February 12, 2019

Mayor Paul Kuhns &
Board of Commissioners
City of Rehoboth Beach
229 Rehoboth Avenue
Rehoboth Beach, DE 19971

By email

Re: Chapter 230 Permitting Scheme

ACLU
AMERICAN CIVIL LIBERTIES UNION
Delaware

100 W. 10th Street, Suite 706
Wilmington, DE, 19801
302-654-3699
www.aclu-de.org

Kathleen MacRae
Executive Director

Ryan Tack-Hooper
Legal Director

Karen Lantz
Staff Attorney and Policy Counsel

Dear Mayor Kuhns and City Commissioners:

On behalf of the ACLU of Delaware, I write to urge you to amend Chapter 230 of the City of Rehoboth Beach Municipal Code to fix some unconstitutional aspects of the newly created "Special Events" statute.

A permit scheme is a prior restraint on free speech subject to "a heavy presumption" against its constitutional validity. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992). It "may not delegate overly broad licensing discretion to a government official" and "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Id.* at 130.

Parts of the new permit law do a commendable job of providing clear decision criteria and avoiding decisions based on the content of speech. But the ordinance exceeds what is constitutionally permissible in at least two areas: the notice requirement is too long and lacks exceptions, and the cost-shifting requirements are impermissibly broad.

1. The 8-week notice requirement is not narrowly tailored

Notice requirements are permissible when they are either short or tailored to the particular kinds of events being requested. A categorical requirement of an application 8 weeks before the event is not narrowly tailored and is therefore unconstitutional. *See, e.g., Grossman v. City of Portland,* 33 F.3d 1200, 1206 (9th Cir. 1994) (holding a seven-day notice requirement for every demonstration in a

public park too restrictive). As noted in *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1356–57 (9th Cir. 1984), cities can protect their legitimate interests with short notice. According to one study discussed in that case, the average advance notice period in studied cities across the country was 36 hours. *See id.*

Any notice requirement must also have an exception for protests that are time-sensitive. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006) ("[T]o comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events"); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009) (striking down regulation requiring 2- hour advance notice of "spontaneous events" as unconstitutional).

ACLU
AMERICAN CIVIL LIBERTIES UNION
Delaware

The City should amend Chapter 230 to either substantially shorten the period of notice required or limit the longer notice period to particular kinds of events (e.g., an annual marathon). You should also provide for an exception for time-sensitive events.

2. The fees and indemnification requirements of the permitting scheme are unconstitutional

Sections 230-6, 230-7, and 230-8 of Chapter 230 attempt to "[e]nsure that any incremental or extraordinary costs to the City are borne by the promoter of the event necessitating such costs." § 230-1(E). There are two constitutional problems with these provisions—insufficient standards for the decisions and cost-shifting that is content-based.

First, these provisions do not sufficiently limit discretion about whether and how much to charge for special events. The ordinance provides that some events "may be required to pay an additional fee" to cover the costs of the event, § 230-6; that the amount of insurance required will be set based on factors such as the "nature of the event," § 230-7; and that the City Manager "may require" a higher deposit for clean-up. § 230-8. While the insurance determination must be based on content-neutral factors, there is no such

requirement stated for the decision about the permit fee and cleanup costs. This boundless discretion over the fees and costs violates the First Amendment. *See Forsyth*, 505 U.S. at 133 (rejecting scheme in which "[t]he decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator.").

Second, these provisions are unconstitutional to the extent they charge speakers for costs created by the public's reaction to the content of their speech. *See Forsyth*, 505 U.S. at 134 (finding that imposing costs for policing and cleanup is an impermissible content-based restriction). The amounts charged for the permit fee, insurance, and cleanup deposit appear to be designed, at least in part, to account for costs of the event. Such costs, in turn, are partially driven by the reaction or expected reaction to the expressive content of the event—such as the cost of police presence. This makes these cost-shifting efforts unconstitutional content-based restrictions. *See id.; see also The Nationalist Movement v. City of York*, 481 F.3d 178, 183 (3d Cir. 2007) (noting that attempts to impose the cost of policing upon permit-holders is necessarily a content-based restriction); *Wilson on behalf of U.S. Nationalist Party v. Castle*, No. CIV. A. 93-3002, 1993 WL 276959, at *4 (E.D. Pa. July 15, 1993) (discussing insurance requirements).

Similarly, although the ordinance contains no indemnification requirement, the Special Event Permit application requires an applicant to "hold the City of Rehoboth Beach harmless from any and all liability and . . . defend the City of Rehoboth Beach in connection therewith." This requirement is unconstitutional because it requires permit-holders to accept responsibility for the actions of people whom they do not control. Indemnification and waiver clauses are acceptable only if they are limited to damages for which a court could hold the speaker legally liable—principally, damage they personally cause. *See Nationalist Movement,* 481 F.3d at 186 n.9.

The City should amend Chapter 230 to more tightly constrain the discretionary aspects, forbid the consideration

of the content of the proposed speech in all decisions, and forego any attempt to shift costs linked to the content of speech. This will likely require, among other things, substantially lowering or eliminating the permit fee and removing the efforts to charge—directly or indirectly—for policing and cleanup services not requested by the applicant. You should narrow any indemnification and waiver language to include only damages for which the permit-holder could be personally liable.

ACLU
AMERICAN CIVIL LIBERTIES UNION
Delaware

Conclusion

We urge you not to enforce Chapter 230 until you amend it. We also urge you to act quickly given the probability that the ordinance will dissuade some from holding events. You may not intend to deny permits to groups who, for good reasons, do not meet the 8-week requirement, or who cannot afford the costs you seek to impose. But they may not apply in the first place given the unequivocal language of the ordinance.

Our hope is that the City will consider these issues and amend Chapter 230 without the need for legal action. We nevertheless reserve all rights to challenge this ordinance in court, including provisions not discussed in this letter.

Sincerely,

Ryan Tack-Hooper

cc: Glen Mandalas, Esq. (glenn@bmbde.com)
Joanne Cabry (sussexprogressives@gmail.com)
Charlotte King (charlottefking@aol.com)
Steering Committee, Women's March Sussex (womensmarchsussex@gmail.com)