INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session: IV: Employment / First Amendment

Title: The First Amendment and Special Municipal Services: Who Picks Up the Tab for the Campaign Event?

by

Presenter: Katherine S. Janega

Presenter's Title: Village Attorney

Presenter's Office: Village of Winnetka, Illinois

© 2007 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2007 Annual Conference, held October 28-31, 2007 in Nashville, Tennessee. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

The First Amendment and Special Municipal Services:
Who Picks Up the Tab for the Campaign Event?

I. Introduction

The financing of political campaigns, particularly for national office, is a big business, as evidenced by the FEC filings of the current presidential candidates, who reported raising millions of dollars, some well into double digit numbers, in just the first three months of 2007.[1] With presidential campaigns beginning more than a year and a half before the actual election, and with both major political parties having a large field of candidates traveling extensively to key states in anticipation of a front-loaded primary election schedule, it is easy to project that the candidates will continue to enrich their campaign coffers through a variety of political fundraising vehicles.

Many fundraising events are large, high-profile affairs held in hotels and banquet halls; however, many candidates attend smaller, private affairs in which the attendees pay a high price for more immediate contact with the candidate. These events tend to be in private homes, and the individuals who host them often request additional police protection so that the affair can be held without the intrusion of the general public. If the Secret Service provides security for the candidate, it is not uncommon for the Secret Service to tell the local police department to provide additional police personnel, to close off streets, to provide special parking areas, to maintain a perimeter around the event site and to have emergency vehicles and personnel at the ready.

A municipality's cost of providing such services can be significant. Following the 2004 presidential election, the *Capital Times* of Madison, Wisconsin, reported that repeated visits by the presidential and vice presidential candidates cost communities in Brown County, Wisconsin, more than $187,000 in overtime, with one 96-minute presidential visit costing Brown County $31,665, and an overnight visit by Democratic presidential candidate John Kerry costing $28,645 in overtime.[2] In September of 2004, the *Denver Post* reported that local police agencies incurred overtime and extra security costs in excess of $100,000, with the final month of the presidential campaign remaining.[3] In the same article, the *Denver Post* reported that the town of Cleveland incurred security and other costs in excess of $270,000, and planned to bill the presidential campaign. In Winnetka, Illinois, a suburb of Chicago, the Village succeeded in collecting $80,000 for police protection and other services provided in conjunction with two private campaign events held in the home of the president of a major corporation.[4]

---

1 For example, FEC Form 3PA filings for the first quarter of 2007 showed that Hillary Clinton's campaign had net receipts in excess of $26 million and expenses above $5 million, Barack Obama's campaign had receipts of more than $25 million and spent more than $6 million, and Rudy Giuliani's campaign had net receipts of approximately $16 million and spent about $5 million.

2 *Capital Times* (Madison, WI), November 22, 2004 (2004WLNR 12143945).

3 *Denver Post*, September 30, 2004 (2004WLNR 997854).

4 *Chicago Tribune*, January 17, 2005.

Not surprisingly, as the news reports disclose, campaign organizations and event sponsors would prefer that municipalities make their services available for free, and municipalities that have tried to recoup their costs have met with resistance. Those who maintain that a municipality may not recover the costs it incurs in providing special services exclusively for a political event rely on two principal contentions. First, they claim that requiring them to pay for the municipal services is an infringement of the rights of free speech and assembly under the First Amendment. Second, event hosts assert that reimbursing the municipality constitutes an in-kind contribution that could put the host over the statutory campaign contribution limits and prevent them from making other contributions to the candidate. These assertions give rise to two questions:

1. Does the First Amendment require municipalities to bear the cost of providing police protection or other services for a campaign event?

2. Is an individual's position vis-à-vis campaign spending limits relevant to determining whether a municipality's reimbursement requirements comport with First Amendment standards?

It is this writer's opinion that the answer to both questions is "no," that the First Amendment does not impose such an affirmative duty upon local governments, and that the validity of a municipal reimbursement policy is not measured against the individual circumstances of those being asked to pay, but against standards that are applied to the municipality's actions. This paper will first explore the basic First Amendment principles related to providing and charging for special services and then will provide practical guidance on how to structure a policy that can withstand scrutiny under the First Amendment.

