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RE: The People of the State of California, et al. v. Wesley Allan Modes
Superior Court of Santa Cruz County, Case No. SCT077272

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. JOHN G. BARISONE, CITY ATTORNEY FOR THE CITY OF SANTA CRUZ,

Plaintiff,

vs.

WESLEY ALLAN MODES,

Defendant.

CASE NO. SCT077272

CITY'S POST-TRIAL BRIEF RE: CONSTITUTIONALITY OF CHAPTER 10.65 OF THE CITY OF SANTA CRUZ MUNICIPAL CODE

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INTRODUCTION

The City's Non-Commercial Event Ordinance at Chapter 10.65 of the City of Santa Cruz Municipal Code (the "Ordinance") establishes the standards for the issuance of a permit for noncommercial events in Santa Cruz on public property. Pursuant to the Ordinance, a "noncommercial event" or "event" is a noncommercial public assembly, the primary purpose of which is the exercise of the participants' constitutional rights of free speech and assembly, which will cause various interferences with public areas.[1]

The Ordinance strictly circumscribes the discretion of City officials administering the Ordinance, only permitting denial of an application for limited and specifically delineated reasons.[2] If the

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[1] From SCMC §10.65.110, only an event:
(a) Which is scheduled to take place on a city street, sidewalk, alley or other right-of way; and/or
(b) Which is likely to obstruct, delay or interfere with the normal flow of vehicular or pedestrian traffic; and/or
(c) Whose participants are not likely to comply with traffic laws or controls; and/or
(d) Which generates a crowd of spectators or participants not comply with traffic laws or controls; and/or
(e) Which due to the crowd it generates, restricts access to or use of parks, beaches or other public areas; and/or
(f) Which will result in the placement of structures or objects on streets or sidewalks exceeding six feet by three feet in size or six feet in height.

[2] SCMC §10.65.250 provides that a permit may only be denied if one or more of the following circumstances exist:

(a) Information contained in the application is found to be materially false or misleading.

(b) The applicant failed to complete the application form after having been notified of the need to do so.

(c) The director of parks and recreation has already received an application for another event or at the same time and place as that requested by the applicant, or so close in time and place as to cause undue traffic congestion, and/or the police department or any other city department is unable to meet the needs for services at both.

(d) The time, route, or size of the event is likely to substantially interrupt the safe and orderly movement of traffic contiguous to the event site or route, or to disrupt the use of a street at a time when it is usually subject to great traffic congestion.

(e)The concentration of persons, vehicles and/or structures at the site of the event, or its assembly and disbanding areas, is reasonably likely to prevent proper police, fire, or ambulance service to areas contiguous to the event.

(f) The size of the event is reasonably likely to require diversion of so many city police officers to ensure that participants stay within the boundaries or route of the event, or to protect participants and spectators, that normal protection to the rest of the city of Santa Cruz will be compromised. Nothing herein authorizes denial of a permit because of the need to protect participants from the conduct of others, if reasonable permit conditions can be imposed to allow for adequate protection of participants with the number of police officers available to police the event.

(g) The location of the event is likely to substantially interfere with construction or maintenance work previously scheduled to take place upon or along city streets, or to interfere with a previously granted encroachment permit.

application is denied or conditionally approved, the applicant will be informed in writing of the grounds for denial or the conditions imposed for approval. Santa Cruz Municipal Code ("SCMC") § 10.65.210. The Ordinance also sets forth the only conditions which may imposed on a permit, all of which concern the time, place, and manner of the event, are necessary to protect the safety of persons and property, and provide for adequate traffic control. SCMC § 10.65.270.[3]

Section 10.65.030 (b), which Defendant is charged with violating, makes it an infraction to participate in a noncommercial event with knowledge that a permit has not been issued for the event. The People accuse Defendant of committing this infraction by participating in a December 31, 2009 parade in downtown Santa Cruz with knowledge that the parade was unpermitted. As an affirmative defense to this charge, Defendant alleges the Ordinance is unconstitutional, facially and as applied. As discussed below, both challenges fail.

(h) The event is likely to occur at a time when a school is in session, at a route or location adjacent to a school, and the noise created by the activities of the event would substantially disrupt the education activities of the school.

