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6
7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF SANTA CRUZ
9

10 THE PEOPLE OF THE STATE
11 OF CALIFORNIA

12 PLAINTIFF,

13 vs.

14 WESLEY ALLEN MODES

15 DEFENDANT,

) Case No.: SCT 77272

) DEFENDANT'S TRIAL BRIEF
) REGARDING CONSTITUTIONALITY OF
) SANTA CRUZ MUNICIPAL CODE
) CHAPTER 10.65 AND REGARDING THE
) CITY'S ABUSE OF DISCRETION IN THE
) ADMINISTRATION OF THE SAME
) ORDINANCE

) TRIAL DATE: July 16, 2010
) TIME: 1:30
) DEPT. 5

) HONORABLE JEFF ALMQUIST

16 I. INTRODUCTION

17 This challenge arises out of citations issued after the annual Santa Cruz "Do It Yourself"
18 New Year's Eve parade. Defendant Wesley Allen Modes was cited pursuant Santa Cruz
19 Municipal Code Section 10.65.030(b), which states:
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21 It shall be an infraction for any person to participate in a
22 noncommercial event, as defined at section 10.65.110, with the
23 knowledge that a permit has not been issued for the event.

24 The Chapter out of which the above Section arises sets forth the permit requirements for
25 noncommercial events. Defendant takes issue with, and raises as an affirmative defense to his
26 infraction charge, the non-constitutionality the above ordinance section and the entire chapter out
27 which it arises as a facial violation of the First Amendment of the United States Constitution and
28 Article I, Sec 2 of the California Constitution. Defendant asserts that SCMC § Chapter 10.65 is

1 an overbroad delegation of authority to government officials to control free speech and assembly.

2 Specifically SCMC § Chapter 10.65 is a content-based prior restraint on speech that is
3 not the least restrictive means to obtain a compelling state interest. Plaintiff also asserts that there
4 is a serious prospect that those subject to this same ordinance will engage in self-censorship and
5 avoid participating in protected First Amendment activity. Defendant also asserts that the
6 manner in which the City of Santa Cruz administers the permits for noncommercial events, in
7 practice, constitutes an abuse of discretion pursuant to Civil Code of Procedure Section 1085.
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9 II. CONSTITUTIONAL SCHEME

10 A. General Provisions

11 The First Amendment to the United States Constitution provides that: “Congress shall
12 make no law ... **abridging the freedom of speech**, or of the press; **or the right of the people to**
13 **peaceably to assemble**, and to petition the government for redress of grievances.”
14

15 Article I, sec 2 of the California Constitution states, “Every person may freely speak,
16 write and publish his or her sentiments on all subjects, being responsible for the abuse of this
17 right. **A law may not restrain or abridge liberty of speech** or press.” California’s Free Speech
18 Clause is more protective than the first Amendment to United States Constitution. *Mardi Gras*
19 *of San Luis Obispo v. City of San Luis Obispo* (2002) 189 F.Supp.2d 1018, 1025, citing *Gonzales*
20 *v. Superior Court (City of San Paula)* (1986) 180 Cal.App.3.d 1116, 1122. While the free speech
21 provisions differ, California Courts draw upon both state and federal law for their constitutional
22 analyses. *Id.* at 1025-1026. [However,] where state law affords greater protection to expression
23 of free speech than federal law, state law prevails. *Id.*
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1 **B. Standing**

2 In order to have standing to raise a facial challenge to Santa Cruz Municipal Code
3 (SCMC) Chapter 10.65 the plaintiff must establish three elements: (1) an injury in fact; (2) a
4 causal connection between the injury and the conduct complained of; (3) likelihood that the
5 injury will be redressed by a favorable decision. *Id.* at 1023; citing *Lujan v. Defenders of*
6 *Wildlife* (US 1992) 504 U.S. 555, 563, 560-61. A plaintiff has standing to challenge a statute that
7 it claims is written so broadly that it may inhibit constitutionally protected speech of third parties.
8 *Foti v. City of Menlo Park* (9th Cir. 1998) 146 F.3d 629, 635; *accord Clark v. City of Lakewood*
9 (9th Cir. 2001) 259 F.3d 996, 1010. (Where there is danger of chilling speech, the concern that
10 constitutional adjudication be avoided whenever possible may be outweighed by society's
11 interest in having the statute challenged. Litigants, therefore, are permitted to challenge a statute
12 not because their own rights of free expression are violated, but because a judicial prediction or
13 assumption that the statute's very existence may cause others not before the court to refrain from
14 constitutionally protected speech or expression.) *Id.*

15 Under the standards set forth above, defendant has standing to challenge SCMC Chapter
16 10.65. First, defendant has standing to challenge SCMC § Chapter 10.65 because he has been
17 injured in fact by being accused of a crime: "participating in a noncommercial event with the
18 knowledge that no permit has been issued for the event." If defendant were found guilty he
19 would face a monetary fine. The monetary fine would flow directly from noncompliance with
20 event coordinators noncompliance with the unconstitutional requirements of SCMC § Chapter
21 10.65 . If the Court issued a favorable ruling, the injury would be abated because the ordinance
22 defining the foregoing crime would be void. Therefore, defendant has met the requirements for
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1 standing. *Mardi Gras of San Luis Obispo*, 189 F.Supp.2d at 1023, citing *Lujan*, 504 U.S. at 560-
2 61.

3
4 Defendant here also possesses standing to challenge SCMC Chapter 10.65 on behalf of
5 third parties as defendant has claimed that there is serious prospect that those subject to this law
6 will engage in self-censorship and avoid participating in protected activity. *Mardi Gras of San*
7 *Luis Obispo*, 189 F.Supp.2d at 1023-1026.

