" rally on June 11, 2022,[1] the issues remain and are independent of that particular event.

The City should consider amending its permit requirements for expressive activities. Given the extent of the issues outlined below, the City may wish to consider the examples of other jurisdictions that have implemented much more targeted requirements. In particular, Washington, D.C. and Vancouver, WA have largely limited the definition of "special events" to exclude expressive activities and have otherwise exempted expressive activities from permit requirements. They have also provided for a cooperative process between government officials and organizers of expressive activity. *See, e.g.*, First Amendment Rights and Police Standards

[1] *See, e.g.*, Clay Lambert, *Pacifica should protect rather than impede free speech*, PACIFICA TRIBUNE (June 14, 2022), https://www.pacificatribune.com/opinion/editorials/pacifica-should-protect-rather-than-impede-free-speech/article_a0b022f0-ec1b-11ec-a9aa-97a783a1a0c2.html.

Act of 2004, D.C. Law § 15-352 *et seq.*; Vancouver Mun. Code §§ 5.17.030, 5.17.060(C)(4), 5.17.070. As you work on developing a more lawful permitting process, ACLU NorCal respectfully urges you to refrain from enforcing the existing unconstitutional aspects of Pacifica's permit requirements, including (but not limited to) the current advance-notice rule as applied to expressive activities.

Analysis

The Pacifica Municipal Code requires permits for "events," defined to include gatherings of 50 or more persons "at a beach or park," and "major events," defined to include events of more than 150 persons. *See* Pacifica Mun. Code ("PMC") § 4.10-101(f), (g), § 4.10-103. The Department of Parks, Beaches & Recreation, in turn, requires permits for "special events," defined as 250 or fewer attendees, and "major events," defined as 251 or more attendees.[2] Both the Code and the Department's expansive definition of "event" includes many forms of political speech or other expressive activities that are protected by the First Amendment and which should not be subject to such restraint and regulation. For example, the Code defines "event" to include a "demonstration . . . or likely gathering . . . for the same collective purpose," PMC § 4.10-101(f), and the Department includes "marches" in the list of examples of events requiring permits.

By requiring advance permits for events involving expressive activity, the City is imposing a prior restraint on speech. A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). And it is well-established that a requirement to obtain a permit before engaging in speech is a prior restraint. *Forsyth Cnty., Ga. v. The Nationalist Movement*, 505 U.S. 123, 130 (1992). The government bears a heavy burden to justify requiring a speaker to obtain a permit before engaging in speech in a public forum, especially political speech. *Id.*; *see also NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984). Several provisions of the City's permitting requirements pose significant problems under this framework.

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[2] *See Special Event or Facilities Permits & Community Center Rentals*, City of Pacifica, Department of Parks, Beaches & Recreation, https://www.cityofpacifica.org/departments/parks-beaches-recreation/special-event-or-facilities-permits-community-center-rentals (last accessed Sept. 28, 2022).

A. Necessity of Permit

The City's permitting requirements are ambiguous in two ways that raise serious First Amendment questions. The City should clarify whether it requires permits on public sidewalks and streets and also should clarify the minimum number of event participants that might trigger the need for a permit.

A city may not require a permit for expressive activity on streets or sidewalks unless an event "realistically present[s] *serious* traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets or sidewalks[.]" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006) (emphasis in original). The "significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks." *Id.* (citing cases).

"In public open spaces, unlike on streets and sidewalks, permit requirements serve not to promote traffic flow but only to regulate competing uses and provide notice to the municipality of the need for additional public safety and other services. Only for quite large groups are these interests implicated, so imposing permitting requirements is permissible only as to those groups." *Id.* at 1042. As a result, it is unconstitutional to require a permit for individuals or small groups to assemble and speak in a park. *See id.*; *Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009).

It is not clear whether the City's permit requirements apply to expressive activity that takes place on public streets and sidewalks. The Code defines events and major events as taking place "at a beach or park," suggesting that the City does *not* require event permits for activities taking place elsewhere. *See* PMC § 4-10.101(f) & (g). But the Department spells out the opposite conclusion. It extends the definition to activities that occur "upon public property that will affect the standard and ordinary use of public spaces, *public streets*, right-of-way, or *sidewalks* and/or require[] extraordinary levels of City services." In other words, the Department suggests that permits are required in more situations than the Code contemplates. ACLU NorCal urges you to clarify the reach of your requirements because a "greater degree of specificity and clarity" is required to avoid "chilling protected speech or expression." *See Edge v. City of Everett*, 929 F.3d 657, 664–65 (9th Cir. 2019) (citation omitted).

It is also unclear whether the City requires permits for expressive activity involving 50 or fewer persons. The Code requires permits only for events and major events of 50 or more persons. PMC § 4-10.101(f) & (g). The Department, by contrast, does not explicitly set a

threshold number of participants. Instead, it addresses the requirements for special events of 250 or fewer attendees and major events of 251 or more attendees. The Department does not clarify whether a special event permit is required for a gathering of fewer than 50 persons. Again, this ambiguity threatens to chill protected speech. *See Edge*, 929 F.3d at 664–65.

