

the existing preliminary injunction or enter a second preliminary injunction enjoining the City from enforcing or implementing the Parade Ordinance enacted by the City Council on March 13, 2008, or to enforce any ordinance or policy of the City to charge parade permit holders for costs associated with marches and parades until resolution of this action.

The First Preliminary Injunction

In the first motion for preliminary injunction, assigned to the Honorable Xavier Rodriguez,¹ plaintiffs sought an order enjoining the City from enforcing City Ordinance 2007-11-29-1193 (hereinafter the 2007 Ordinance) creating City Code Chapter 19, Article XVII (Parades, Runs, Walks, and Related Events), and replacing the 1988 Ordinance, arguing the 2007 Ordinance was unconstitutional for five reasons: (1) the Ordinance vested too much discretion in the chief of police to make cost assessments; (2) the Ordinance allowed the chief of police to engage in content-based discrimination by charging for security costs; (3) the Ordinance enabled the City to commit content and viewpoint discrimination by covering the costs of three specified First Amendment events while not subsidizing the cost of other events; (4) the Ordinance permitted the City to engage in content discrimination by excluding from coverage funeral processions and governmental agencies acting within the scope of their functions; and (5) the assessment of traffic control and clean-up costs imposed an unconstitutionally high barrier to speech without providing ample alternatives for groups that cannot afford these costs. Judge Rodriguez held a hearing on December 20, 2007, and issued an order on February 21, 2008, granting in part and denying in part the plaintiffs' motion (docket #38). In his order, Judge Rodriguez summarized plaintiffs' claims for relief into two categories: (1) challenges to the City's allocation or use of discretion and (2) concerns the City has erected an impermissibly high burden to speech.

¹ Plaintiffs subsequently filed Plaintiffs' Response to Defendant's Motion to Strike and Motion for Leave to File Plaintiffs' Corrected Pretrial Disclosures on January 15, 2009, naming a person Judge Rodriguez has known since childhood and with whom there is a family relationship necessitating recusal and reassignment to another federal judge.

With respect to the challenges to the City's allocation of or use of discretion, Judge Rodriguez explained:

Admittedly, the text and administration of the ordinance presents a close call on the question of whether too much discretion rests with the chief of police. There is no evidence suggesting the chief of police has engaged in content based discrimination. But the concern here is not with whether such discrimination has occurred, but whether an unconstitutionally high risk exists that it could. Setting out exactly what a constitutionally permissible ordinance would say is the task of the legislative branch of government. That said, the chief defects with the current ordinance are failure to require the chief of police to devise written guidelines on which to rely on at least some significant degree in determining the number of safety officers and traffic barricades needed for a procession, along with the absence of a clearly stated appeals process for challenging the costs assessed against a group, even when its application for a permit is not denied. The Court holds that the City must address these defects in the ordinance before the ordinance can pass constitutional muster.

Order, filed February 21, 2008, docket #38 at pages 11-12. The Court also ordered "the ordinance be amended to make clear that event organizers will not bear the responsibility for unconstitutional security related costs." Id. at page 15. In ruling on the preliminary injunction, Judge Rodriguez found:

Plaintiffs have demonstrated a substantial likelihood of success on their claims that the ordinance, as currently enacted, is unconstitutional for 1) granting the chief of police overly broad discretion in assessing costs, 2) not clearly distinguishing between traffic control and security costs, and 3) exempting funeral processions and government agencies operating within the scope of their functions.

Having established the substantial likelihood of such constitutional violations, Plaintiffs have demonstrated a substantial threat of irreparable harm, as they have indicated an intent to apply for a permit to hold a march on or around International Women's Day on March 8, 2008. Because of the constitutional problems currently present in the ordinance, Plaintiffs' application would likely be subject to the First Amendment dangers posed by the ordinance's constitutional inadequacies unless the Court intervenes.

The threatened injury to Plaintiffs is a restriction or deprivation of their First Amendment freedom of speech rights. Such threat outweighs the potential harm to the City, which would be the burden of subsidizing the costs of marches and parades that take place during the time between the issuance of this Order and a finding that the City has corrected the constitutional defects noted herein.

