

CITY COUNCIL STAFF SUMMARY

Meeting Date: February 17, 2016

Agenda item: 5.1

Prepared by: Bill Hill

Reviewed by: Bill Hill

AGENDA ITEM DESCRIPTION: Discussion / action - Policy governing the use of City Hall - Mayor Pro Tem Ross / Alderman Hisel

Attachments for Reference:

- 1) 6.3a 2015 Final Draft Policy
- 2) 6.3b 2011 Revised Draft Policy (Track Changes)
- 3) 6.3c 2011 Revised Draft Policy Clean (2016)
- 3) 6.3d 2015 Draft Policy – Ald. Hisel
- 4) 6.3e ~~City Attorney Memo 2011 City Hall~~
- 5) 6.3f 2000 ILMA Paper Public Access City Facilities

BACKGROUND / HISTORY: The use of City Hall has been a topic of debate for a number of years. Primarily the debate has centered on whether the City Hall should be used for only official City business or whether to open it up to other uses and if open to other uses, where do you draw the line on permitted uses so that you protect City resources and staff time.

In 2015, City Council formed a sub-committee comprised of MPT Ross and ALD Hisel to consider a policy and make recommendations. The subcommittee met several times and several draft policies were created (Attachments 1 and 3)

In 2010, the question was previously considered and our City Attorney provided a memo Attachment 4) for executive session (not public - attorney client privilege) outlining the considerations (5.1a). Additionally, a 2011 draft policy was created, but never approved (Attachment 2).

Staff research produced International Municipal Lawyer's Association Conference Paper concerning Public Access to Municipal Facilities (Attachment 5).

City Council held a Workshop on January 23, 2016 to discuss the Usage of City Hall.

At the January, 25th City Council Meeting, Council provided guidance that the action will be addressed at a City Council Special Meeting and that the City Attorney was to review the 2011 draft policy in light of court rulings since 2011 which may have bearing on a CoSP policy.

DISCUSSION:

After the January 25th City Council meeting, CoSP resident (an attorney with expertise in this area) Shawn Fitzpatrick reviewed the 2011 draft City Hall Use policy and provided comments and recommended changes. These revisions were passed to the City Attorney whose review of changes did not identify any issues. The City Attorney also provided some comments (primarily concerning whether we want to allow private organizations to be able to lease the interior or whether we want to allow only Community and Civic Organizations the use (See highlighted portion of policy). Additionally, minor grammar and editing revisions were made to update the document (See Attachment 2 with track changes and Attachment 3 as a clean version).

Key parts of this revised policy are highlighted within the policy and are pasted below:

Definition - "Community and Civic Organization"- an organization dedicated to issues of concern specific to the Shavano Park community and its continued welfare.

Authorized Use includes:

- E. Meetings of Community and Civic Organizations, including, but not limited to, Neighborhood Watch, Home Owners Associations, Women's Club, Business Clubs and Boy/Girl Scouts; and
- F. Rentals for private functions.

Note 1: Council should consider allowing private functions (leave in as an authorized use) or prohibiting private functions (remove as an authorized use).

Note2: This revised 2011 Draft City Hall Use Policy only addresses the interior use (Chamber only). An option to simplify the approval process is to create an internal use policy like this 2011 draft and to later create an exterior use policy.

COURSES OF ACTION: There are three draft policies to consider.

FINANCIAL IMPACT: N/A

MOTION REQUESTED: N/A



CITY OF SHAVANO PARK
900 Saddletree Court
Shavano Park, TX 78231

CITY POLICY NO. 8

SUBJECT: Shavano Park City Facilities Use Policy

December 21, 2015

1. REFERENCES.

- a. Internal Revenue Service, Publication 557 "Tax-Exempt Status For Your Organization."
- b. 26 U.S.C. 501.
- c. City of Shavano Park Code of Ordinances Chapter 8, Article III *Food and Food Establishments*.

2. PURPOSE. The purpose of this policy is to define the proper usage of Shavano Park City Facilities.

3. STAFF POINT-OF-CONTACT. The staff point of contact for this policy is the City Secretary at 210.493.3478 x240.

4. DEFINITIONS.

- a. Facilities. All City-owned grounds and buildings.
- b. City Hall Interior. The City Hall Interior Area includes the entrance, council chambers/courtroom and staff offices.
- c. Municipal Tract Exterior. The Municipal Tract grounds, beyond City Hall's walls extending to the unimproved natural tree line, including the parking lot and immediate surrounding grounds (excludes the Police parking lot).
- d. City approved groups. Shall include not-for-profit or non-profit groups or organizations who either possess an affiliation with the City of Shavano Park or are designated by the City Council as an approved organization or formal group.
- e. Food Establishment. Food establishment shall mean a food service establishment, a retail food store, a mobile food unit, and/or a roadside food vendor and includes those selling pre-packaged food items.

- f. Food and Beverage Handler. Food and beverage handler shall mean any person, including any cook, cook's helper, waiter, waitress, dishwasher, bartender, barmaid, bus boy, or other person, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, who engages in the delivery, storing, preparation or dispensing or serving of food or beverages, as defined herein, for pots, pans, grills, skillets, plates, trays, eating utensils, or similar wares in, on or with which such food or beverage is prepared, dispensed or served.

- g. Large Events. Large events are events in excess of 400.

5. GENERAL GUIDELINES.

- a. Facility Use.
 - 1. City Hall Interior will only be used to conduct official city business or activities by elected officials and City Staff and is not available for use by organizations under this policy.

 - 2. A Special Events Permit is not required for conduct of official city business.

 - 3. Municipal Tract/City Hall Exterior is available, on a limited basis. The event must support a public purpose, benefit, service, training or interest to the City of Shavano Park residents and will require a Special Events Permit. Detailed requirements for an Event will be on the Special Events Permit Application.

 - 4. Other Municipal Facilities cannot be used for public events. Including the Fire Station, Public Works / Water Building, easements, well sites and greenbelts.

 - 5. Public Large Events will not be allowed.