(i) The event will occur on a route or location adjacent to a hospital or extended care facility and the noise created by the event would substantially disrupt the operation of the hospital or extended care facility or disturb the patients within. In determining whether or not the permit application should be granted or denied, the director of parks and recreation shall resolve all doubts in favor of granting the application.

[3] Pursuant to §10.65.270, potential conditions are:
(a) Alteration of the date, time, route or location of the event;
(b) When the event is a march, conditions pertaining to the area of participant assembly and disbanding;
(c) Conditions concerning accommodation of pedestrian or vehicular traffic, including restricting the event to only a portion of a street, or allowing for intermittent traffic flow through an event site when safe to do so.
(d) Requirements for the use of traffic cones or barricades;
(e) When the event is a march, conditions pertaining to the periodic interruption of the march to allow for the flow of intermittent traffic across the march route;
(f) Requirements for provision of first aid, sanitary or emergency facilities; however, conditional approval shall not be denied because the applicant or sponsor cannot afford to pay for these services;
(g) Requirements for use of event monitors and some method for providing notice of permit conditions to event participants;
(h) Restrictions on the number or type of vehicles or structures for fire safety as required by Santa Cruz fire department;
(i) Requirements for use of garbage containers, cleanup and restoration of city property;
(j) Reasonable restrictions on use of amplified sound;
(k) Compliance with any other applicable ordinance or laws pertaining to required permits or licenses;
(l) Restrictions on the sale of alcoholic beverages;
(m) Requirements for security personnel to be present; however, conditional approval shall not be denied because the applicant or sponsor cannot afford to pay for private security personnel;
(n) Requirement for the applicant to provide advance written notification to those residents residing along the event route or within the immediate vicinity of the event.

I. EVIDENTIARY OBJECTION

The court should not consider the evidence attached to Defendant's post-trial brief (collectively, the "Evidence"): (1) July 28, 2010 Declaration of Daniel James Howell, (2) July 28, 2010 emails with City staff attached thereto as Exhibit 1, (3) the Declaration Jonathan Che Gettleman, and (4) information purportedly printed from the City's website. The Evidence was improperly submitted after the defense rested its case and the evidentiary portion of the trial was closed.[4] Defendant was required to submit any evidence of an affirmative defense at the trial. Furthermore, the declarations contain inadmissible hearsay, as out of court statements offered to show the truth of the matter therein.

The declarations are also irrelevant. A facial challenge considers only the text of the Ordinance, to determine from the four corners of the law if it passes constitutional muster. An as applied challenge is improper here; the only portion of the Ordinance that was applied to Defendant was that section making it an infraction to participate in the event with knowledge that the event was conducted without a permit. Defendant cannot assert an as applied challenge to Ordianance provisions regarding the application and approval of permits, since it is undisputed that no application was even made to the City. Moreover, the emails are dated July 28, 2010, nearly 8 months after the occurrence of event that is the subject of this case. Plainly, the Evidence is irrelevant and should be excluded. (See Section III.C)

II. ARGUMENT

A. THE ORDINANCE IS FACIALLY CONSTITUTIONAL

A statute is facially unconstitutional only if it is unconstitutional in every conceivable application, or if it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad. *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998). In evaluating a facial challenge to a municipal law, a court must consider any limiting construction that a municipality has proffered. *Ward v. Rock against Racism*, 491 U.S. 781, 795-796 (1989). A statute should be interpreted narrowly to avoid constitutional difficulties. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

[4] At trial, Defendant rested his case after presenting two witnesses. Each testified that she had participated in the December 31, 2009 DIY parade, had subsequently e-mailed the City Attorney and notified him of her participation, had requested a citation similar to Defendant's and had not heard back from the City Attorney. "The assertion that the Defendant was singled out for prosecution while other guilty persons were allowed to go unpunished, even for the same class of offense or for offenses in the same transaction, usually amounts to no more than a charge of laxity in law enforcement, and it is uniformly rejected as a defense." 1 Witkin, California Criminal Law (3rd ed. 2000) Defenses, § 233, p. 603.

1. The Ordinance is a Reasonable Time, Place, and Manner Restriction

Government may regulate the time, place, and manner of expression in public forums so long as the regulations are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[5] *Frisby, supra.* To this end, government may impose a permit requirement on those wishing to hold a march, parade, or rally in a public forum. *Cox v. New Hampshire,* 312 U.S. 569 (1941). "[I]f a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the street." *Id.* at 576. The Ordinance at issue is a reasonable time, place, and manner regulation that carefully balances free speech rights with the City's interest in public safety and welfare.