II. Overview of First Amendment Principles

The mandate of the First Amendment is couched in negative terms. That is, rather than requiring government to take affirmative actions to meet a defined minimal standard of behavior, the First Amendment prohibits "abridging the freedom of speech…or the right of the people to peaceably assemble." U.S. Const. Amend. I.

Though no case has directly addressed the specific issue of whether a governmental entity must provide services so that an individual or group of individuals can hold a private political gathering, the Supreme Court has spoken numerous times on the basic First Amendment principle and concluded that "not to subsidize the exercise of a fundamental right does not infringe on the right." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983).

In *Regan*, a not-for-profit organization was denied tax exempt status under Section 501(c)(3) of the Internal Revenue Code because it engaged in substantial amounts of legislative lobbying. The organization unsuccessfully claimed that the denial

of tax exempt status was unconstitutional because its lobbying activities were an exercise of its rights under the First Amendment. The Court viewed the organization's claim as an assertion that the First Amendment requires Congress to subsidize lobbying, a claim the Court had previously rejected in upholding tax regulations that denied business expense deductions for lobbying activities. *Cammarano v. United States*, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959). Quoting from Justice Douglas' concurring opinion in *Cammarano*, the *Regan* Court stated: "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.' " *Regan*, 461 U.S. at 546, 103 S.Ct. at 2001.

The *Regan* Court also cited *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), in which the Court considered a variety of challenges to the Federal Election Campaign Act of 1971 ("FECA"), as amended in 1974, rejecting a First Amendment challenge to that part of FECA that provided for matching funds for certain candidates, while reaching the opposite conclusion as to FECA's limitations on campaign contributions. Similarly, when faced with a challenge to what is commonly referred to as the "Hyde Amendment," which prohibited providing public funds for abortions, the Court rejected the claim that the denial of funding prevented those who could not afford an abortion from exercising their First Amendment right to obtain one. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

The *Regan* Court quoted from *Harris* in explaining the common thread in all of the foregoing decisions, stating, at 461 U.S. 549-50, 103 S.Ct. 2003:

> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of ... freedom of [speech], it need not remove those not of its own creation." [*Citation omitted.*]

Thus, the Supreme Court has recognized a clear distinction between the individual exercise of First Amendment rights and a fiscal subsidy to support that exercise. While the former must be protected, the latter is not required.

The logic of this principle is readily apparent. "Free" municipal services are not really free, for if the persons hosting or sponsoring the event do not pay for the services provided, then the costs are borne by the taxpayers of the municipality. More significant, however, is that to hold that a municipality has a constitutional obligation to provide exclusive use of its services or other resources for political fundraising events is to hold that any person can compel the municipality to provide him or her with the exclusive use of municipal services, whenever requested, without charge or restriction. Such a policy would leave a community without the ability to plan its own operations and how to finance them, because fiscal and other resources could be diverted to private use at any time.

The Supreme Court has recognized that First Amendment rights are not absolute. In *Niemotko v. State of Maryland*, 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951), the

Court reviewed disorderly conduct convictions of members of the Jehovah's Witnesses. The Court first conducted a lengthy examination of cases addressing the constitutional right to free speech, and observed:

> While the Court has emphasized the importance of 'free speech,' it has recognized that 'free speech' is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration.

340 U.S. at 282, 71 S.Ct. at 333. The court went on to describe the central questions on which the courts have focused: (1) What is the interest that requires the regulation of the speech? (2) What method is used to further that interest? (3) What form of speech is being regulated? (4) Where does the regulated speech occur? 340 U.S. at 282-83, 71 S.Ct. at 333.

In sum, the Courts have recognized that First Amendment rights are not absolute and can be subject to conditions and limitations. Nevertheless, a municipality's power to impose regulations that impact individual rights under the First Amendment is also limited. The relative interests of the individual's right to free speech and the municipality's interests in preserving public order must necessarily be balanced in each instance. The next section addresses the First Amendment standards against which a municipality's efforts to recover costs must be measured.

III. First Amendment Standards for Regulating the Use of Public Funds and Resources

How municipalities go about recovering their costs of providing exclusive services for political fundraising events can vary. Some communities may have an established, but unwritten policy that is applied on a case by case basis. Others may formalize the policy, by setting fees or by enacting an ordinance that requires those who request exclusive municipal services to obtain a permit. Of these alternative modes, setting out the policy in an ordinance is the preferred method, since it helps to assure consistency in how the requirements are imposed and in how they are understood by those who must comply with them.