 - 6. Representatives of the City have the right to enter any portion of the facilities for any purpose whatsoever any time during a scheduled event or activity. The City representative is not responsible for performing any services in conjunction with any activity or event but the City reserves the right to take control of the facilities at any time during an event to preserve the peace or protect the health, safety and welfare of the public or to protect the public property.

 - 7. The City Manager or the City Manager's representative has the right to preserve the general peace to protect the health, safety and welfare of the public by requesting that

persons believed to be engaging in objectionable behavior that could result in a breach of peace leave, or be removed from the premises in accordance with state law.

8. Facilities are smoke-free and the use of tobacco products in all forms, including electronic or vaping cigarettes, is prohibited.

6. APPLICANTS.

- a. This section of the policy extends to organizations (“Applicant”) desiring to temporarily occupy some portion of the Exterior of the Municipal Tract for the purposes of facilitating a meeting, gathering or assembly (“Event”).
- b. Organizations whose primary address is not located within Shavano Park are not eligible to hold events unless a resident makes a request to City Council for support of the organization, a City Council member requests support of the organization or staff recommends to City Council support of the organization.
- c. .
 1. Event forms for events sponsored by non-Shavano Park-based organizations may be reviewed by staff based on the following criteria to determine whether such event qualifies for consideration
 2. The applicant must be either be a non-profit or not-for-profit entity or a school group.
 3. The applicant must be in good standing with federal and state entity requirements.
- d. The City reserves the right to refuse use of the facilities to any applicant if the proposed event is in conflict with established policies or laws, or is in conflict with any other confirmed reservation.
- e. Facilities are not available to any applicant on City observed holidays. If the holiday falls on a Monday or Friday, the weekend that follows or proceeds the holiday will also be considered a holiday.
- f. Facilities are not available on dates that conflict with any standing meeting of city business. (i.e. City Council, Court, Commission, Committees, etc.)
- g. Each application is for one event only. The City Manager may approve an event that overlaps no more than three days.
- h. Applicant event access to facilities will be restricted between 10:00pm and 6:00am unless previously authorized by the City Manager.

7. PROCEDURE.

- a. A Special Events Permit is necessary for temporarily occupying exterior facilities.
- b. Applicant must submit a complete application with all required documentation to City Secretary at least 15 days before proposed event. Incomplete applications may be rejected.
- c. Special Event Permit Applications require review by the City Manager, the Police Chief and the Fire Chief.
- d. A report will be furnished by the City Manager to City Council on an as-need-basis for approval of all non-Shavano Park-based events.
- e. Applicant shall be contacted by City Secretary on the status of their application. If approved, Applicant will be given a staff point-of-contact to coordinate preparation for the Event.

8. DEPOSIT.

- a. Applicant must submit a \$125.00 deposit. Due at time of application.
- b. For events that exceed 4 hours, the deposit will be increased by an additional \$75.00. For events covering multiple days, each additional day beyond the first will require an additional fee of \$150. Consecutive event days shall not exceed two days.
- c. The City may waive the permit fees under Chapter 8, Article III if the organization is a non-profit organization and if there is no cost incurred by the City.

9. FOOD & BEVERAGE.

- a. If food and beverages will be served to the public at the Event, Chapter 8, Article III of City of Shavano Park code of Ordinances shall apply.
- b. The City may waive the food handler permit fees for city-sponsored events, if vendor has a valid San Antonio Food Handler license.

10. INSURANCE. The Applicant is required to carry a liability insurance policy of at least \$500,000 with the City as a named insured in order to indemnify the City from any liability associated with the event. The City Manager may waive the insurance requirement for small events involving less than 50 people.

11. TRAFFIC. The Applicant shall coordinate with the Shavano Park Police Department on detailed traffic planning specific to the event. These general provisions apply:

- a. For the purpose of controlling traffic during the Event, the City may require the hiring off-duty Shavano Park police officers.
- b. The number and duration of service will be approved by the Chief of Police.
- c. The City may require the organization to provide clearly identified event volunteers to assist drivers in parking their cars in an efficient and safe manner.
- d. Participants should not walk in the paved roadway when parking along N.W. Military, Lockhill-Selma and DeZavala.
- e. If the event extends beyond the City Hall Exterior (e.g. 5k Runs) advance warning signs are required to be posted at each end of the primary streets involved, warning travelers that there is potential congestion or foot traffic ahead.
- f. Pre-event information shall include that no driveways are to be blocked during the course of the event.
- g. Run/Walks will be required to use one of 3 pre-approved routes established by the City. The routes rotate so as not to burden one area of the City with all of the run/walk events.

12. BATHROOM FACILITIES. The applicant shall coordinate with the City's event point-of-contact to determine bathroom facilities requirements. The event sponsor may be required to provide portable toilets.

13. TRASH COLLECTION. The applicant shall coordinate with the City's event point-of-contact to determine trash collection requirements. The event sponsor may be required to coordinate with the City's Solid Waste Contractor, Allied Waste/Republic Waste, to provide the event with trash containers.

14. FIRST AID. The applicant shall coordinate with the City's event point-of-contact to determine first aid requirements. The event sponsor may be required to provide a first aid kit and a qualified person designated responsible for its use.

15. NOISE NUISANCE. Applicant shall be required to comply with the City's noise regulations.

ORDINANCE NO. _____

AN ORDINANCE AMENDING THE CITY OF SHAVANO PARK CODE OF ORDINANCES CHAPTER 1 SETTING FORTH POLICIES AND PROCEDURES REGARDING THE USE OF CITY HALL CHAMBERS FOR MEETINGS AND VARIOUS EVENTS FOR RESIDENTS AND CIVIC ORGANIZATIONS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Shavano Park City Council declares that the primary purpose of the City Hall is for the function of City business; and

WHEREAS, the City of Shavano Park City Council understands the residents' desire to have access to the City Hall Chamber; and

WHEREAS, the City of Shavano Park City Council desires to create a consistent policy to allow residents, local community and civic organizations permissive, access to the City Hall Chamber; and

WHEREAS, the City of Shavano Park City Council recognizes its ability to restrict the use of the City Hall Chambers in a way that is viewpoint neutral and reasonable in light of the forum; and

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WHEREAS, the City of Shavano Park recognizes its limited legislative authority to subsidize the use of City Hall Chambers through waiver of Lessee fees in the City Hall Use Lease Agreement; and

WHEREAS, the City of Shavano Park City Council finds and determines that the value of the activities of community and civic organizations, whose work often contributes to the good and enhances the social fabric of the Shavano Park community, sufficiently off-sets the cost of use of City Facilities; and

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WHEREAS, the City of Shavano Park City Council hereby finds and determines that it is in the best interest of the City to waive fees for Community and Civic Organizations which contribute to the good, and enhance the social fabric, of the community.