8
9 **C. SCMC Chapter 10.65 is an Impermissible Prior Restraint on Protected
10 Expression in a Public Fora.**

11
12 1. SCMC Chapter 10.65 is a Prior Restraint.

13 A prior restraint exists when the enjoyment of protected expression is contingent upon the
14 approval of government officials. *Mardi Gras of San Luis Obispo*, 189 F.Supp.2d at 1026, citing
15 *Baby v. Tam & Co., Inc v. City of Las Vegas* (9th Cir. 1998) 154 F.3d 1097, 1100 (citing *Near v.*
Minnesota (US 1931) 283 US 697, 713.)

16 In *Mardi Gras, supra*, plaintiff argued and the Court agreed that the similar permit
17 requirements in that case was an impermissible prior restraint on speech because it (1) required a
18 permit to engage in expressive activities and (2) imposed a lengthy pre-filing requirement before
19 permit may be granted. *Mardi Gras of San Luis Obispo*, 189 F.Supp. at 1026.

20 In analyzing this issue, the *Mardi Gras* court considered that,

21
22 All advance notice requirements tend to inhibit speech. The simple
23 knowledge that one must inform the government of his desire to speak and
24 must fill out appropriate forms and comply with applicable regulations
25 discourages citizens from speaking freely. *Id.* at 1026 [internal cites
omitted].

26 States [and inferior governments] may not invoke unduly cumbersome and time
27 consuming procedures before they may exercise their constitutional right of expression.

28 *Shuttlesworth v. City of Birmingham* (US 1969) 394 U.S. 147, 162 (Harlon, J., concurring).

1 In the case, *sub judice*, SCMC Chapter 10.65 requires that, “Any person or organization
2 intending to conduct a noncommercial event in the City of Santa Cruz **shall first obtain a**
3 **permit** from the director of parks and recreation.” *SCMC § 10.65.120*. A noncommercial event
4 is defined as a “noncommercial public assembly, the primary purpose of which is **the exercise of**
5 **the participants’ constitutional rights of free speech and assembly...**” *SCMC § 10.65.110*
6 The permit application requires thirteen separate items of information including six additional
7 items of information for a “marching noncommercial event.” *SCMC § 10.65.160 & 170*.
8

9
10 Therefore, because SCMC Chapter 10.65 (1) requires a permit to engage in protected
11 expressive activities and (2) imposes a lengthy pre-filing requirement before a permit may be
12 granted. SCMC Chapter 10.65 is an impermissible prior restraint. *Mardi Gras of San Luis*
13 *Obispo*, 189 F.Supp.2d at 1027.

14 2. SCMC Chapter 10.65 Restricts Speech in a Public Fora

15
16 Public Streets and sidewalks are clearly public fora. Regulation of speech in a traditional
17 public forum is subject to the highest scrutiny. *Id.*, citing *Foti v. City of Menlo Park* (9th Cir.
18 1998) 146 F.3d 629, 635. The city bears an exceptionally heavy burden of justification to restrict
19 expressive activities in these fora. *Id.* citing *NAACP v. City of Richmond* (9th Cir. 1984) 743
20 F.Supp. F.2d 1346, 1355.

21
22 In the case, *sub judice*, SCMC Chapter 10.65 definition of noncommercial event includes
23 any “noncommercial public assembly, the primary purpose of which is the exercise of the
24 participants’ constitutional rights of free speech and assembly: (a) Which is scheduled to take
25 place on a city street, sidewalk, alley or other right-of-way....” Therefore, SCMC Chapter 10.65
26 expressly restricts protected speech in a public fora. *Id.* at 1027.
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1 **D. SCMC is a Prior Restraint Subject to Strict Scrutiny**

2 Because a prior restraint upon speech suppresses the precise freedom which the First
3 Amendment sought to protect against abridgment, it comes to this Court bearing a “heavy
4 presumption against the validity of the prior restraint.” *Id.*, citing *Vance v. Universal Amusement*
5 *Co., Inc.*, (US 1980) 445 U.S. 308, 317.

7 Despite this presumption, governments may impose a permit requirement for those
8 wishing to hold a march, parade or rally. However, such a scheme may not delegate overly broad
9 licensing discretion to a government official. *Id.* at 1028, citing *Forsyth County, Ga v.*
10 *Nationalist Movement* (US 1992) 505 US 123, 129. Any permit scheme controlling time, place,
11 and manner of First Amendment activity must be (1) content-neutral, (2) be narrowly tailored to
12 serve a significant government interest, and (3) leave open ample alternative channels or
13 expression. *Mardi Gras of San Luis Obispo*, 189 F.Supp.2d at 1028, citing *United States v.*
14 *Grace* (US 1983) 461 U.S. 171, 177.

17 The failure to satisfy a single prong of this test invalidates the requirement. *Id.* Thus any
18 permit scheme regulating protected speech and advocacy activities in a public forum, “which is
19 based upon the content of speech, requires strict scrutiny.” *Id.*; *Burbridge v. Sampson* (C.D.Cal.
20 1999) 74 F.Supp.2d 940, 948; *Consolidated Edison Co. V. Public Serv. Comm’n* (US 1980) 447
21 US 530, 535-36.

- 23 1. SCMC Chapter 10.65 is Not a Reasonable Time, Place and Manner
24 Restriction
25 a. SCMC Chapter 10.65 is Content-Based

26 The Court in *Mardi Gras of San Luis Obispo, supra*, found that San Luis Obispo’s
27 ordinance was “obviously” content-based where it set up a dual permit system based upon
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1 whether the intended activity is deemed protected by the First Amendment activity. *Mardi Gras*
2 *of San Luis Obispo*, 189 F.Supp.2d at 1029.