A. Content neutrality

The most fundamental criterion for complying with the First Amendment is that the reimbursement policy be content or viewpoint neutral. In *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, at 828-29, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995), the Supreme Court set out the following summary of the principles of content neutrality as follows:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643, 114 S.Ct. 2445, 2458-2460, 129 L.Ed.2d 497 (1994). These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. ***829** *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S.Ct. 501, 507-508, 116 L.Ed.2d 476 (1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391, 112 S.Ct. 2538, 2547, 120 L.Ed.2d 305 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)

To test whether a reimbursement policy is content neutral, a municipality should ask itself such questions as:

1) Would the reimbursement requirements apply to another resident who requests the same type and level of services, for example, closing off a street and providing 5 police officers for security and traffic control, for a large private party featuring a rock band?

2) Would the same reimbursement requirements apply if the same request were made for a family reunion?

3) Would the same reimbursement requirements apply if a local organization requested the same services for a similar event?

4) Has the municipality charged different rates for a favored community organization?

If the answer to the first three questions is “yes,” and the answer to the last question is “no,” then the policy is content neutral, for the outcome depends not on who attends, who requests the services, or what the purpose of the gathering is, but on the event’s demand for and impact on municipal resources.

B. Reasonable time, place and manner

It is also well established that the Constitution does not prohibit municipalities from establishing a licensing or permitting system for events such as parades as long as they constitute a reasonable regulation of the time, place, and manner in relation to the other proper use of the location in question. *Thomas v. Chicago Park District*, 534 U.S. 316, 323, 122 S.Ct. 775, 780, 151 L.Ed.2d 783 (2002) (upholding a park district ordinance requiring a permit for events for 50 or more persons); *Cox v. State of New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (upholding a parade permit requirement). While these cases involve public venues, they are relevant to the discussion of private events on private property, as their focus is on balancing the time, place and manner of the regulation against the normal use of the particular public resource demanded for the event.

In the context of a political fundraiser, the time, place and manner of the regulations of the exclusive use of police services must be considered in relation to the normal assignment of the police and the community's normal police resources. In its simplest application, the balance would be tipped in favor of denying a parade permit or a permit for a public gathering if another party has obtained a permit for a like event at the same time and place. However, the situations that give rise to controversy are inevitably more complicated. For example, a municipality such as New York City or Chicago, with a police force of well over 10,000, could more easily absorb the assignment of 5 police officers than could a municipality with a population of 10,000 and a total police force of 15 officers who are evenly distributed over three shifts per day. Similarly, if a public figure requires that an ambulance or other emergency vehicle be assigned exclusively to the event location, taking it out of service to the rest of the community, the community can take into consideration whether it can spare the ambulance at the time requested, or if it is able to get another community to provide coverage for emergency medical services.

Perhaps the clearest example of the balancing involved in the time, place, and manner consideration is for a proposed campaign event in a small town on the Fourth of July, when all of the community's police and fire vehicles are participating in the annual parade, there is a community picnic that requires off-duty personnel to be called in, and the evening fireworks display requires the full complement of police and fire personnel, with on-call assistance from a neighboring community, to manage crowds and be available should the fireworks display goes awry. The municipality could deny a permit for an event under such circumstances. *See, Thomas v. Chicago Park District*, 534 U.S. 316, 319, 122 S.Ct. 775, 778 (2002), (sustaining ordinance that included a provision allowing a permit to be denied if "the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public.")

Another factor in determining whether a license or permit requirement is a reasonable time, place and manner regulation, is that the requirement "must be narrowly tailored to serve a significant governmental interest, and must leave open ample

alternatives for communication." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

Thus, in *Forsyth*, the Court found a county ordinance that could apply to any activity on public property, such as parades, street speeches and bike races, to be unconstitutional where the amount of the permit fee and the scope of costs included in determining it were decided only by the county administrator. Noting that how much to charge, and whether to charge a fee at all, was "left to the whim of the administrator," who was not guided by any articulated standards, was not required to rely on any objective factors, and did not need to explain his decision, which was not reviewable, the Court stated unequivocally: "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth*, at 505 U.S. 133, 112 S.Ct. 2403.

In contrast to *Forsyth*, the ordinance the Court upheld in *Thomas, supra*, not only contained specific standards for denying a permit, (discussed in greater detail in the following section), it also required the administrator to specify the reasons for denial and contained an appeal process, first to the Park District Superintendent, and then to the courts. *Thomas,* 534 U.S. 316, 319, 324, 122 S.Ct. 775, 778, 781.