Finally, granting the preliminary injunction will serve the public interest by protecting permittees from application of an unconstitutional ordinance and encouraging the City to take swift action to correct the constitutional inadequacies of the present ordinance.

Id. at pages 35-36. In its conclusion, the Court found the ordinance unconstitutional on three separate grounds:

First, it vests too much discretion in the chief of police to determine the costs assessed against permittees. Second, it does not clearly distinguish between traffic control costs, which can be assessed, and security costs, which cannot. Finally, it impermissibly exempts funeral processions and governmental agencies.

The Court does not find that the ordinance's provision for the subsidization of the three specified events is unconstitutional, nor does it strike down the City's requirement that permittees pay for traffic control and clean-up costs. As for indigent groups, the Court finds that the City has arranged for ample alternatives.

Id. at page 36.

The March 3, 2008 Amendment

On March 3, 2008, the City enacted City Ordinance 2008-03-13-0201 (hereinafter the "2008 Ordinance"), which amended the 2007 Ordinance in an attempt to address the Court's issues.² In particular, Section 19-636(C) provides:

In reviewing the application for parade permit, the chief of police or his or her designee shall determine the number of peace officers and traffic control devices reasonably necessary to control traffic in the area of the requested procession. The chief or designee will consider the following factors and identify the effect of each factor in assessing the estimated traffic control costs:

² The Ordinance provides, in part, as follows:

WHEREAS, on February 21, 2008 in *International Women's Day March Planning Committee v. City of San Antonio*, SA-07-CA-971-XR, the United States District Court issued a preliminary injunction concluding that the ordinance failed to require the chief of police to devise written guidelines to determine the number of safety officers and traffic barricades needed for a procession, along with a clearly stated appeals process for challenging costs assessed to a permittee; and,

WHEREAS, the court further concluded that the ordinance impermissibly exempted funeral processions and governmental agencies from the permit requirement; and,

WHEREAS, City Council wishes to amend Chapter 19, Article XVII of the City Code in response to the issues raised in the court's ruling

- 1) the route and the identification of roadways that cross through or fee into the street of the proposed route,
- 2) the number of anticipated participants and vehicles in the event;
- 3) identification of other roadways, or public transportation and emergency vehicle routes that may be affected by the event;
- 4) length of the route and the identification of the number of intersections along the route that will require barricades or traffic control personnel;
- 5) whether intersections must be individually barricaded or whether officers can be assigned to move along with the event;
- 6) the date and time of the event;
- 7) volume of vehicular and pedestrian traffic typical on and along the route for the time of day, day of the week and time of the year for the proposed route.

In addition, the 2008 Ordinance clarified that “[t]he cost of each San Antonio Police Department officer shall be set in accordance with the Collective Bargaining Agreement” and “[t]he cost for traffic control devices will be set in accordance with the prices set in the city’s annual contract for traffic control devices.” The 2008 Ordinance also provides that “[t]he permittee may choose to contract directly with a traffic control device provider subject to compliance with the Texas Manual on Uniform Traffic Control Devices.”

The 2008 Ordinance created an appeals process for challenging the costs assessed by the police department as follows:

If the applicant dispute the costs assessed by the police department, the applicant may file an appeal with the Office of the City Manager within seven (7) business days of receipt of the invoice. The appeal must identify the specific costs in dispute. The City Manager or his or her designee will review the assessed costs based on the criteria required to be used by the chief of police and render a final decision regarding the costs to be paid by the permittee within fifteen (15) business days of receiving the appeal. No costs shall be owed during the appeal until the Office of the City Manager has rendered its decision.