3
4 In the present case, SCMC Chapters 10.64 and 10.65 establish the same type of dual
5 system: one system of “commercial events” and separate system for noncommercial events. The
6 two categories of events are distinguished by the content and purpose of the speech involved;
7 noncommercial events, as previously defined and noncommercial events defined as any
8 “commercial public assembly... which will generate financial gain for its sponsor or participants
9 or which will advertise products, goods or services;....” *SCMC 10.65.110 & 10.64.110*.

10
11 The noncommercial scheme Chapter 10.64 requires different application elements,
12 different fees and different prior notice similar to the San Luis Obispo schemes. The Court there
13 found, “To determine which advance notice requirement applies to a particular permit
14 application, a city official must review the speech and decide whether the proposed permit is
15 First Amendment activity. This determination is clearly content-based.” *Mardi Gras of San Luis*
16 *Obispo*, 189 F.Supp.2d at 1029. Therefore, for the same reasons, SCMC Chapters 10.64 and
17 10.65 clearly establish a dual content-based system.

18
19 In the case of *Alternatives for California Women, Inc. v. County of Contra Costa County*
20 (US 1989) 145 Cal.App.3d 436, 448, n.7, the United States Supreme Court determined that an
21 ordinance is content based if it distinguishes between speech merely conveying information on
22 one hand and speech conveying information in request for funds or contributions on the other.

23
24 *Id.*

25 Content-based regulations are presumptively unconstitutional. *Id* at 1031. Content-based
26 regulations pass constitutional muster only if they are the least restrictive means to further a
27

1 compelling interest. *Id.* at 1031; *S.O.C., Inc v. County of Clark* (9th Cir 1998) 152 F.3d 1136,
2 1145 citing, *Sable Communs. of Cal. v. F.C.C.* (US 1989) 492 US 115, 126.

3
4 2. SCMS Chapter 10.65 is Not the Least Restrictive Means to Further a
5 Compelling State Interest.

6 Defendant does not dispute that Santa Cruz has a “significant public interest” in
7 maintaining order, traffic safety and balancing of space with other public events. The Ninth
8 Circuit has found that although a City has a “substantial government interest in regulating
9 parades, when large groups use public streets and disrupt traffic by causing major arteries to be
10 closed and transportation to be rerouted,” the City’s “advance notice requirement is not the least
11 restrictive means for achieving that end.” *Id.* at 1033, citing *City of Richmond*, 743 F.2d at 1355.

12 In the case, *sub judice*, depending on the purpose and content of speech (in this case
13 likely “noncommercial”) the permit scheme expressly requires, in part: the identification of the
14 organizers, identification of persons in charge, the purpose of the event, estimated boundaries,
15 start time, estimated number of people who will show participate, types and number of vehicles
16 that may appear, description of sound amplification, whether food or alcohol will be sold,
17 whether monitors will be employed, anticipated parking needs, security and police needs. *SCMC*
18 § 10.65.160. (a-m)

19
20 If the participants will march the permit also requires assembly point, proposed route,
21 whether participants will be on the street, intervals of space between vehicles, the number types
22 and sizes of vehicles, material and maximum size of signs or banners to be carried along the
23 route. *SCMC* § 10.65.170 (a-f).

24
25 Further, without any specific guidelines tempering his discretion, the director of parks and
26 recreation can require an additional fourteen conditions on a permittee including the incredibly
27 onerous “[r]equirement for the applicant to provide advance written notification to those
28

1 residents residing along the event route or within the immediate vicinity of the event.” *SCMC §*
2 *10.65.270(n)*.

3 Failure to complete an application form is express grounds for a permit denial. *SCMC §*
4 *10.65.250(b)*. Failure to obtain a permit for a noncommercial event is a crime. *SCMC §*
5 *10.65.030*.

6 All of these requirements are less disturbing than the requirements for noncommercial
7 event permits that are separately required by the City but not provided for by ordinance. For
8 example in addition to the foregoing requirements a parade applicant for the DIY parade would
9 also have to pay \$1,817.92 (Including an application fee, a sound permit, street closure charge,
10 unused parking meter charge and four police officer charge.) Exhibit A to the Declaration of
11 Daniel Howell. In addition to the standard permit requirements and the \$1,817.92, the City also
12 requires that the applicants get a port-o-potty, copy of notification to all emergency agencies and
13 Certificate of Insurance (\$1,000,000).
14
15

16 In *Mardi Gras of San Luis Obispo, supra*, 189 F.Supp.2d at 1032, in distinguishing the
17 government claim of a legitimate interest in maintaining order, the court reasoned, “**while the**
18 **City of San Luis Obispo clearly has a significant public interest in maintaining order, this**
19 **interest does not permit it to charge applicants for that order.”** *Id.* The court later
20 distinguished a case, *Coalition for the Abolition of Marijuana Prohibition (CAMP) v. City of*
21 *Atlanta* (11th Cir. 2000) 219 F.3d 1301, where an ordinance relating to charges for permits was
22 held constitutional. First point of distinguishment made by the *Mardi Gras* court was that the
23 ordinance was content-neutral. Second point was that, “... the [CAMP] ordinance constitutional
24 because it provided an express method for calculating costs and excluded from its cost
25 assessment any time incurred by the City’s special event coordinator, police officers and any
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1 other person at the rank of bureau director or higher.” *Mardi Gras of San Luis Obispo*, 189
2 F.Supp.2d at 1035, citing *CAMP*, *supra*, 219 F.3d at 1322.