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NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SHAVANO PARK, TEXAS THAT:

The following shall be considered the City of Shavano Park Use of City Hall Chamber Policy:

**CITY OF SHAVANO PARK
USE OF CITY CHAMBER POLICY**

1. PURPOSE

This administrative policy establishes a procedure governing the use of the City of Shavano Park City Hall Chambers. The primary purpose of the City Hall building is to provide available space for City Boards, Commissions and other official City functions. Other official City functions include City Council meetings, Municipal Court hearings and trials, and various other meetings and activities by staff and city officials in the conduct of municipal business of the City of Shavano Park and delivery of City services.

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2. DEFINITIONS

The following definition shall apply to this ordinance:

"Community and Civic Organization"- an organization dedicated to issues of concern specific to the Shavano Park community and its continued welfare.

3. POLICY FOR USE OF THE CITY HALL CHAMBER AND OTHER CITY FACILITIES

Subject to Paragraph 4, the Shavano Park City Hall Chamber shall be available to local community, civic and recreational groups as a place to hold Community and Civic Organization meetings subject to compliance with all applicable policy regulations. The City Hall Chamber shall also be available for private functions.

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- Deleted: The policy for using the City Hall Chambers is governed by this ordinance and the Lease Agreement attached as Exhibit A.

4. APPROVED USE OF THE CITY HALL CHAMBER

4.1 The policy for using the City Hall Chambers is governed by this ordinance and a Lease Agreement adopted by the City Manager (hereafter "Lease Agreement"). The fee schedule for use of City Hall and adjoining property is set forth on Exhibit A.

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4.2 The City Hall Chambers may be used for activities including, but not limited to, the following, provided the City Hall Chambers is available and the activities do not interfere with the normal functions of City government:

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- A. Official activities and functions sponsored by the City;
- B. Official police or fire department related activities to include training for police, fire, emergency management and other related organizations;
- C. American Red Cross as a Mass Care Shelter/Service Center;
- D. Public Elections;

E. Meetings of Community and Civic Organization, including, but not limited to, Neighborhood Watch, Home Owners Associations, Women's Club, Business Clubs and Boy/Girl Scouts; and

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F. Rentals for private functions.

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4.2 The dais and the conference room at the back of the City Hall Chambers are reserved without exception for official city business only.

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5. LEASE AGREEMENT REQUIRED FOR ALL FUNCTIONS

5.1 Any person, entity or organization intending to use the City Hall Chamber shall be required to fill out the Lease Agreement, pay the associated fees, and follow the policies set forth in the Lease Agreement. The Lease Agreement must be submitted to the City Secretary for consideration and review.

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5.1.1 All fees paid shall be forwarded to a restricted fund specifically for the maintenance of the City Hall building.

5.2 A Community and Civic Organization intending to use the Shavano Park City Hall Chambers is required to fill out the Lease Agreement and adhere to the policies and procedures within it. For use during the hours 10:00 a.m. to 4:30 p.m. on regular business days, all fees associated with the rental of the facility by any Community and Civic Organization are hereby waived.

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5.3 At least 14 days written notice to the City shall be required to reserve the City Hall Chamber.

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5.4 Whenever there is a conflict between an event scheduled to be held in the City Hall Chambers and any scheduled meeting of the City Council or any City Board, Committee or Commission, the City Council or the City Board, Committee or Commission meeting shall take precedence.

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6. POLICY REGULATIONS

6.1 Hours of Use - As set out in the Lease Agreement as adopted by the City Manager.

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6.2 The Lessee is fully responsible for cleanup of the area after use and returning area back to original configuration.

7. CONFLICT

All ordinances and parts of ordinances in conflict herewith are hereby amended. Any current fee or future fee not covered in the scope of this ordinance shall not be in conflict with this ordinance.

8. SEVERABILITY

If any word, phrase, clause, sentence, paragraph, section or other part of this ordinance or the application thereof to any person or circumstance, shall ever be held to be invalid or unconstitutional by any court of competent jurisdiction, the remainder of this ordinance and the application of such word, phrase, clause, sentence, paragraph, section or other part of this ordinance to any other persons or circumstances shall not be affected thereby.

9. EFFECTIVE DATE

This policy shall become effective from and after its date of passage as provided by law.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Shavano Park this the ___ day of February, 2016.

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A P P R O V E D

Robert Werner
MAYOR

Attest: _____
Zina Tedford
City Clerk

Approved as to Form: _____
City Attorney

Exhibit A

Deposit	\$500
City Hall Chambers (maximum of 75 persons)*	\$175; with patio \$250
Kitchen	\$ 20

*** City Hall Chambers excludes all areas behind the Council dais, including the gateway to the Council dais area.**

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ORDINANCE NO. _____

AN ORDINANCE AMENDING THE CITY OF SHAVANO PARK CODE OF ORDINANCES CHAPTER 1 SETTING FORTH POLICIES AND PROCEDURES REGARDING THE USE OF CITY HALL CHAMBERS FOR MEETINGS AND VARIOUS EVENTS FOR RESIDENTS AND CIVIC ORGANIZATIONS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Shavano Park City Council declares that the primary purpose of the City Hall is for the function of City business; and

WHEREAS, the City of Shavano Park City Council understands the **residents' desire** to have access to the City Hall Chamber; and

WHEREAS, the City of Shavano Park City Council desires to create a consistent policy to allow residents, local community and civic organizations permissive, access to the City Hall Chamber; and