Defendant's facial challenge to the Ordinance relies primarily on one case, *Mardi Gras of San Luis Obispo v. City of San Luis Obispo,* 189 F.Supp.2d 1018 (2002). This case is in no way dispositive. First, the United States District Court for the Central District of California is not binding in this District. Second, the ordinance in that case is distinguishable in many critical respects from the Ordinance here under review. Third, more recent cases binding in this District have reached different legal conclusions.

2. The Ordinance is Content-Neutral

In analyzing whether a statutory provision constitutes an unconstitutional prior restraint the court first determines if the challenged regulation is content-neutral or content-based. The Ordinance applies by its terms to any "noncommercial public assembly, the primary purpose of which is the exercise of the participants' constitutional rights of free speech and assembly."[6] The Ordinance does not differentiate between any particular speech or viewpoint. Based upon a variety of standards elucidated in case law, regulations that do not differentiate among non-commercial speech based upon the message content, are content neutral.

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[5] The requirement that the regulations leave open ample alternative channels of communication is not challenged by Defendant and therefore is not addressed in this brief.

[6] The only Ordinance properly before the court is the Ordinance under which Defendant is charged. It is not the function of this proceeding to review other ordinances governing types of permits not at issue in this case. Therefore, the court should not take Chapter 10.64 into consideration, but should keep its review properly focused on the only Ordinance relevant to the alleged affirmative defense. Furthermore, it is the City's position that Chapter 10.64 is not a speech regulation; it is intended to regulate commerce in the public right of way such as sidewalk sales and craft fairs.

According to the United States Supreme Court, "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock against Racism,* 491 U.S. 781, 791 (1989). In *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 322 (2002), the Court, in analyzing whether an ordinance requiring a permit to conduct a public assembly, parade, or picnic was content neutral, found it significant that "the ordinance does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say" and " the object of the permitting scheme was 'to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event rather than to exclude expression based on any particular content." *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 322 (2002). The Ordinance here shares these content-neutral characteristics: it does not authorize the City to pass judgment on the content of the proposed speech, a permit may not be denied for what any speaker may say, and the Ordinance's exclusive objective is to mitigate potential public interference caused by an event; it does not exclude expression. Thus, as in *Thomas,* "'[t]he [permit] required is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved.'" *Thomas* at 323

The Ninth Circuit in *Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1037-1038 (9th Cir. Cal. 2006), found that the Santa Monica ordinance shared the content-neutral characteristics set forth in *Thomas.* Santa Monica's permit requirements were challenged as content-based because events were classified as "expressive" or "non-expressive" and expressive events were treated more favorably. The court rejected this argument, on the basis that the regulations did "not distinguish among the expressive events based on their content, and therefore satisfies the content-neutrality requirement for valid time, place, and manner regulations." Likewise here, the Ordinance does not distinguish among expressive events based on their content, but rather treats all expressive events the same. Significantly, the Ninth Circuit in *Santa Monica Food Not Bombs* did not cite to the

Central District of California's earlier *Mardi Gras* decision, even though the Santa Monica ordinance required the City to determine whether an event was expressive or non-expressive.

In *Maldonado v. Morales*, 556 F.3d 1037, 1047 (9th Cir. Cal. 2009), the court considered an ordinance that banned offsite commercial advertising but permitted non-commercial and onsite commercial advertising to be content-neutral. Similarly in *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 902 (9th Cir. Cal. 2009), the court held that an ordinance barring offsite commercial advertising but permitting non-commercial and onsite commercial advertising was "not by its terms a content-based regulation." If this distinction between commercial and non-commercial speech does not offend the Ninth Circuit, it should not invalidate the Ordinance here.

In determining the City of Richmond's parade ordinance content neutral, the Ninth Circuit reasoned: "There is no evidence on the record suggesting that this ordinance was enacted or enforced to censor particular viewpoints. Nor is there any claim that the ordinance is intended to suppress specific ideas that the government finds distasteful. We conclude that the law is facially content-neutral." *NAACP v. City of Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984). Similarly here, there is no evidence that the Non-Commercial Event Ordinance was enacted or enforced to censor particular viewpoints, nor is there any claim that the Ordinance was intended to or does suppress particular ideas.