3
4 In the case, *sub judice*, the City of Santa Cruz seeks to charge applicants not only for the
5 processing time by the special events coordinator (application fee), but also the full charge of the
6 police officers and even some vague calculation of lost parking meter revenue. These charges,
7 not provided for by ordinance, should be considered in light of the fact that the definition of
8 noncommercial event is one in which the participants are exercising their constitutional rights.
9 Since, Mr. Modes was charged with participating in a noncommercial event, the City cannot
10 claim that the DIY parade is anything but a noncommercial event. The Court should also
11 consider that the City ordinance punishes not only those who “conduct” [SCMC § 10.65.030(a)]
12 the event but also those who even participate [SCMC § 10.65.030(b)]. Therefore, in order to
13 express one’s constitutional rights in a public forum in the City of Santa Cruz, participants must
14 pay high variable fees, obtain a million dollar insurance policy, tell everyone in the vicinity of
15 their intention, obtain a complicated permit, indemnify the City from all liability, and pay the
16 meter fee for everyone who might have parked their car and paid for it along the “marching”
17 route.
18
19

20 The City simply cannot establish that the permit requirements are the least restrictive
21 means to achieve a compelling interest and as such cannot establish the constitutionality of
22 SCMC Chapter 10.65's restriction on constitutionally protected activity. *Mardi Gras of San Luis*
23 *Obispo*, 189 F.Supp.2d at 1032-1035; *Forsyth County*, 505 U.S. at 134. In analyzing whether the
24 least restrictive means are being employed, the Court should also analyze the additional
25 requirements not authorized by ordinance but included in the City’s Non Commercial Permit
26 Application Packet as described in Section III below. For all the foregoing facts and citations of
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1 law, SCMC Chapter 10.65 is unconstitutional and must be voided.

2 **E. SCMC Chapter 10.65 is Constitutionally Invalid Because it Imbues the**
3 **Director of Parks and Recreation With Unfettered Authority to Determine**
4 **Whether Exceptions Exist to the Permitting Requirements, What Constitutes**
5 **Good Cause for a Late Application and What Fees to Charge.**

6 When a permit scheme is completely discretionary, there is a danger that protected speech
7 will be suppressed impermissibly because of the government officials... distaste for the content of
8 speech. *Mardi Gras of San Luis Obispo*, 189 F.Supp.2d at 1033. SCMC § 10.65.130 provides
9 for exceptions where permits are not required. The same section provides two circumstances
10 where activity that falls within the Chapter 10.65 but does not require a permit. However, no
11 guidelines exist to determine the criteria or procedure by which such an exception is made. For
12 example, a permit is not required for a noncommercial event which in the estimation of the
13 director of parks and recreation will involve less than one hundred persons and for which the
14 sponsor makes nine specific enumerated guarantees. *SCMC § 10.65.130*. The guarantees
15 include several that are facially unknowable such as “participants will cross streets only at cross
16 walks in units of fifteen or less...;” or “Participants will obey all traffic controls and regulations;”
17 or “Participants will assemble or march only on the sidewalks.”

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19
20 Despite the nine guarantees that are required to obtain an exception, there are no
21 guidelines for how such an estimation is made or how a potential event sponsor initiates the
22 process of an exception. The entire exception clause of *SCMC § 10.65.130* imbues the director
23 of parks and recreation with unfettered discretion as to whether an exception to the permit
24 requirement has been met.

25
26 Similar to *Mardi Gras of San Luis Obispo*, *SCMC § 10.65.150* vests the director of parks
27 and recreation with “unfettered discretion to determine whether good cause exists to grant a
28 permit submitted after the deadlines established by the ordinance. The ordinance does not

1 describe any standards that must be followed in making the determination of whether to grant an
2 extension that constitutes the good cause necessary to grant an extension.” *Mardi Gras of San*
3 *Luis Obispo*, 189 F.Supp.2d 1033-34.
4

5 The success of a facial challenge on the grounds that an ordinance
6 delegates overly broad discretion to the decision maker rests not on
7 whether the administrator has exercised his discretion in a content-based
8 manner, but whether there is anything in the ordinance preventing him
9 from doing so. *Id.* at 1033, n. 15, citing *Forsyth*, 505 U.S. at 131.

10 Finally, the City has established no guidelines for calculating additional fees and
11 requirements not provided for in Chapter 10.65. Indeed, using its unbridled discretion the City
12 has determined for the DIY parade that the permit would cost \$1,817.92 with no clear formula
13 for how each subcategory of charge was calculated (Administration fee, sound permit fee, street
14 closure fee, meters fee, and four SCPD police officers). See Exhibit A to Declaration of Daniel
15 Howell.

16 The permit scheme of SCMC Chapter 10.65, therefore, is an overly broad delegation of
17 authority because there are no standards by which the director of parks and recreation establishes
18 how many people are likely to participate in a public event involving First Amendment speech or
19 what constitutes good cause for late filing. Therefore, SCMC Chapter 10.65 delegates overly
20 broad authority to limit speech and, therefore, is unconstitutional.
21

22 **III. THE CITY OF SANTA CRUZ ACTUAL ADMINISTRATION OF PERMITS**
23 **PURSUANT TO SCMS CHAPTER 10.65 CONSTITUTES AN ABUSE OF ITS**
24 **DISCRETION PURSUANT TO CIVIL CODE OF PROCEDURE SECTION 1085.**

25 *SCMC § 10.65.120* specifically states that, “Any person or organization intending to
26 conduct a noncommercial event in the city of Santa Cruz **shall obtain a permit from the**
27 **director of parks and recreation.**” The permit must be submitted to the director of parks and
28 recreation on a form supplied by the director of parks and recreation. *SCMC § 10.65.140.*

1 Further, the director of parks and recreation shall approve, conditionally approve, or deny
2 a noncommercial permit application on the grounds specified in Section 10.65.250. SCMC §
3
4 *10.65.180*.