C. Adequate administrative standards

The third key criterion for testing a reimbursement or permitting requirement is that it must have adequate standards so that those who are administering it do not have unfettered discretion to grant or deny permits, waive fees or alter the terms of the requirement. This criterion was addressed at length in *Niemotko v. State of Maryland*, 340 U.S. 268, 284-85, 71 S.Ct. 328, 334, 95 L.Ed. 280 (1951), in which the Court stated: "[If] a municipality conditions holding street meetings on the granting of a permit by the police, the basis which guides licensing officials must not give them a free hand, or a hand effectively free when the actualities of police administration are taken into account." *Niemotko* also teaches that "appropriate standards" are required whether the speaking is to occur indoors or outdoors. *Id.*

More recently, in *Thomas v. Chicago Park District,* 534 U.S. 316, 323, 122 S.Ct. 775, 780 (2002), the Court reiterated the need for adequate administrative standards, stating:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

The Court closely examined the precise language in the Park District's ordinance and concluded that it contained adequate administrative standards. Most notably, those standards set out a detailed listing of grounds for denying a permit, which included: (1) material misrepresentations or falsehoods on the application; (2) violations of prior

permits; (3) unresolved damage to public property on a prior occasion; (4) submitting an incomplete application; (5) failure to pay the required fee or submit required insurance and indemnification information; (6) failure to submit a required security deposit; (7) an applicant who is not competent to contract or be sued; (8) the event would conflict with a previously scheduled event or with an event that is the subject of another application or permit; and (9) the proposed event is for an activity that is prohibited by law or ordinance.

With the foregoing in mind, the following section outlines practical considerations for drafting an ordinance for recovering expenses related to providing services for special events.

IV. Drafting Guidelines

To meet First Amendment standards, any ordinance establishing a mechanism for recovering the costs incurred by a municipality should define the scope of the ordinance, establish procedures, delineate standards for evaluating the application, provide channels for communicating with the applicant, and provide a mechanism for prompt review. At the same time, the ordinance should establish a fee structure and assure that the municipality's property and personnel are protected from damage and injury in the course of the event. The following paragraphs expand on each of these components.

Scope of the ordinance. The ordinance may be cast as a special events ordinance or a special services ordinance, and should contain a clear and specific statement of the municipality's legislative intent to enact content neutral regulations for the processing of requests for the exclusive use of municipal resources, such as personnel, property and equipment. It should also contain a statement that reflects the balancing of interests between the individual's requests and the public needs and safety.

For example, the legislative findings may state that individuals and organizations sometimes host or sponsor events that require special municipal services, and that providing such special services affects the public health, safety and general welfare by requiring the reallocation of the municipality's personnel, equipment and property, imposing additional costs on the municipality, exposing the municipality to additional liability, and interfering with the municipality's normal operations as well as with the safe use of the municipality's public ways and property.

Exclusions from the ordinance should also be stated. For example, a municipality that has a parade ordinance should continue to use its parade ordinance, and limit the special events or special services ordinance to uses of the public way for other purposes, such as closing off streets for a particular event. Similarly, municipalities that have regulations governing the use of municipal resources for film production purposes may wish to continue to use such an ordinance. In all cases, the drafter must take care to maintain consistency among the standards and procedures of the various ordinances, so as to avoid claims that the ordinance is not content neutral.

Definitions. Defining terms will assist both administrators and the public in understanding the scope of the ordinance, with definitions of special events or special services that are based on the nature of the service requested, rather than on the purpose or location of the event. An essential component of the definition should be that the services are being sought for use by or for the applicant, making the requested resource unavailable for ordinary use by the municipality. For example:

> As used in this chapter, "special services," means the exclusive allocation of Village resources, including but not limited to Village personnel, equipment, rights-of-way or property, for use in conjunction with a specific event or activity, as requested by the host or sponsor of the event, or as requested by or on behalf of any person attending the event. Special services shall include, but not be limited to, any of the following: street closures; requiring police officers to stop or reroute traffic; special police protection; stationing emergency vehicles at or in the immediate vicinity of the event; exclusive use of Village streets as a staging area or for event parking; additional street cleaning and garbage removal services; special signage, such as temporary no parking signs; the use of any Village building, equipment or other property for any purpose other than the normal daily operations of the Village; and otherwise providing exclusive services.[5]

The definitions may also establish the basis for exceptions to the reimbursement requirement. For example, if the ordinance does not apply to official visits of the incumbent President and Vice-President, or the incumbent U.S. Senators and Representative for the municipality's jurisdiction, it is advisable to define an "official visit" or an "official appearance" as being one that is paid for with public funds and that is open to the general public.