2008 Ordinance at Sec. 19-636(C). Language was also added with respect to traffic control personnel, "Traffic control personnel shall be in a number sufficient to adequately safeguard the flow of both participant and non-participant traffic in order to minimize congestion, as determined by the chief of police. Any additional costs for police personnel deemed necessary to provide security due to the nature of the event will not be assessed to the permit holder." The Ordinance previously required that "Traffic control personnel shall be in a number sufficient to adequately safeguard the safety of the event participants and the general public, as determined by the chief of police." (Bolded language deleted in the 2008 Ordinance). The 2008 Ordinance also added a definition of "Traffic control personnel" which means "certified peace officers engaged to provide control of the flow of both non-participant and participant pedestrians and vehicles so as to minimize the traffic congestion and to maintain traffic flow at permitted events." 2008 Ordinance at Sec. 19-630 Definitions at (12). Also in response to the Court's ruling on the preliminary injunction, the 2008 Ordinance omitted "funeral processions or escorts" and "a governmental agency acting within the scope of its functions" as except from application. 2008 Ordinance at Sec. 19-632. The 2008 Ordinance now requires the chief of police to "create a written Standard Operating Procedure for issuance of permits and assessments of traffic control costs in conformity" with Sec. 19-636 entitled "Duties of and Costs to be Paid by Permit Holder." On June 23, 2008, the San Antonio Police Department adopted Standard Operating Procedure 214 to comply with the 2008 Ordinance requirement.

Standard Operating Procedure 214

As discussed above, the 2008 Ordinance instructed the chief of police to create a written standard operating procedure for issuance of permits and assessments of traffic control costs in conformity with the new ordinance. Standard Operating Procedure 214 (hereinafter SOP 214)

tracks the language of the 2008 Ordinance and provides additional guidance to officers tasked with processing permits. Such guidance includes detailed descriptions of requirements for five different typical processions grouped by size and road closure requirements. For example, SOP 214 describes using a “lead car and tail car with flankers” for processions of less than 250 pedestrians with no vehicles, floats, or animals, covering less than one half mile. Traffic devices are not required for such a procession; the procession is staffed by officers from the “on duty Traffic Shift”; and cross traffic is allowed ahead of the lead vehicle, behind the tail vehicle, and, when possible, during gaps in the procession. SOP 214 states this type of procession causes no inconvenience to the motoring public, businesses, and/or residences along the route, normally gathers and disbands on private property, and would proceed along the route occupying an area less than one city block.

SOP 214 also describes in similar detail use of a “single lane closure” for processions exceeding one half mile and/or 250 participants (including pedestrians, runners, cyclists, vehicles, floats, and/or animals); “multiple lane closure” for processions of less than one mile and/or 500 participants; “total roadway closure” with “cross traffic allowed during breaks” for processions exceeding one mile and/or 500 participants; and “total roadway closure” with “no cross traffic allowed” for “large processions of significant importance and interest to the community.” In each instance, SOP 214 describes the level of inconvenience the procession imposes upon the public, businesses, and/or residences along the route; the amount and type of traffic control devices required; the amount of traffic control personnel necessary; and the tasks required of traffic control personnel.

The City’s Motion to Dissolve Preliminary Injunction

Based on Ordinance 2008 and SOP 214, the City contends it has addressed the constitutional concerns raised by the Court regarding the amount of discretion vested in the chief

of police. It has also addressed the concern over ambiguous language in the Code about the payment of security versus traffic control costs and the Court's order that the Code be amended "to make clear that event organizers will not bear the responsibility for unconstitutional security related costs." As amended, the Code provides any additional costs deemed necessary for security purposes will not be the responsibility of the permit holder. The 2008 Ordinance also removed funeral processions and government agencies from the exception category as required by the Court to remedy a constitutional defect. As a result, the City argues "the constitutional defects that lead to the issuance of the preliminary injunction in this case no longer exist. Absent those constitutional defects, the Plaintiffs' likelihood of success on the merits in this matter has been eliminated, thus removing an essential element to the existence of a preliminary injunction." The City asks this Court to grant its motion and allow the City to enforce the provisions of City Code Chapter 19 as amended by Ordinance 2008.

The Court has thoroughly reviewed the record before it and finds the constitutional defects that lead to the issuance of the preliminary injunction in this case no longer exist. Accordingly, IT IS HEREBY ORDERED that Defendant City of San Antonio's Motion to Dissolve Preliminary Injunction (docket #48) is GRANTED and the preliminary injunction entered on February 21, 2008 is DISSOLVED, and Plaintiffs' Motion for Modification of the Existing Preliminary Injunction or Entry of a Second Preliminary Injunction (docket # 58) is DENIED.

It is so ORDERED.

SIGNED this 31st day of March, 2009.


FRED BIERY
UNITED STATES DISTRICT JUDGE