Whether the City's attendance trigger is 1 or 50, it is too low to comply with the First Amendment. The lowest attendance trigger for permits for expressive activity approved by the Ninth Circuit is 75 persons, and that was a "close question." *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1034 (9th Cir. 2009). "Advance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant governmental interests, or where the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses." *Id*. The City bears the burden of proof to justify any such requirement, *Berger*, 569 F.3d at 1041, and here, the Code makes no showing that every public space in Pacifica is so small or congested that a permit trigger of 50 persons is constitutional under all circumstances.

B. Advance Notice Requirement

The Code requires permit applications to be filed at least 20 business days before an event, and at least 30 business days before a major event. PMC § 4-10.105(a). For its part, the Department requires permit applications to be filed 60 days before both special and major events. While it may "take *some* time to coordinate the various demands on the streets, sidewalks, and parks" and make appropriate arrangements, *Santa Monica Food Not Bombs*, 450 F.3d at 1045 (emphasis in original), the outer limit for advance notice of expressive activity appears to be a few days. *See id.* at 1044 (listing cases that invalidated advance notice requirements of 5, 20, 30, and 45 days). While the City may be able to require greater notice for certain events not involving expressive activity, its 60-day notice requirement is unconstitutional as applied to expressive activity. *See id.*

C. Spontaneous Events

Even when advance notice is otherwise appropriate, the City must exempt from onerous permit requirements spontaneous demonstrations in response to breaking news. "Spontaneous expression [] is often the most effective kind of expression[.]" *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994). As the Ninth Circuit has emphasized, "when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. A delay of even a day or two may be intolerable when applied to political speech in which the element of timeliness may be important." *Long Beach Area Peace Network*, 574 F.3d at 1021 (cleaned up)

(citation omitted). Therefore, to "comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." *Santa Monica Food Not Bombs*, 450 F.3d at 1047; *see also Long Beach Area Peace Network*, 574 F.3d at 1037 (considering "available alternative means of expression" for spontaneous events).

The Code contains an exception for late permit applications where the "imposition of the time limitations would place an unreasonable restriction on the free speech rights of the applicant," *see* PMC § 4-10.106, but as written, it is likely unconstitutional. The Code requires the Director to make certain written findings that the exemption applies. *Id.* § 4-10.106(a). This requirement imposes an additional obstacle in the way of spontaneous expression, particularly because the Code does not impose a deadline by which the Director must make those findings. Second, the Code clarifies that the exemption for late applications does not apply if "there is insufficient time for the City to make necessary preparations for traffic control or other public safety matters." *Id.* § 4-10.106(b). But the City provides no guidance on how long it needs to prepare for events, interfering with the public's ability to hold a meaningful spontaneous demonstration in any public space. The Ordinance also fails to provide available alternatives for spontaneous expression, such as a specific designated location where such events can take place. *Cf. Santa Monica Food Not Bombs*, 450 F.3d at 1048–49 (upholding two-day notice requirement because it exempted spontaneous demonstrations by large groups on City Hall lawn or in sidewalk marches).

D. Fees and Costs

The Department website sets forth a schedule of permit fees depending on the location of the event. The City may "impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of administering the ordinance, the cost of public services for an event of a particular size, or the cost of special facilities required for the event." *S. Ore. Barter Fair v. Jackson Cnty., Ore.*, 372 F.3d 1128, 1139 (9th Cir. 2004) (listing cases). The City should clarify that the fee schedule is related to these permissible costs, such as reasonable and necessary costs in processing applications.

In addition to this ambiguity, there is another problem with the City's potential fees. Beyond the schedule of fees, the Department also advises that "[a]dditional fees or permits may be required." Similarly, the Code provides that the Department "may require as a condition of a permit that events and major events be monitored by City staff at the applicant's sole expense." PMC § 4-10.110(c). These provisions vest the Director with unfettered discretion to impose fees when he so chooses. Permit regulations "must provide objective standards that do not leave the amount of the fee to the whim of the official, enabling the official to favor some speakers and suppress others." *S. Ore. Barter Fair*, 372 F.3d at 1139. A lack of objective standards invites

content-based judgments. As the Supreme Court in *Forsyth* explained, "[i]n order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content." 505 U.S. at 134 (citation, quotation marks omitted). To avoid the discrimination that can stem from making such judgments and to comply with the First Amendment, the City should provide objective standards for when it will impose additional fees.

Moreover, even if fees are otherwise constitutional, the ordinance contains no provision to waive them. Where the City's permitting requirements apply to expressive activities that take place on public streets and sidewalks, the lack of a waiver means the City is improperly conditioning the right to engage in protected activity on ability to pay. *See Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1137 (6th Cir. 1991) (while "failure to satisfy the fee prerequisite preclude[s] the prospective participants' involvement in the constitutionally protected activity," "an alternative forum is available—the Columbus sidewalks which parallel the streets are free for purposes of conducting a parade and the parks are available without cost for related speech activities").

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The City's current practices contravene fundamental constitutional protections, and these legal deficiencies should be cured immediately. Please let me know if you have any questions or would like to discuss the issues raised in this letter. I can be reached at hkieschnick@aclunc.org.

Sincerely,

Hannah Kieschnick
Staff Attorney
ACLU Foundation of Northern California

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