Application form. The ordinance should prescribe the basic form and contents of the application. That application should request objective information that will assist the municipality in determining precisely what the applicant is requesting and the extent of the request's impact on normal municipal operations. Besides the dates, time, location and duration of the event, and information identifying the applicant and providing contact information, the application should include a description of the services, personnel, equipment and property the applicant is asking the Village to provide. Any requested street closures should also be required as part of the application.

It is advisable to avoid requiring a description of the purpose of the event. For example, if two different events request the same or similar services, it is immaterial that one might be a political fundraiser and the other might be a wedding reception.

The application should also contain the applicant's signed statement agreeing to pay all fees and meet all other requirements of the ordinance, and representing that he or she is duly authorized to make such agreement on behalf of the sponsor of the special

[5] Sample definition from Section 5.66.020 (B) of the Winnetka Village Code, Winnetka, Illinois.

event. The ordinance should also require the applicant to provide additional information as needed by the administrative official to determine the nature and extent of municipal services to be provided.

Review procedures. The ordinance should specify who reviews the application and should set out the timeframe for processing. In general, small events with minimal requests will take little time to process. The municipality may require more lead time for large events that seek the use of municipal property, so that scheduling issues can be resolved well in advance of the proposed event. The ordinance should also state that the applications will be processed in the order they are received.

The ordinance should contain either detailed grounds for denying a request, or a specific statement of when a permit must issue. In that regard, the provisions in the Park District ordinance considered in *Thomas v. Chicago Park District, supra,* provide a good model for standards and establishing when a permit can be denied. A notable example of a provision requiring issuance of a permit can be found in the ordinance considered by the Seventh Circuit Court of Appeals and was included in *MacDonald v. City of Chicago,* 243 F.3d 1021, 1024 (7th Cir. 2001). Under the Chicago ordinance, a parade permit must issue if the following criteria are among those that are met:

> The proposed activity will not substantially or unnecessarily interfere with traffic in the area contiguous to the route;
>
> There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful participants in the activity;
>
> The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service;

The court in *MacDonald* overturned the administrator's denial of a parade permit, on grounds based on the three criteria listed above. The administrator stated:

> The proposed activity will substantially and unnecessarily interfere with traffic; there are not available a sufficient number of peace officers to police and protect participants; and the concentration of things at the assembly and along the route will prevent proper fire and police protection and ambulance service." *Id.*

Of particular note here is that the court rejected the applicant's contention that the use of the terms "substantially," "unnecessarily" and "sufficient" in the ordinance's standards gave the administrator unfettered discretion. The ordinance in question required the administrator to consider: (1) whether the proposed parade would "substantially or unnecessarily interfere with traffic in the area contiguous to the route;" (2) whether the city would have available "sufficient city resources to mitigate the

disruption;" (3) whether city would have available "a sufficient number of peace officers to police and protect lawful participants and non-participants from traffic related hazards in light of the other demands for police protection;" and (4) whether the concentration of persons will "prevent proper fire and police protection or ambulance service." The court concluded that, read in context, the terms actually limited the municipal official's authority. *Id.*, at 1026-28.

Conferring with applicant. The application processing procedures should also require the administrator to confer with the applicant before denying a permit, to determine whether there are terms under which the permit can issue, such as holding the event on another date, considering another location for the event, obtaining some services from private vendors, or having the municipality provide other or additional special services. These requirements are consistent with the process approved by the Court in *Thomas, supra.*

Waivers. If the administrator is allowed to waive fees or other requirements, the procedure should clearly define the circumstances under which that may occur. For example, fees may be waived for indigent persons, or the full-blown application process can be waived or modified if the administrator finds that the proposed event will have such a minimal impact on the municipality's services, equipment or property that requiring an applicant to comply with all of the requirements of this chapter would impose an undue burden on the applicant and that the applicable administrative fee would be so low that it would not cover the actual cost of processing the application.