WHEREAS, the City of Shavano Park City Council recognizes its ability to restrict the use of the City Hall Chambers in a way that is viewpoint neutral and reasonable in light of the forum; and

WHEREAS, the City of Shavano Park recognizes its limited legislative authority to subsidize the use of City Hall Chambers through waiver of Lessee fees in the City Hall Use Lease Agreement; and

WHEREAS, the City of Shavano Park City Council finds and determines that the value of the activities of community and civic organizations, whose work often contributes to the good and enhances the social fabric of the Shavano Park community, sufficiently off-sets the cost of use of City Facilities; and

WHEREAS, the City of Shavano Park City Council hereby finds and determines that it is in the best interest of the City to waive fees for Community and Civic Organizations which contribute to the good, and enhance the social fabric, of the community.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SHAVANO PARK, TEXAS THAT:

The following shall be considered the City of Shavano Park Use of City Hall Chamber Policy:

CITY OF SHAVANO PARK USE OF CITY CHAMBER POLICY

1. PURPOSE

This administrative policy establishes a procedure governing the use of the City of Shavano Park City Hall Chambers. The primary purpose of the City Hall building is to provide available space for City Boards, Commissions and other official City functions. Other official City functions include City Council meetings, Municipal Court hearings and trials, and various other meetings and activities by staff and city officials in the conduct of municipal business of the City of Shavano Park and delivery of City services.

2. DEFINITIONS

The following definition shall apply to this ordinance:

“Community and Civic Organization”- an organization dedicated to issues of concern specific to the Shavano Park community and its continued welfare.

3. POLICY FOR USE OF THE CITY HALL CHAMBER AND OTHER CITY FACILITIES

Subject to Paragraph 4, the Shavano Park City Hall Chamber shall be available to local community, civic and recreational groups as a place to hold Community and Civic Organization meetings subject to compliance with all applicable policy regulations. The City Hall Chamber shall also be available for private functions.

4. APPROVED USE OF THE CITY HALL CHAMBER

- 4.1 The policy for using the City Hall Chambers is governed by this ordinance and a Lease Agreement **adopted by the City Manager (hereafter “Lease Agreement”)**. The fee schedule for use of City Hall and adjoining property is set forth on Exhibit A.
- 4.2 The City Hall Chambers may be used for activities including, but not limited to, the following, provided the City Hall Chambers is available and the activities do not interfere with the normal functions of City government:
 - A. Official activities and functions sponsored by the City;
 - B. Official police or fire department related activities to include training for police, fire, emergency management and other related organizations;
 - C. American Red Cross as a Mass Care Shelter/Service Center;
 - D. Public Elections;

- E. Meetings of Community and Civic Organizations, including, but not limited to, Neighborhood Watch, Home Owners Associations, Women's Club, Business Clubs and Boy/Girl Scouts; and
- F. Rentals for private functions.

4.2 The dais and the conference room at the back of the City Hall Chambers are reserved without exception for official city business only.

5. LEASE AGREEMENT REQUIRED FOR ALL FUNCTIONS

5.1 Any person, entity or organization intending to use the City Hall Chamber shall be required to fill out the Lease Agreement, pay the associated fees, and follow the policies set forth in the Lease Agreement. The Lease Agreement must be submitted to the City Secretary for consideration and review.

5.1.1 All fees paid shall be forwarded to a restricted fund specifically for the maintenance of the City Hall building.

5.2 A Community and Civic Organization intending to use the Shavano Park City Hall Chambers is required to fill out the Lease Agreement and adhere to the policies and procedures within it. For use during the hours 10:00 a.m. to 4:30 p.m. on regular business days, all fees associated with the rental of the facility by any Community and Civic Organization are hereby waived.

5.3 At least 14 days written notice to the City shall be required to reserve the City Hall Chamber.

5.4 Whenever there is a conflict between an event scheduled to be held in the City Hall Chambers and any scheduled meeting of the City Council or any City Board, Committee or Commission, the City Council, or the City Board, Committee or Commission meeting shall take precedence.

6. POLICY REGULATIONS

6.1 Hours of Use - As set out in the Lease Agreement as adopted by the City Manager .

6.2 The Lessee is fully responsible for cleanup of the area after use and returning area back to original configuration.

7. CONFLICT

All ordinances and parts of ordinances in conflict herewith are hereby amended. Any current fee or future fee not covered in the scope of this ordinance shall not be in conflict with this ordinance.

8. SEVERABILITY

If any word, phrase, clause, sentence, paragraph, section or other part of this ordinance or the application thereof to any person or circumstance. shall ever be held to be invalid or unconstitutional by any court of competent jurisdiction, the remainder of this ordinance and the application of such word, phrase, clause, sentence, paragraph, section or other part of this ordinance to any other persons or circumstances shall not be affected thereby.

9. EFFECTIVE DATE

This policy shall become effective from and after its date of passage as provided by law.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Shavano Park this the ___ day of February, 2016.

A P P R O V E D

Robert Werner
MAYOR

Attest: _____
Zina Tedford
City Clerk

Approved as to Form: _____
City Attorney

Exhibit A

Deposit	\$500
City Hall Chambers (maximum of 75 persons)*	\$175; with patio \$250
Kitchen	\$ 20

*** City Hall Chambers excludes all areas behind the Council dais, including the gateway to the Council dais area.**

WHEREAS, the City Council of Shavano Park recognizes the need for guidelines for the use of City owned facilities (grounds and buildings, hereinafter collectively referred to as “facilities”) by City elected officials and staff and by non-City related organizations and sets forth policy as follows:

1. Facilities are primarily used for official City functions by elected officials and staff. It is intended that facilities be used to the fullest extent for these primary purposes.
2. Listed locales (Exhibit “A”) may be made available to other users on a limited basis for events that support a public purpose, benefit, service, training or interest to City of Shavano Park residents that otherwise could not occur without the facility being available.
3. The City reserves the right to refuse use of facilities to any group if the proposed event conflicts with the intended use of the building, is in conflict with established policies or laws, or is in conflict with any other confirmed reservation.
4. Facilities are not available to any non-City related organization on City Holidays. If the holiday falls on a Monday or a Friday, the weekend in between would be considered a holiday.
5. Meeting spaces are not available for use on days on which Council and City meetings are scheduled. Meeting spaces may be used between the hours of 8:00 a.m. to 11:00 p.m.
6. Access to facilities will be restricted between 11:05 p.m. and 7:00 a.m. unless previously authorized by the City Manager.