Turning to similar conclusions from courts of other states, *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (D.C. Cir. 1990) held that a regulation requiring a permit for "the organized exercise of rights and privileges which deal with political, religious, or social matters and are non-commercial" is content-neutral because it is "justified without reference to the content of the regulated speech." *Id.* at 1369, citing *Clark*, 468 U.S. at 293. Those justifications for the permit requirement were: promoting safety, ensuring that the transit facilities are used for transportation purposes, and providing equal access to facilities for all members of the public desiring to express their views. Each of these is grounded in concerns independent of content. In the Ordinance here, the justifications for the permit are also content-neutral, seeking to promote public safety and welfare and to preserve people's First Amendment rights on City property. See SCMC §§ 10.65.020; 10.65.110; 10.65.160; 10.65.170; 10.65.250; 10.65.260; 10.65.270.

In *Kaahumanu v. Hawaii*, 685 F. Supp. 2d 1140, 1153-1154 (D. Haw. 2010), the court found permit requirements regulating "commercial" activity content neutral, since the regulation "focuses on any commercial wedding regardless of denomination or indeed whether it might be religious or not." As the reverse, here the Ordinance concerns all noncommercial events, regardless of the content of the speech, and is also content-neutral.

Defendant's heavy reliance on the *Mardi Gras* case for the proposition that the Ordinance is content-based is misplaced. The ordinance in *Mardi Gras* is distinguishable because it did not treat all noncommercial events the same, but rather placed discretion without guidance in a city official to determine from the outset if the proposed event enjoyed "First Amendment protection," *Id.* at 1020. Based upon this city official's determination, the permit received differential treatment. *Id.* Here, nothing in the Ordinance requires or authorizes the City to (1) deny, approve, or conditionally approve an application based upon content, (2) make any determinations whatsoever about First Amendment protections, or (3) apply alternate application or permit requirements based upon content. The characteristics of the ordinance in *Mardi Gras* which made it content-based are simply not present in the Ordinance challenged here.

Content-neutral restrictions are acceptable so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. *Sebago, Inc. v. City of Alameda*, 211 Cal.App.3d 1372, 1382 (1989).

3. The Ordinance is Narrowly Tailored to Serve Substantial Government Interests

The United States Supreme Court has stated the applicable standard of review as follows: "The regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but ... it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock against Racism*, 491 U.S. 781, 797-799 (U.S. 1989) (citations omitted). Further, the Court rejected the standard asserted by Defendant in this case: "This 'less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner

regulation.' *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984). Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Ward v. Rock against Racism,* 491 U.S. 781, 797 (U.S. 1989).

It is clearly established that there is "substantial government interest in regulating parades, when large groups use public streets and disrupt traffic by causing major arteries to be closed and transportation rerouted." *NAACP v. City of Richmond, supra; accord Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981); *Mardi Gras* at 1031-1032 (coordination and facilitation of the use of public facilities and ensuring that First Amendment events are lawfully regulated). The right of free speech does not carry with it a right to deny others the use of the streets for normal movement and passage. *People v. Huss*, 241 Cal.App.2d 361 (1980). It also "can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." *Ward v. Rock against Racism,* 491 U.S. 781, 796 (U.S. 1989), citing *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 806 (1984).

The Ordinance here requires no more than is necessary to serve the City's legitimate interests in public safety and welfare. Each of the permit requirements is directly related to serving these interests and accommodating the events. None of its requirements are superfluous, unduly burdensome, or costly. The Ordinance requires basic information about the event, such as date, location, size, structures, sound amplification, parking needs, security needs (SCMC § 10.65.160); and information particular to marches, such as assembly point and route, meeting time, manner of vehicular travel, and size of banners to be carried along the route (SCMC § 10.65.170). The director of parks and recreation may condition a permit on 14 potential requirements concerning the time, place, and manner of the event, but only when necessary to protect the safety of persons and property and to provide for adequate traffic control (SCMC § 10.65.270). Each of these items are critical to the City's interests in arrangement of

necessary accommodations and resources and mitigating possible public safety and welfare impacts.[7] It cannot be said that these requirements do not serve the City's interests in public safety and welfare.