5 However, according to the City's Non Commercial Events Application, (Exhibit A to the
6 Declaration of Jonathan Che Gettleman), the permit application process is diverted away from
7 the director of parks and recreation to the City Manager's Office's Special Events Division in
8 direct contravention to the direct mandate of the ordinance. The application form also notifies
9 applicants that the Chief of Police has the power to condition the issuance of a permit by
10 imposing time, manner and place restriction. No such authority exists pursuant to Chapter 10.65
11 for the Chief of Police to have any involvement in the permit process.
12

13 The application form for a noncommercial special event is misleading and does not
14 follow the regulations set forth in SCMC Chapter 10.65. The application packet describes as a
15 noncommercial event an event including some or more of the following: involve more than 50
16 **participants**, one which lasts longer than one hour, one involving setting up signage larger than
17 6 foot by six foot by three feet, and one involving amplified sound. See Exhibit A, page 1, to the
18 Declaration of Jonathan Che Gettleman.
19

20 *SCMC § 10.65.130* specifically excludes and excepts from the permit requirement an
21 event of less than **100 participants**. The ordinance states nothing regarding sound making an
22 event noncommercial, nothing regarding the duration of the event, and nothing regarding the
23 exact dimensions of signage. The ordinance also does not apply to every use of public/city
24 properties.
25

26 The permit application packet requires additional fees, information and waivers that are
27 not required by the ordinance itself. These additional fees include a \$33 nonrefundable fee for
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1 amplified sound (Exhibit A, page 2, item 10), an alcohol control board and city counsel approval
2 for serving or selling alcohol (Exhibit A, page 3, item 12), approval from the health department
3 to serve or sell food or beverages (Exhibit A, page 3, item 11), and finally and agreement to
4 Release, Indemnify and Hold the City of Santa Cruz Harmless for “all damages, loss, claims,
5 suits or action of any kind or nature what-so-ever, including attorney’s fees” in “consideration”
6 for allowing the participants in the event to exercise their constitutional right to participate in
7 expressly acknowledged constitutionally protected speech and assembly in public fora (Exhibit
8 A, page 4). Defendant can think of no greater chilling effect on speech, other than perhaps
9 holding all event sponsors liable for anything that happens at a public noncommercial event.
10

11 The provision of permit conditioning and required approval by non-authorized City
12 officials and the additional unauthorized permit requirements are not provided for by ordinance
13 and are certainly not the “least restrictive means to achieving a compelling government interest.”
14 Instead, the Non Commercial Special Events Application Packet constitutes a clear abuse of
15 discretion pursuant to CCP sections 1085 and 1088 without any support in the ordinance.
16

17 As mentioned previously, the types of fees charged are also a clear abuse of discretion in
18 the context of what is required for the City to merely allow a collective expression of
19 constitutional rights. Some of these fees are simply outrageous in the context of the exercising of
20 the participants’ constitutional rights, such as requiring “conductors” of the event to pay for
21 unused City parking meters. These charges are nothing more than an attempt to defer all possible
22 foreseeable costs to the event “conductor” and are not related to public safety. The calculations
23 are not clearly set forth in the permit ordinance. These fees are very significant when you
24 consider that it makes every person who participates in a noncommercial event “jointly and
25 severably” liable for the cost because **if the fees are not paid then the whole event is illegal,**
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1 every participant with knowledge that no permit was obtained is citable.

2
3 Finally, SCMC Chapter 10.65 certainly does not permit the City to condition a citizen's
4 participation in an acknowledged constitutionally protected assembly or speech upon whether the
5 sponsor agrees to indemnify the City for harm for which the City may otherwise be rightly and
6 legally responsible. This requirement represents the most base form of leveraging and should not
7 be tolerated by any Court of law interested in society's free expression of ideas and assembly as
8 mandated by both Article I, Section 2 of the California Constitution and the First Amendment to
9 the United States Constitution.
10

11 Both the United States and California Constitutions guarantee that citizens need waive no
12 rights to which they are otherwise entitled to actively and freely exercise their rights to assembly
13 and speech. Any such precondition required by a government is clearly unconstitutional. The
14 City's attempts to defer all liability, costs and responsibility for the expression of its citizen's
15 constitutional rights to free speech have gone too far and violated the most protected of our
16 constitutional guarantees, the right to freely speak and assemble with others of a like mind and to
17 do so in concert.

18 IV. CONCLUSION

19 Based on the foregoing averments of facts and points and authorities of law, defendant
20 respectfully requests this Honorable Court to hold that Santa Cruz Municipal Code Chapter 10.65
21 is unconstitutional because it is unconstitutionally overbroad in that: 1) it is a content-based prior
22 restraint on speech that is not the least restrictive means to achieving a compelling interest and 2)
23 it lacks sufficient standards to prevent the City from exercising its discretion in a content-based
24 manner. Defendant also requests that this Honorable Court rule that the Non Commercial Events
25 Application Packet and other "discretionary" cost and insurance requirements that fall outside the
26 express language of Chapter 10.65 constitute an abuse of discretion pursuant to CCP 1085.