The City Manager’s Office is responsible for the use of facilities and has the authority to enter into agreements for the use of facilities in accordance with the established rules and regulations.

1. Facilities will be authorized for use on a first come – first served basis.
2. Facilities will be authorized for use so as to make them available for the best interest of the community.
3. No single group or individual will be given preference or priority so that the facilities are made available to serve the needs of as many different groups as possible. Equal access shall be given to all groups and individuals applying, and no group or individual shall be denied access because of considerations of race, sex, religious or political persuasion, or because of the political,

religious, or social aims expressed by an individual or group, or by any group's members.

4. No solicitation or exchange of goods or services for profit is allowed and no admission charges may be made.
5. The frequency with which one group may utilize facilities is at the discretion of the City. Agreements will not be made which involve repetitive dates, which would tend to eliminate other meetings or gatherings.
6. The City Manager's Office has a use agreement form (Exhibit "B") which must be completed in full by any group who wishes to use City facilities. Verbal agreements will not be honored.
7. Users shall comply with all the laws of the United States, the State of Texas, all ordinances of the City of Shavano Park, and all rules and regulations of the Police and Fire Departments and other municipal authorities of the City of Shavano Park.
8. Representatives of the City have the right to enter any portion of the facilities for any purpose whatsoever any time during a scheduled event or activity. At all times the rooms shall be under the charge and control of the City Manager or his representative.
9. During any scheduled event or activity, a representative from the City may be on premises at the sole discretion of the City Manager. The City representative is not responsible for performing any services in conjunction with any activity or event.
10. After any scheduled event or activity, the user is responsible for removing all effects from the facilities including but not limited to decorations, equipment, and waste. The facility should be left as it was found upon conclusion of any scheduled event or activity.
11. The City Manager or the City Manager's representative has the right to have objectionable persons removed from the premises.
12. The user shall not admit to the meeting spaces a larger number of persons than are permitted by the fire code.
13. No refreshments shall be served in the City Council Chambers. In no event shall alcoholic beverages be permitted in any facility unless prior written approval is obtained.
14. City of Shavano Park facilities are smoke-free facilities and the use of tobacco products in all forms, including electronic or vaping cigarettes, is

prohibited.

15. The City shall reserve the right to deny the use of any meeting spaces to any organization, group, or individual who willfully misuses, abuses, or damages it.
16. A public reservation may not be made more than six months in advance or less than 14 days of the date requested.
17. Meetings scheduled during working hours (8:00 a.m. to 5:00 p.m.) shall not be allowed to be conducted in a manner which is disruptive to or interferes with the work of city employees.
18. The City reserves the right to determine if police security is required during a scheduled activity. The City of Shavano Park will determine the number of officers and hours required. The user is responsible for this expense and will pay the security officer on the day of the event by separate check.

NON-SHAVANO PARK RESIDENTS

All non-Shavano Park resident use agreements shall be at the discretion of the City Manager.

Exhibit "A"

List of facilities and meeting rooms

Exhibit "B"

(City Manager's Form)

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RELEASE OF LIABILITY

The City of Shavano Park, hereinafter a licensor, grants permission to: _____
hereinafter, a licensee, to use _____
hereinafter, the premises, on _____ from _____ until _____ for the following
purpose(s): _____
_____.

Licensor shall not be liable for any personal injury or property damage occurring on or to the premises or to any persons in or on the premises, whether negligent or otherwise. Licensee shall not make any claim against Licensor for any loss or damage described in this section.

Licensee understands and agrees to take the premises as they find them.

Licensee hereby releases Licensor from any and all actions, causes or actions, claims and demands for, upon or by reason of any damage, loss or injury, which hereafter may be sustained.

This release, extends and applies to, and also covers and includes, all unknown, unforeseen, unanticipated and unsuspected injuries, damages, loss and liability and the consequences thereof.

The provisions of any state, federal, local law or statute providing in substance that releases shall not extend to claims, demands, injuries or damages which are unknown or unsuspected to exist at the time, to the person executing such release, are hereby expressly waived.

The statements and agreements herein are not merely recital but are contractual in character.

Licensee:

Signed by:

- (Organization Liaison - Signature and Printed Name)

Date: _____

ACKNOWLEDGMENT OF RELEASE

THE STATE OF TEXAS)(

COUNTY OF BEXAR)(

Before me, the undersigned authority, in and for said state and county, on this day personally appeared _____, known to me to be the person whose name is subscribed to the within instrument, and being by me first duly sworn on oath, state that she executed the same for the purposes and consideration therein expressed; that she had read it, fully understood its meaning and effect, know it is an unconditional release in full, and that she voluntarily executed it as such.

Given under my hand and seal of office on this the _____ day
of _____.

Notary Public in and for the State of Texas

My commission expires:

Public Access to Municipal Facilities/ Free Speech, Free Exercise & Establishment Clause Issues

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I. INTRODUCTION.

The fictional City of Bayport has just completed construction of a new Civic Center. The City Council is of course proud of the new facility—particularly the modern Council Chambers. The City Council would like to make the Chambers available to the residents after hours, but not without restriction. In particular, the Council does not want the Chambers to be utilized indiscriminately. Instead, as the name implies, the Chambers should be made available to the residents only for "civic" purposes or activities.

As reflected in the meeting minutes, all of the aldermen envisioned the outside use of the Chambers being limited to activities relating to the government and operation of the City. Classic examples, such as candidates' debates, town hall meetings held by state and local representatives, and discussions of proposed ordinances, are the types of civic activities to which this taxpayers' supported building would be devoted after hours. A policy is drafted specifically limiting outside use of the Chambers to use by community residents only and about "civic matters" only. To reflect the flavor of debates and the intent of the Council, the implementing regulations define civic matters by way of example along the lines discussed during Council consideration.