Defendant does not attack any particular requirement of the Ordinance as not narrowly tailored, to which the City could specifically respond. Instead, Defendant simply mentions some requirements of the Ordinance, and then, without analysis, concludes that these are "less disturbing" than requirements Defendant alleges are imposed by the City but not found in the Ordinance. Defendant's Brief at 8:12-9:9. Requirements that are not in the Ordinance have no place in this facial challenge. For this reason, the following portions of Defendant's Brief should not be considered: 9:8-10:19; 10:24-27; 12:8-15. Furthermore as explained in Section II, the evidence Defendant proffers to support these alleged "extra-Ordinance" requirements is inadmissible. Alleged requirements not found in the Ordinance, and related portions of Defendant's brief, should not be considered.

B. THE ORDINANCE DOES NOT CONFER UNFETTERED AUTHORITY UPON THE CITY OFFICIALS

Under the Ordinance, the director of parks and recreation may only deny an application for one of nine specifically enumerated reasons. SCMC § 10.65.250; 10.65.210. The director may condition the issuance of a permit on 14 potential requirements concerning the time, place, and manner of the event, only when imposition would be necessary to protect the safety of persons and property and to provide for adequate traffic control. SCMC § 10.65.270. The reasons for denial of a permit, and the imposition of any conditions, must be in writing. SCMC § 10.65.210. The Ordinance sets forth only two permit exceptions, subject to specific guidelines. SCMC § 10.65.130. This scheme restricts, rather than confers, discretion.

The Supreme Court has held that a local ordinance permitting an official to deny a permit application if the proposed activity "would present an unreasonable danger to the health or safety of park users", was "narrowly drawn, reasonable and definite", and did not "leave the decision to the whim of the administrator.'" *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002). The Ordinance essentially requires the parks and recreation director to make the same findings of public health and safety in order

[7] Lacking an attack by Defendant on any specific Ordinance requirement alleged to not be narrowly tailored, and given the page limit of this brief, it is not possible for the City to discuss the relationship of each sentence in the Ordinance to the respective government interests furthered.

to impose any of the conditions, and in turn, to calculate any costs to be borne by the applicant.[8] Moreover, "'A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.'" *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951); *Thomas* at 322-323. Here, all requirements and conditions are in consideration of public safety and welfare, not the content of the proposed speech. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) also made it clear that the United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion by the licensing officials is appropriately confined. In *Cox*, the Court upheld regulations where a license for a parade could be refused only for "considerations of time, place and manner so as to conserve the public convenience," and the license fee was "to meet the expense incident to the administration of the [regulations] and to the maintenance of public order in the matter licensed." *Cox* at 577. The licensing system was sustained even though the license fee was determined by the licensing officials on the facts of each case. *Id.*

The foregoing principles also validate the narrowly designed exceptions to the Ordinance's permit requirement.[9] Defendant's assertion that no guidelines exist for making exceptions is inaccurate. The first exception applies only when the event will be conducted exclusively in a City park without causing the public interferences the Ordinance seeks to mitigate. SCMC 10.65.130(a). The official's review of this exemption is guided and limited by determining whether, based upon information from the applicant, the event will likely cause any of the six specific public right of way impacts set forth in Section 10.65.110, such as whether the event is likely to obstruct a street, interfere with traffic, restrict public access, or result in the placement of large structures on streets or sidewalks. The second exception applies to an event that will involve less than one hundred people and for which the applicant guarantees compliance with nine specifically enumerated reasonable time, place, and manner restrictions

[8] Of the 14 conditions, the two which may impose costs upon an applicant – "provision of first aid, sanitary or emergency facilities" and "requirement for security personnel to be present" – both contain the caveat "however, conditional approval shall not be denied because the applicant or sponsor cannot afford to pay for private security personnel." SCMC § 10.65.270(f),(m).

[9] Here, the Ordinance permits the parks and recreation director to waive the application deadline for "good cause". Should this provision be found to vest excessive discretion, as found by the court in the *Mardi Gras* case, the Ordinance contains a severability clause that would limit this finding to that section of the Ordinance. SCMC § 10.65.380. Of course, this provision of the Ordinance played no role in this case since Defendant refused to apply for a permit as a matter of principle.

mitigating public health and safety impacts of the event, such as marching on sidewalks, obeying traffic regulations, and obeying laws. SCMC § 10.65.130(b). These provisions narrowly restrict the discretion of the director to grant or deny an exception, based upon specific enumerated criteria aimed exclusively at considerations of public safety rather than the content of the speech.