27 Dated: *August 2, 2010*


Jonathan Che Gettleman,

Attorney for Defendant, Wesley Modes

TABLE OF CONTENTS

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7

8

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10

11

12

13

14

15

16

17

18

19

20

21

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27

28

I.	INTRODUCTION.....	1
II.	CONSTITUTIONAL SCHEME.....	2
	A. General Provisions.....	2
	B. Standing.....	3
	C. SCMC Chapter 10.65 is an Impermissible Prior Restraint on Protected Expression in a Public Fora.....	4
	1. SCMC Chapter 10.65 is a Prior Restraint.....	4
	2. SCMC Chapter 10.65 Restricts Speech in a Public Fora.....	5
	D. SCMC is a Prior Restraint Subject to Strict Scrutiny.....	6
	1. SCMC Chapter 10.65 is Not a Reasonable Time, Place and Manner Restriction.....	6
	a. SCMC Chapter 10.65 is Content-Based.....	6
	2. SCMS Chapter 10.65 is Not the Least Restrictive Means to Further a Compelling State Interest.....	8
	E. SCMC Chapter 10.65 is Constitutionally Invalid Because it Imbues the Director of Parks and Recreation With Unfettered Authority to Determine Whether Exceptions Exist to the Permitting Requirements, What Constitutes Good Cause for a Late Application and What Fees to Charge.....	11
III.	THE CITY OF SANTA CRUZ ACTUAL ADMINISTRATION OF PERMITS PURSUANT TO SCMS CHAPTER 10.65 CONSTITUTES AN ABUSE OF ITS DISCRETION PURSUANT TO CIVIL CODE OF PROCEDURE SECTION 1085.....	12
IV.	CONCLUSION.....	15

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7 SUPERIOR COURT OF CALIFORNIA
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9 THE PEOPLE OF THE STATE
10 OF CALIFORNIA
11 PLAINTIFF,

12 vs.

13 WESLEY ALLEN MODES
14 DEFENDANT,

) Case No.: SCT 77272

) DECLARATION OF DANIEL JAMES
) HOWELL IN SUPPORT OF DEFENDANT'S
) TRIAL BRIEF REGARDING
) CONSTITUTIONALITY OF SANTA CRUZ
) MUNICIPAL CODE CHAPTER 10.65 AND
) REGARDING THE CITY'S ABUSE OF
) DISCRETION IN THE ADMINISTRATION
) OF THE SAME ORDINANCE

15 I, Daniel James Howell, do hereby declare:

16 1) My name is Daniel James Howell. I currently reside at 312 Buena Vista Avenue Santa
17 Cruz, CA 95062. All the facts stated herein are of my own personal knowledge unless indicated
18 that the fact is based on my information and belief. If called as a witness I would testify
19 truthfully to the following:

20 2) On July 28, 2010, I contacted Kathy Agnone via her official city email address and
21 asked the following question:

22 "Can you tell me how much it would cost for a permit to have the DIY
23 parade on New Years Eve? Do the streets need to be closed? Is there a cost
24 involved for that? What permits are needed?"

25 3) The response I received back from her email address from the City on the same day of
26 July 28, 2010 is as follows:

27 "Hi Daniel. I have pasted info below in response to your question regarding fees.

28 A Special Event Permit would be needed if the streets are to be closed.

The following is a pretty good estimation of the fees and requirements:

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FEES:

Application Fee	\$75.00
Sound Permit	33.00
Street Closure	100.00
Meters	127.20
SCPD Personnel 4 officers	1,482.92
Total Due	1,817.92

DOCUMENTS:

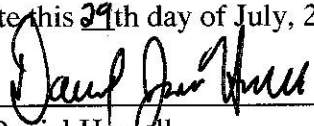
- Signed copy of the conditions of use
- Copy of notification flyers to businesses/neighbors
- Copy of notification to emergency response and other agencies
- Certificate of Insurance
- One portable bathroom and trash/recycle totes for the staging area are also required.
- I would be happy to meet with you if that would be helpful.

Kathy Agnone, Special Event Coordinator
 City of Santa Cruz
 831-420-5132
 Mon – Thurs: 8 to Noon; out on Fridays due to the city's furlough schedule:"

4) Later, the same day of July 28, 2010, I followed up this email with a phone call during which a woman who identified herself as Kathy Agnone answered and confirmed that she sent the above email.

5) I have attached the same email as Exhibit One to my declaration. The same email is a true and correct copy of what it purports to be.

I declare under penalty and perjury pursuant to the laws of the State of California that the foregoing statement is true and correct. Execute this 29th day of July, 2010 at Santa Cruz, California.



 Daniel Howell

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EXHIBIT ONE

Print

From: Jonathan Gettleman (jonathangettleman@yahoo.com)
To: jonathangettleman@yahoo.com;
Date: Wed, July 28, 2010 3:52:33 PM
Cc:
Subject: Re: Permit Questions

From: kagnone@cityofsantacruz.com
To: djameshowell@hotmail.com
Date: Wed, 28 Jul 2010 12:16:02 -0700
Subject: RE: Permit Questions

Hi Daniel. I have pasted info below in response to your question regarding fees.

A Special Event Permit would be needed if the streets are to be closed.

The following is a pretty good estimation of the fees and requirements:

FEES:

Application Fee	\$75.00
Sound Permit	33.00
Street Closure	100.00
Meters	127.20
SCPD Personnel 4 officers	1,482.92
Total Due	1,817.92

DOCUMENTS:

Signed copy of the conditions of use

Copy of notification flyers to businesses/neighbors

Copy of notification to emergency response and other agencies

Certificate of Insurance

One portable bathroom and trash/recycle toters for the staging area are also required.

Print

I would be happy to meet with you if that would be helpful.

Kathy Agnone, Special Event Coordinator

City of Santa Cruz

831-420-5132

Mon – Thurs: 8 to Noon; out on Fridays due to the city's furlough schedule

From: Daniel Howell [mailto:djameshowell@hotmail.com]
Sent: Wednesday, July 28, 2010 12:08 PM
To: Kathryn Agnone
Subject: Permit Questions

Greetings Kathy,

Can you tell me how much it would cost for a permit to have the DIY parade on New Years Eve? Do the streets need to be closed? Is there a cost involved for that? What permits are needed?