Reservation of municipal rights. The municipality should reserve the right to deny a permit under certain, limited circumstances and to stop an event in progress if it creates a hazard or there is a violation of the law. Here, again, the ordinance set out in *Thomas, supra*, is instructive. It should be noted, however, that a permit cannot be denied merely because an assembly has political overtones and could generate a large crowd of onlookers or protesters that could dramatically increase the municipality's costs. A denial solely on such grounds constitutes a "heckler's veto" and is not constitutionally sanctioned. *See, Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134-35, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

Insurance and indemnification. The municipality should also consider requiring the applicant to indemnify the municipality against liability, injury and damages arising from the event's use of the municipality's resources. The indemnification requirement can also be supported by an insurance requirement. The ordinance should build in flexible standards for the amount of insurance, based on the nature and extent of the municipal resources devoted to the event: there is less risk to a municipality for an event held in a private home than for an event held in a public building, and the fewer people and other resources that are required for an event, the less the risk to the municipality.

Appeal from permit decisions. Finally, the ordinance should provide for a review of denials, ideally through a prompt administrative review at the municipal level, followed by easy access to the courts.

V. Permit Fees, Reimbursement Requirements and Campaign Contribution Limits

A special events or special service ordinance should contain a fee provision that is based on recovering the municipality's costs of providing services. Special events fees should not attempt to tax the event holders and should not be seen as a profit center for the municipality.

While events that require a municipality to devote extensive resources to the occasion will likely generate higher fees, higher fees are not necessarily a constitutional flaw. Nevertheless, the ordinance should provide a mechanism for waiving fees in certain situations (such as an unfunded, grass roots group seeking to gather in a public park) or, at the least, for a quick appeal of the imposition of a large fee. In addition, just as a municipality cannot deny a permit for an event solely on the basis of how the public might react to those speaking or attending, the municipality should not shift the financial burden of the response to the person holding the event, since that is as much a "heckler's veto" as the outright denial of the permit under the circumstances.

As noted earlier in this article, it is not unusual for persons holding special events, particularly political fundraisers, to invoke campaign donation limitations in objecting to reimburse a municipality for costs incurred in servicing a fundraising event. While whether reimbursing a municipality for its costs of providing exclusive services for a political fundraiser should not be a consideration in determining whether the requirement is constitutional, municipalities should be prepared to respond to such attempts to avoid a community's reimbursement requirement. However, this article is not intended to be a guide to campaign financing issues, and this section is accordingly a cursory survey of the topic. The Federal Election Commission ("FEC") has the authority to issue advisory opinions on the application of the federal campaign finance laws, FEC regulations, and related Internal Revenue Code issues. 2 U.S.C. 437f, 438(a)(8) Individuals who are concerned about whether reimbursing a municipality would constitute an in-kind contribution to the campaign of the candidate for whom the fundraising event was held should be encouraged to seek an FEC opinion. Whatever the FEC's opinion may be, however, it should have little effect on the municipality.

If the FEC were to rule that reimbursing a municipality for services provided is not considered an in-kind contribution, then the individual can be required to pay without fear of sanction. Such a ruling would also put to rest any claim that the reimbursement requirement would somehow prevent the individual from exercising his or her First Amendment rights. If, on the other hand, the FEC were to rule that paying for municipal services provided exclusively for a campaign fundraising event is considered an in-kind contribution to the campaign organizations, then the issues become more complex, for if bearing the cost is an in-kind contribution, it must be an in-kind contribution for whoever

pays. It must follow, then, that for the municipality to bear the cost of the services would be an in-kind contribution from the municipality. Unlike private individuals, however, municipalities are required to spend their funds for public purposes, and subsidizing a campaign fundraiser is likely to run afoul of that restriction. *See, generally*, 63C Am.Jur.2d §74; 15 McQuillin Mun. Corp. §39.25 (3rd ed.).

In any event, regardless of how the FEC would interpret payments by the individual who lends his or her home as an event venue, the payment for event security is no less an expense of the campaign organization itself than would be paying for the food, flowers and music for the event.

VI. Conclusion

The ever-expanding political campaign season brings with it increasing demands for municipal services as candidates and their supporters hold fundraising events. Municipalities can expect that the pressure to provide free services for such events will continue. By enacting a content neutral special events or special service ordinance, a municipality can increase its chances of recovering its costs, while avoiding challenges that it is interfering with the First Amendment rights of the candidates and their supporters.