The policy is adopted. Some months later, the City adopts a "Domestic Partners Ordinance," prohibiting discrimination against same-sex partners in the sale or rental of housing, providing dependent health insurance coverage to municipal employees and their same-sex domestic partners, and requiring City contractors to do likewise. *See, Myers v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001).

Two groups seek to use the Chambers. The first group wants to hold a forum to urge repeal of the Ordinance because the Ordinance is contrary to the teachings of the Christian faith. Several priests and ministers are scheduled to discuss the Ordinance; explain how the Ordinance violates the teachings of Christ, and explore ways to persuade the City Council to repeal the measure. A second application for use of the Council Chambers is made, this one by a coalition of Catholic homosexual groups in the community. Their proposed use of the Council Chambers is for a Catholic mass to be said by a priest who is on the verge of excommunication because he had presided over a number of gay wedding ceremonies. This mass is to include a gay couple taking their matrimonial vows and also a homily by the priest, the topic of which is why the Domestic Partners' Ordinance is really mandated by the teachings of Jesus Christ.

Does either proposed use fall within the scope of the policy? If one or both do not, is the policy nevertheless unconstitutional? What is a well intended city to do when

confronted with these proposed religious uses of a building designated for civic meetings? By allowing these religious uses of the forum, are we creating in the Establishment Clause problems for ourselves?

Courts throughout the country have been struggling with this issue. The validity of municipal building use regulations is currently being shaped by a number of cases arising in the context of religious groups seeking access to public school facilities after school hours. The divergent and hotly contested views of the Supreme Court in the most recent such case, Good News Club v. Milford Central School, 121 S.Ct. 2093 (decided June 11, 2001) illustrate the complexity and the sensitivity involved in determining public access rights to municipal facilities. It is the purpose of this paper to set forth the "forum analysis" principles under which a municipality may choose to limit the use of municipal facilities, and to survey the relevant recent cases on the issue (particularly those such as Good News Club) which deal with the use of municipal facilities by religious groups and the interplay between the free speech and establishment clauses of the First Amendment.

Two cautionary notes: First, this is an area of the law steeped in narrow semantic distinctions. At times, it may be difficult for a reader of some of the decisions to readily perceive the difference between "permissible" subject matter discrimination and "impermissible" viewpoint discrimination. Second "municipal facilities" refer not simply to real property like the Council Chambers. A municipal facility includes everything from advertising space on a city bus (Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998); to a wall where signage can be placed, Wells v. City and County of Denver, _____ F.3d _____ (10th Cir. 2001); to a municipal web page, Putnam Pit v. City of Cookeville, 221 F.3d 834 (6th Cir. 2000).

II. PUBLIC FORUM ANALYSIS.

With the exception of streets, sidewalks and parks, which have "immemorially been held in trust for the use of the public and time out of mind have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions," Hague v. CIO, 307 U.S. 496, 515 (1939), the First Amendment "does not guarantee access to property simply because it is owned or controlled by the Government." United States Postal Service v. Council of Greenburgh Civic Association, 453 U.S. 114, 129. When individuals seek to use public property to engage in expressive activity, the constitutionality of any governmental restriction is assessed under the Supreme Court "forum analysis." Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 802 (1985).

Since the Court's 1983 decision in Perry Education Assoc'n v. Perry Local Educators Assoc'n, 460 U.S. 37 (1983), the Court has assessed the extent to which a government may regulate expressive activity on its property based on the nature of the "forum" the Government itself has created. Specifically:

-- A traditional public forum is "defined by the objective characteristics such as whether 'by long tradition or by government fiat' the property has been 'devoted to assembly and debate.'" Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 667 (1998). In a traditional public forum, any content based speech restriction is subject to strict scrutiny; the restriction will survive only if it is narrowly tailored to serve

a compelling state interest. Perry, supra, 460 U.S. at 45.

-- A designated public forum is created by specific governmental action, opening up the forum for expressive activity by some or all of the public. Forbes, supra, at 523 U.S.677; International Society for Krishna Consciousness v. Lee, 505 U.S.672, 678 (1992). In order to create a forum of this type, the Government "must intend to make the property 'generally available' to a class of speakers." Forbes, 523 U.S.678 (citing to Widmar v. Vincent, 454 U.S.263, 264 (1981)).

-- Any other governmental property is either "non-public fora or not fora, at all." Forbes, 523 U.S. at 677. Access to a non-public forum can be restricted "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speakers' views.

Over the years, a great deal of semantic uncertainty has developed between the terms "designated public forum" and a "subcategory" of the designated public forum referred to as the "limited public forum." In a limited public forum, the Government opens what might otherwise be a designated public forum but limits the expressive activity to certain types of subject matters or speakers. New York Magazine v. Metropolitan Transportation Authority, 136 F.3d, 123, 128 (2nd Cir. 1998); Warren v. Fairfax County, 196 F.3d 186, ___ (4th Cir. 1999) (equating designated public forum and limited public forum); contrast Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000), rehearing denied, 231 F.3d 937 (5th Cir. 2000), remanded, 121 U.S. 2518 (2001) (equating "non-public" and "limited public" forum);with Chin v. Plano Independent School District, ___ F.3d ___ (5th Cir. 2001), at Nt.10-11 (summarizing the confusion).¹ For the purposes of this paper, we will use the term "limited public forum" to mean a municipal facility which has been opened to either a limited class of speakers for a wide variety of subject matters or open to limited classes of speakers for limited subject matters. Striking the balance is difficult; the court in Forbes recognized (at 680) it is essential to allow local governments to make reasonable distinctions and limitations on use of facilities:

...We encourage the Government to open its property to some expressive activity in cases where if faced with an all or nothing choice it might not open the property at all. That this distinction turns on government intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the Government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Forbes, 523 U.S. at 679-680.

A limited public forum, then, is property which the government has designated as a place for public communication by certain speakers, or for the discussion of certain subjects. Any content-based restriction on speech within the forum must (i) be "reasonable in light of the purposes served by the forum," Cornelius, supra, at 473, U.S.806, and (ii) not discriminate against speech on the basis of "viewpoint." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S.819-829 (1995). Thus, a municipality has the authority to make a public building available to a limited class of speakers and/or limited subject matter upon which persons may speak. Any such restriction must be both reasonable and viewpoint neutral.

