KENNETH A. SCHATZ, Esq.
City Attorney
EUGENE M. BERGMAN, Esq.
Sr. Assistant City Attorney
NIKKI A. FULLER, Esq.
Assistant City Attorney
RICHARD W. HAESLER, JR., Esq.
Assistant City Attorney
GREGG M. MEYER, Esq.
Assistant City Attorney

CITY OF BURLINGTON, VERMONT
OFFICE OF
THE CITY ATTORNEY
AND
CORPORATION COUNSEL

149 CHURCH ST.
BURLINGTON, VT 05401-8489
(802) 865-7121
(TTY) 865-7142
FAX 865-7123

MEMO

TO: Burlington City Council

FROM: Gregg Meyer, Esq., Assistant City Attorney

RE: Opinion on Waterfront Park Act 250 Permit

DATE: November 12011

Introduction

On September 27, 2011, the 200 Lake Street Condominium Association (the Association) wrote a letter to the Burlington "Board of Parks and Recreation Commissioners" concerning the recently held Nor'easter Outdoor Sports and Music Festival (the festival). The festival took place in Waterfront Park (the park) from September 23-25. The Association alleges the City violated its Act 250 Land Use Permit (the permit) governing use of the park by hosting the festival after September 15. The City Council referred the matter to the City Attorney's Office for an opinion, with a report due back to the Council at the November 7, 2011 City Council Meeting.

Discussion

The question is whether the City violated the permit by hosting the festival after September 15. For the reasons described below, it is the opinion of the City Attorney's Office that the use of the park for this festival did not violate the applicable permit.

The permit at issue (4C0863-1) is actually an amendment to the original permit issued by the District Environmental Commission in 1990 prior to construction of the park. The amendment came about in 1994, after construction and following various special events held in the park resulted in noise and traffic complaints from neighbors. Although the amendment does address ongoing construction issues such as dust control, grading, drainage, and landscaping, it mainly deals with post construction site use and the mitigation of impact from large events and amplified music, particularly during the busy summer season.

The first paragraph of the 1994 permit amendment authorizes use of the waterfront park "for festivals and other public events," subject to specified conditions. Paragraph 19 is the relevant provision which provides:

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The following rules shall apply to events held in the park, unless the Permittee secures written permission from the District Commission to change these rules.

(a) The park can be used for events for up to 27 days between May 27 and September 15.
(b) A maximum of 22 days may involve amplified music. Amplified music does not include music from acoustic instruments which is subsequently amplified.
(c) No more that 18 of the 27 days may be Saturdays and Sundays.
(d) Events may occur on no more than three consecutive weekends.
(e) Sound will not exceed 85 decibels, measured at the perimeter of the park nearest the source of the sound. Sound may not exceed 75 decibels measured at the eastern edge of Lake Street adjacent to any residential or commercial property.
(f) The cutoff time for amplified music will be 9:45 PM Sunday through Thursday and 10:45 PM on Friday and Saturday.

The Association reads sub-paragraph (a) – that "the park can be used for events for up to 27 days between May 27 and September 15" – as a total ban on use of the park for special events outside the date range. Thus, since the festival was held from September 23-25, the Association argues, the City violated the permit. However, we believe this is an unreasonably narrow reading of the permit and is not appropriate in the present case. Although the document at issue is a permit, as opposed to a statute, we believe the rules of statutory construction are instructive in this situation. Specifically, when construing statutes the primary goal is to give effect to the drafters' intent, and the definitive source of intent is the language, unless it is uncertain, unclear or leads to an irrational result. In re Bennington Sch., Inc., 176 Vt. 584, 586-87(2004).

Paragraph 19(a) says that during the summer season – from May 27 – September 15 - only 27 days may be used for special events. Nowhere does the permit say all events must take place during this date range. By its plain and clear language, this subsection only limits the number of event days in the park from May 27 – September 15. Indeed, other requirements in the permit are not time limited to the summer season. For example, sub-paragraphs (d) – (f) state that events cannot occur on more than 3 weekends in a row, sound cannot exceed 85 decibels nearest the source of sound and 75 decibels adjacent to adjacent residential and commercial property, and cutoff time for amplified music is 9:45 PM during the week and 10:45 PM on Friday and Saturday nights. Paragraphs 16 and 17 require a crossing guard and a traffic officer be stationed in the area during public events involving more than 700 persons per day. If the District Commission truly wanted to ban events outside the date range expressed in sub paragraph (a), it would have said so in paragraphs 16 and 17 as well as in the first paragraph of the permit.

Reading the permit to ban events outside the summer season described in Paragraph 19(a) leads to the result that the park can only be used for events 27 out of 338 days in the year, and that the park can never be used for public events between September 16 and May 26. Such a substantial limitation on the public use of the park seems irrational. A more reasonable interpretation is that the District Commission recognized that the cumulative impact of multiple events during the summer season is problematic for neighbors thus requiring specific attention in

the permit. Outside the summer season, individual events during the remaining 7 months of the year do not have the same cumulative impact. Consequently, the District Commission imposed the limitation on the number of event days between May 27 through September 15 to balance the neighbors and public interests during the busy summer season.

The City has always interpreted sub-paragraph (a) of the permit as a limit on the use of the park during the busy summer season and not as a ban on use for the remainder of the year. Events have always taken place in the park outside the date range without complaint since the park was constructed. For example, all of the following events took place outside the date range and were well publicized:

1. Kids Day every year in early May;
2. The Vermont City Marathon (when Memorial Day Weekend fell before May 27 - 1998, 2002, 2003, 2008, and 2009;
3. The Penguin Plunge every February since 2001;
4. The National Resources Council and Mayor's Club Youth Speak Event in April 2000;
5. The Ford Motor Company event on May 20, 2003;
6. The Rubber Duck Race on September 27, 2003;
7. Caribbean Day on October 3, 2004;
8. Veterans Day on November 6, 2006; and
9. The Pumpkin Regatta in October since 2007.

We appreciate the Association's concerns about the Nor'easter festival. The Association asserted in its letter that "we believe that this particular festival, based upon its size, duration of set-up and breakdown, and height and appearance of the climbing wall structure is not appropriate for Waterfront Park." In response, we understand that meetings and forums have been held between members of the Association and others with concerns about this particular event and staff from the Department of Parks and Recreation. However, with respect to the actual interpretation of the permit, it is our opinion that when the Department's event coordinator recently advised a member of the Association that the 27 day limitation only applies to the period from May 27 to September 15 and does not preclude events outside that period, that opinion was correct.

Conclusion

Waterfront Park is an important cultural and economic resource for the City. The permit restricts the number of days in which events can be scheduled during the busy summer season from May 27 – September 15 to a total of 27 days. However, we believe this limitation only applies to the summer season and does not prohibit use of the park for public events outside of that date range. As such, it is our opinion that the City did not violate the Act 250 permit by hosting the festival in Waterfront Park after September 15.

lb/c: GM 2011/City Council - Opinion re Waterfront park Act 250 Permit