C. AN AS APPLIED CHALLENGE IS INAPPROPRIATE BECAUSE THE CHALLENGED PROVISIONS OF THE ORDINANCE WERE NEVER APPLIED TO DEFENDANT, AND SUCH CHALLENGE IS MERITLESS IN ANY EVENT

This argument should not detain us long. First, the as applied challenge is based entirely upon inadmissible evidence as discussed in Section II above. Second, it is undisputed that Defendant has not applied for and been denied a permit. The only portion of the Ordinance that was applied to Defendant was that section making it an infraction to participate in the event with knowledge that the event was without a permit (SCMC § 10.65.030(b)). Defendant cannot assert an as applied challenge as to provisions regarding the application and approval of permits which were not applied to him. The evidence is also irrelevant because the information is dated July 28, 2010, nearly 8 months after the occurrence of event that is the subject of this case. Thus, there is no basis for an as applied challenge.

CONCLUSION

Defendant's facial and as applied constitutional challenges to the Ordinance are unavailing. The Ordinance constitutes reasonable time, place, and manner restrictions under constitutional jurisprudence. The Ordinance is content-neutral, narrowly tailored, and leaves open ample alternatives for speech. The Ordinance does not confer excessive discretion upon City officials. The *Mardi Gras* case upon which Defendant primarily bases his challenge is not binding, addresses a significantly different ordinance, and is easily distinguished. Finally, Defendant's as-applied challenge must fail because, in the undisputed absence of any application for a permit, the Ordinance provisions he challenges were not applied to him. In light of the foregoing, the Ordinance cannot serve as an affirmative defense to the charge against Defendant.

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ATCHISON, BARISONE, CONDOTTI & KOVACEVICH

Dated: 8/9/10

By: _____

CELESTIAL CASSMAN, Attorney for Plaintiff, THE PEOPLE OF THE STATE OF CALIFORNIA ex rel. CELESTIAL CASSMAN, DEPUTY CITY ATTORNEY FOR THE CITY OF SANTA CRUZ

The People of the State of California, ex rel., et al. v. Wesley Allan Modes
Santa Cruz County Superior Court Case No. SCT077272

PROOF OF SERVICE

I am employed in the County of Santa Cruz, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 333 Church Street, Santa Cruz, California 95060.

On the date set forth below, I served the following document(s):

CITY'S POST-TRIAL BRIEF RE: CONSTITUTIONALITY OF CHAPTER 10.65 OF THE CITY OF SANTA CRUZ MUNICIPAL CODE

on the interested party(ies) to said action by the following means:

[✖] **(BY MAIL)** By placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, for collection and mailing on that date following ordinary business practices, in the United States Mail at the offices of Atchison, Barisone, Condotti & Kovacevich, Santa Cruz, CA, addressed as shown below. I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and in the ordinary course of business, correspondence would be deposited with the U.S. Postal Service the same day it was placed for collection and processing.

[ ] **(BY HAND-DELIVERY)** By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the address(es) shown below.

[✖] **(BY FACSIMILE TRANSMISSION)** By transmitting a true copy thereof, from sending facsimile machine telephone number (831) 576-2269 to the following party(ies) at the receiving facsimile machine number(s) shown below. The transmission was completed, and the transmission report attached was properly issued by the transmitting facsimile machine.

[ ] **(BY OVERNIGHT DELIVERY)** By placing a true copy thereof, enclosed in a sealed envelope, with delivery charges to be billed to Atchison, Barisone, Condotti & Kovacevich, to be delivered by Federal Express, to the address(es) shown below.

[ ] **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 9, 2010, at Santa Cruz, California.

ESMERALDA CASTILLO

NAMES, ADDRESSES AND/OR FAX NUMBERS OF PARTIES SERVED:

Jonathan Gettleman
223 River St, Suite D
Santa Cruz CA 95060
Facsimile No.: (831) 515-5228

Attorney for Defendant
Wesley Allan Modes