One source of contention is that the "Supreme Court never has defined what constitutes viewpoint discrimination," except within the context of the specific facts before it. (Chemerinsky, "Court Takes Narrow View of Viewpoint Discrimination," Trial Magazine, March, 1999 at 91.) For the leading Supreme Court decisions to find governmental restrictions within a designated or limited public forum to be unconstitutional, each must deal with a restriction limiting religious groups' use of a limited forum. In each of those cases, the court concluded the restriction violated the free speech rights of the applicants.ⁱⁱ2

III. FROM WIDMAR TO GOOD NEWS CLUB

A. Widmar

In Widmar v. Vincent, 454 U.S.263 (1981), a public state university created a public forum limited by nature of the speakers (student groups only) but generally unlimited to subject matter. The court held that, having made the facility generally available to student groups, the university could not deny student religious groups access to the facility based on the content of their activities (prayer meetings, discussions from a religious perspective, etc.).

In Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S.384 (1993), a school facility was opened pursuant to state law allowing after-school use for social, civic, recreational meetings and entertainment and other uses pertaining to the welfare of the community. A religious based group sought to use a facility for a six-part film series containing lectures by a licensed psychologist. The brochure description indicated the series would discuss the psychologist's "views on the undermining influences of the media that could only be counterbalanced by returning to traditional Christian family values instilled at an early age." *Id.*, at 388. Similar application described the proposed use as a family oriented movie series from a Christian perspective. The Supreme Court found that as a general matter a lecture or film about childrearing and family values was permissible. Thus, that subject matter "is not one that the district has placed off limits to any and all speakers." *Id.*, at 393. The Court found the denial was based solely on the fact that "the presentation would have been from a religious perspective." The Court also found the after school display of the film series did not create any Establishment Clause problems; i.e., "there would have been no realistic danger that the community would think that the district was endorsing religion or any particular creed..." *Id.*, at 395.

In Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S.819 (1995), the university authorized the payment of printing costs for a variety of student publications. The university guidelines declined to provide reimbursement for such things as religious activities and political activities.

A university group sought funding for a magazine publication editorializing from a Christian viewpoint. The university argued its decision was based not on viewpoint but rather on content or subject matter. Relying on Lamb's Chapel, the Court concluded the university's objection to the student publication was impermissible viewpoint discrimination. The Court stated (at 831):

By the very terms of the [guideline's] prohibition, the university does not exclude religion as a subject matter but selects for disfavored

treatment those student journalistic efforts with religious editorial viewpoint. Religion may be a vast area of inquiry; but it also provides as it did here a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. No prohibitive perspective—not the general subject matter—resulted in the refusal to make third-party payments. For the subjects discussed were otherwise within the approved category of publications.

Once again, an Establishment Clause defense was rejected.

B. Good News Club

On June 11th, 2001, the Supreme Court decided Good News Club v. Milford Central School, 121 U.S.2093 (2001). Good News Club reversed the Second Circuit's decision at 202 F.3d 502 (2nd Cir. 2000). The school district had a community use policy which provided in part that residents could use school facilities for:

...holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community provided that such uses shall be non-exclusive and shall be open to the general public...

202 F.3d 504. The policy "expressly forecloses use for religious purposes and requires that applicants certify that their proposed use complies with the policy..."

The Good News Club, a community based Christian youth organization, sought to use the facility pursuant to the policy. The "stated purpose of the Club was to instruct children in moral values from a Christian perspective." The court of appeals extensively reviewed the teaching materials and proposed lessons of the Good News Club. The court then turned to the club's argument that the policy was not viewpoint neutral because it was teaching moral values just as the Boy Scouts, Girl Scouts and 4-H Clubs, entities using the facility, were doing and that it has been "excluded because it seeks to teach these moral values from a Christian viewpoint." 202 F.3d 510. The Second Circuit rejected this argument and found the Good News Club "is doing something other than simply teaching moral values." The court concluded the club was involved in activities which were "quintessentially religious" in subject matter. The school's decision to exclude the club from its facilities was proper because it "was based on content, not viewpoint." *Id.*, at 511.

The Supreme Court reversed. Justice Thomas's opinion provided no extensive analysis of the Club's actual activities. Instead, the Court focused on the purpose for which the forum was opened: "The development of character and morals from a religious perspective," and "teaching morals and character development to children..." (121 U.S.2101). The Court found it was "clear that the club teaches moral and character development to children...The Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient even if it does so in a non-secular way."

After reviewing Lamb's Chapel and Rosenberger, the Court concluded the district was prohibiting the Club from using the facility based on "the Christian viewpoint" used by the Club to teach moral and character development. The Court concluded:

We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as

the teaching of morals and character development from a particular viewpoint...What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons...According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in the way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion...Speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the club from use of the school pursuant to its community use policy constitutes impermissible viewpoint discrimination.

Id., at 2102.

The Court also rejected the district's Establishment Clause defense. The district argued its Establishment Clause concerns constitutionally justified even viewpoint discrimination. In rejecting this contention, the Court found first that the Club sought nothing more than to be treated "neutrally and given access to speak about the same topics as are other groups." Second, no coercive pressure was being applied toward elementary school children. Finally, no prior precedent would "foreclose private religious conduct during non-school hours merely because it takes place on school premises where elementary schoolchildren may be present." *Id.*, at 209.

Justices Stephens, Ginzburg and Souter dissented. Justice Souter's dissent was most critical of the majority's cursory treatment of the facts. *Id.*, at 1215-18.

Good News Club does little to further define the distinction between permissible content or subject matter restrictions, on the one hand, and impermissible viewpoint discrimination on the other. For purposes of municipal facility use by religious organizations, perhaps the most important aspect of Good News Club is the line-drawing concern raised by Justice Souter and the footnote response by Justice Thomas. Justice Souter concluded it was "beyond question" that the Club was using the premises

...not for the mere discussion of a subject from a particular Christian point of view but for an Evangelical service of worship calling children to commit to themselves in an act of Christian conversion. The majority avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character from a religious standpoint." [Citation.] If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue or mosque.