Thanks-
Daniel Howell

1 Jonathan Che Gettleman (SBN # 243560)
223 River Street, Ste D
2 Santa Cruz, CA 95060
Tel: (831) 427-2658
3 Fax: (831) 515-5228
4

5 SUPERIOR COURT OF CALIFORNIA
6 COUNTY OF SANTA CRUZ

7 THE PEOPLE OF THE STATE	) Case No.: SCT 77272
8 OF CALIFORNIA)
9 PLAINTIFF,	) DECLARATION OF JONATHAN CHE
10 vs.	) GETTLEMAN IN SUPPORT OF
11 WESLEY ALLEN MODES	) DEFENDANT WESLEY MODES' TRIAL
12 DEFENDANT,	) BRIEF REGARDING
	) CONSTITUTIONALITY OF SANTA CRUZ
	) MUNICIPAL CODE CHAPTER 10.65
	) AND REGARDING THE CITY'S ABUSE
	) OF DISCRETION IN THE
	) ADMINISTRATION OF THE SAME
	) ORDINANCE

13
14 I, Jonathan Che Gettleman, do hereby declare:

15 All the facts stated herein are of my own personal knowledge
16 unless indicated that the fact is based on my information and belief.

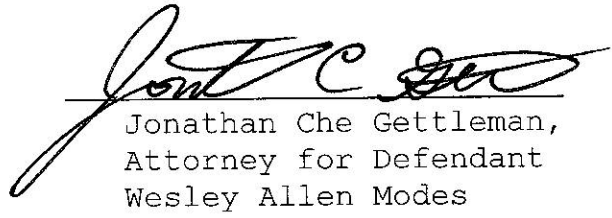
17 If called as a witness I would testify truthfully to the following:

18 1) I am the attorney of record for the Defendant in the above
19 entitled case.

20 2) The attached Exhibit A is a true and correct copy of what
21 it purports to be.

22 3) I obtained a copy of Exhibit A to this declaration by
23 downloading it off of the City of Santa Cruz official website at
24 <http://www.cityofsantacruz.com/index.aspx?page=881> and clicking on
25 the heading noncommercial event.
26

1 I declare under penalty and perjury pursuant to the laws of the
2 State of California that the foregoing statement is true and correct.
3 Execute this 2nd day of August, 2010 at Santa Cruz, California.
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6 Jonathan Che Gettleman,
7 Attorney for Defendant
8 Wesley Allen Modes
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EXHIBIT A



Special Events
City Manager's Office
809 Center St, Room 8
Santa Cruz, CA 95060
(831) 420-5132
(831) 420-5031 fax

Non Commercial Special Events Application Packet

Thank you for your interest in scheduling a non-commercial event in the City of Santa Cruz.

What is a noncommercial special event?

Per City of Santa Cruz Ordinance 10.65.100 b, "Noncommercial" means and denotes any political, civic, religious or other public activity intended primarily for the communication of ideas by the participants in or sponsors of the event.

Application Process

The purpose of the application is to promote public safety and welfare, to provide the City with a minimum amount of time to logistically accommodate the noncommercial event, and to assure that the First Amendment rights of those who wish to peacefully participate in noncommercial events on City of Santa Cruz public property are preserved and protected.

Non-commercial special events typically include some or all of the following:

- The use of public/City properties, Compass Rose/ Sister City's Plaza, Corner of Cooper and Pacific, Memorial Plaza (triangle at Front & Pacific Streets), Town Clock, Public Sidewalks, Other public areas if requested and approval is possible.
- more than 50 participants
- longer than 1 hour
- setting up a display larger than 6 ft x 6 ft x 3 ft
- amplified sound, if necessary

Submit this application form no less than 36 hours prior and to the event.

The special event coordinator will review the application and contact the organizer as soon as possible with the status of the request. Conditions of use are developed with the event details taken into consideration.

The Chief of Police may condition the issuance of a permit by imposing reasonable requirements concerning the time, place, and manner of the event, and any other requirements, which are necessary to protect the safety of persons and property, and to provide for adequate traffic control. These conditions will be outlined with the permit.

There is no application fee associated with this permit if no sound permit is required.
Submission deadlines: A minimum of 3 days prior and no more than 6 months to the event.

An approved Non-Commercial Special Event Application is required for all groups and a permit must be in possession of the applicant or representative at the event.

The right to revoke permission for an event at any time is retained by the City of Santa Cruz.

CITY OF SANTA CRUZ
NON-COMMERCIAL SPECIAL EVENTS APPLICATION

EVENT TITLE: _____

1. Applicant Name: _____ Phone (W) _____
Address: _____ Phone (H) _____

Alternate Person _____ Phone (W) _____
Address _____ Phone (H) _____

Sponsoring Organization _____ Phone (W) _____
Address _____ Phone (H) _____

Responsible Person at Event: _____ Phone (W) _____
Address: _____ Phone (H) _____

2. Purpose of Event: _____

3. Location Requested (including boundaries): _____

4. Date of Event: _____ Total Days: _____

5. Time of Event: Set up and prepare from _____ to _____
 Actual event from _____ to _____
 Clean up, close from _____ to _____

6. Number of People Expected: Adult _____ Youth _____

7. If vehicles will be involved, how many? _____ Type? _____

8. If structures will be set up, how many? _____ Type? _____
Tables or display devices, banners _____ Size? _____

9. Will an emergency aid station be provided? Yes _____ No _____

10. Sound amplification: Will sound amplification be used? Yes _____ No _____
 \$33 non-refundable fee

PURPOSE for sound: circle items: Speakers Music Announcements Other: _____

Type of music: _____

Band: # of players/pieces: _____

Have you applied for a sound permit for this location in the past? Yes _____ No _____

Results: _____

Sound Coordinator: _____ Mobile Phone: _____

Sound Ordinance/City of Santa Cruz:

- a. No person shall, between the hours of 10:00 p.m. and 8:00 a.m., be permitted to make any offensive noise within 100 feet of any building or place regularly used for sleeping purposes or which disturbs any person within hearing distance of such noise. ORDINANCE #9.36.010
- b. No person shall make, cause or permit to be made any noise or sounds which are unreasonably disturbing or physically annoying to people, of ordinary sensitiveness or which are so harsh or so prolonged or unnatural in their use, time, or place as to cause physical discomfort to any person and which are not necessary in connection with any activity which is otherwise lawfully conducted. ORDINANCE #9.36.020.
- c. Where the Police Department responds to a loud or unruly gathering more than once within twelve (12) hours, the responsible person shall be liable for the costs of providing special security services for the second and subsequent responses. ORDINANCE #9.37.030

- 11. Will food/beverages be served? Yes _____ No _____
Sold? Yes _____ No _____
(Food service must be approved by the County Health Department)
- 12. Will alcohol be served? Yes _____ No _____
Sold? Yes _____ No _____
(An ABC permit and City Council approval required)
- 13. Will monitors be provided? Yes _____ No _____ Number _____
- 14. Are there any anticipated parking needs? Yes _____ No _____
Will reserved parking/tow-away be required? _____
Is special parking requested for the handicapped? Yes _____ No _____
- 15. Do you anticipate any police or security needs? Yes _____ No _____

ADDITIONAL INFORMATION REQUIRED Only FOR MARCHES and/or PARADES

- 16. A map of the proposed route must be attached to this application.
- 17. Assembly point: _____ Time: _____
- 18. Portion of street to be used: All _____ Portion _____ Sidewalk Only _____
- 19. Intervals of space to be maintained between vehicles and other units: _____
- 20. Describe any vehicles to be used: # _____ Size _____ Type _____
- 21. Describe any other units to be used: # _____ Size _____ Type _____
- 22. Describe material and maximum size of any signs or banners _____

Agreement to Release, Indemnify and Hold the City of Santa Cruz Harmless

A. In consideration for the City of Santa Cruz (hereinafter known as "City") agreement to allow Permittee to use the Facility named within and attached hereto, Permittee hereby agrees on behalf of itself, its agents and employees, to indemnify and hold harmless the City and the City's representatives, officers, agents, employees and volunteers (hereinafter jointly referred to as "Releasees") for all damage, loss, claims, suits or action of any kind or nature whatsoever, including attorney fees brought for or on account of damage to property, or injuries to, or health of any person, resulting or alleged to have resulted directly or indirectly, wholly or partially, from the use of the Facility for the Event or from the conduct of the Event sponsored by Permittee at the Facility.

B. Additionally, Permittee hereby agrees to indemnify Releasees against and hold Releasees harmless from all damage, loss, claims, suits or action of any kind whatsoever, including attorney fees, which Releasees may sustain or incur, in whole or in part, as a consequence of the Permittee's negligence or intentional misconduct in the use of the Facility or the conduct of the Event sponsored by Permittee at the Facility.

C. In further consideration of the City's agreement to allow Permittee to use the Facility, Permittee hereby agrees not to assert any claim against, sue, attach the property of, or prosecute Releasees for injury or damage alleged to have been caused in whole or in part by Permittee's use of the Facility or the conduct of the Event sponsored by Permittee at the Facility, or any other activity undertaken by Permittee at or about the Facility with or without the City's permission.

D. Should it become necessary to enforce the terms of this agreement by legal or equitable action or should Permittee breach this agreement, Permittee shall pay legal costs and attorney fees incurred by the City of Santa Cruz whether in defense of a suit by Permittee or in the prosecution of a suit against Permittee.

NAME PRINTED: _____

SIGNATURE: _____ DATE _____

Return form(s) and fees, as needed, to:

Special Events/City Manager's Office
809 CENTER STREET Room 8
SANTA CRUZ, CA 95060
(831) 420-5132 Fax: (831) 420-5031

1 Jonathan Che Gettleman (SBN # 243560)
2 223 River Street, Ste D
3 Santa Cruz, CA 95060
4 Tel: (831) 427-2658
5 Fax: (831) 515-5228

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE)	Case Nos.: SCT 77272
)	
OF CALIFORNIA)	
	)	PROOF OF SERVICE
PLAINTIFF,)	
)	
vs.)	
)	
WESLEY ALLEN MODES,)	
)	
DEFENDANT,)	
)	

I, Jonathan Che Gettleman, do hereby declare that I am of the age of 18, not a party to this action and my business address is 223 River Street, Suite D Santa Cruz, CA 95060. On the date shown below, I served the within **DEFENDANT'S TRIAL BRIEF REGARDING CONSTITUTIONALITY OF SANTA CRUZ MUNICIPAL CODE CHAPTER 10.65 AND REGARDING THE CITY'S ABUSE OF ITS DISCRETION IN THE ADMINISTRATION OF THE SAME ORDINANCE; Declaration of Counsel; Declaration of Daniel Howell** by the following method.

Sending a true copy thereof by facsimile, per the City's request:

Celestial Kasman, Esq.
ATCHINSON, BARISONE, CONDOTTI & KOVACEVICH
333 Church Street
Santa Cruz, CA 95060
[City Attorney]
FAX: (831) 423- 9401

I declare under penalty of perjury of the laws of the State of California the foregoing is true and correct. Executed this 2nd day of August, 2010 at Santa Cruz, California.

Sincerely,


JONATHAN CHE GETTLEMAN