Id., at 2117 [emphasis added]. In response to this concern, Justice Thomas's majority opinion (at Footnote 4) responded in this fashion:

Despite Milford's insistence that the club's activities constitute

"religious worship," the Court of Appeals made no such determination. It did compare the club's activities to "religious worship." [Citation.] But ultimately, it concluded merely that the club's activities "fall outside the bounds of pure 'moral and character development.'" [Citation.] In any event, we conclude that the club's activities do not constitute mere religious worship divorced from any teaching of moral values...Regardless of the label, Justice Souter wishes to use what matters as the substance of the club's activities which we conclude are materially indistinguishable from the activities in Lamb's Chapel and Rosenberger.

It certainly appears arguable the majority was in some fashion tempering its holding by providing some indication that municipal facilities open for civic activities are not required to open their doors to religious groups who propose to conduct activities which "constitute mere religious worship..." This exchange demonstrates the majority in dissent have two entirely different "viewpoints" on the nature of the activities taking place. Good News Club makes it clear that a very intensive fact specific analysis of each proposed activity is necessary in relation with the purposes of the forum.

Shortly after deciding Good News Club, the Supreme Court remanded Campbell v. St. Tammany's Parish School Board, 206 F.3d 482 for consideration in light of the Good News holding. Like many of the other facilities decision, Campbell itself engendered strong views by the Court of Appeals. In Campbell, the school district had an outside use policy permitting buildings to be used for civic, recreational and entertainment purposes, but specifically prohibited partisan political activity, for-profit fundraising and uses involving "religious services or religious instruction..." The policy permitted discussions of religious material or material containing a religious viewpoint. The Court upheld the constitutionality of the policy. What makes Campbell interesting, as it has now been remanded for reconsideration, is the fact that in explaining its refusal to reconsider (231 F.3d 937), the panel extensively distinguished Good News Club.ⁱⁱⁱ³

C. **The National Day of Prayer Cases.**

Two decisions—one decided by the Ninth Circuit *en banc* prior to Good News Club and one case currently pending before the Seventh Circuit—deal with municipal decisions to deny religious groups access to public forums in connection with proposed prayer services to be conducted on the "National Day of Prayer." As proclaimed by Congress, 36 U.S.C. §119, the first Tuesday in May is the "National Day of Prayer." The day is meant as an opportunity to encourage all Americans to pray as they see fit.

In Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001), cert. petition filed 07/12/01 (No. 01-75), the City of Tucson established a "civic events fund" designed to support local organizations which:

...celebrate and commemorate the historical, cultural and ethnic heritage of the City and the Nation or increase the community's knowledge and understanding of critical issues...generate broad community appeal and participation...instill civic pride in the City, State or Nation...contribute to tourism...or are identified as unique community events.

The fund is not accessible for "events held in direct support of religious organizations."

The issue in Gentala was whether the city violated the First Amendment rights of an NDP group. The group planned to gather in the park on the National Day of Prayer for purposes of prayer and worship led by a number of different churches. The congregations were invited to participate in prayers for local, state and national issues. The plaintiffs challenged the city's refusal to financially underwrite the service held in the bandshell of a public park.^{iv4}

A sharply divided Ninth Circuit panel concluded the city was correct in deciding that providing the requested funding would have violated the Establishment Clause; thus, the decision to refuse to support the service "did not run afoul of another First Amendment proscription against abridging freedom of speech." The parties briefed and argued the content/viewpoint First Amendment issue. The court found that while the question was a "difficult one," it did not have to answer it because the City's Establishment Clause justification for refusing the subsidy was appropriate. The court ultimately concluded the subsidy was proscribed by the establishment clause. The court cited a number of factors:

- Unlike Rosenberger, general taxpayer funds were being used by Tucson; in addition, the newspaper in Rosenberger was one with a religious viewpoint, "not an 'organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.'"

- A reasonable observer would conclude the subsidy amounted to a state endorsement of the religious observance. This perception was magnified by the fact that "the City has retained a role for itself something like that of an impresario selecting the events that are consistent with the image of Tucson that the City wishes to foster and therefore merit public subsidy." Such role would clearly give rise to state endorsement of a religious activity. The court accordingly concluded the city was correct, that it was unable to provide funding in direct support of religious organizations generally or to the N.D.P. event in particular.

Finally, DeBoer v. Village of Oak Park is pending before the Seventh Circuit.^{v5}

The Village of Oak Park has a reputation for progressiveness, diversity and openness in government. For many years, the Village allowed virtually unlimited access to its conference rooms and meeting places for all sorts of public access. Local citizens' groups, social groups, unions, and business promotional groups were allowed to utilize the Village Hall. Frequently, Village staffers were forced to leave rooms where they were holding meetings on Village business because the room had been previously "booked" by an outside group. Indeed, the Village Hall had become a designated public forum.

By 1995, things had reached a point where free and open access was interfering too much with the normal business activities of the Village. In the summer of 1995, the Village Board adopted a policy (the "Use Policy") restricting and limiting access to the Village Hall. Outside use of the Village Hall was now limited to local "civic programs or activities." The activities had to be locally sponsored, had to be designed to provide a general public benefit (as opposed to a commercial sales pitch), and had to allow opportunity for all viewpoints to be heard. The Village Board's intent was to establish a nonpublic forum for civic matters such as town hall meetings, candidates' debates, and the like, under the mantle of complete neutrality and tolerance of all viewpoints.

One of the first groups seeking to use the Village Hall under the Use Policy were

local citizens seeking to hold a prayer service in conjunction with the National Day of Prayer. For three consecutive years, the Village denied the request based primarily on the fact that the prayer service was not a civic program or activity. The Village also knew that these citizens were gearing up to be plaintiffs. They filed periodic FOIA requests, seeking access to all Village records regarding outside use of the Village Hall. The Village kept extensive records and produced them.

In 1998, the Village once again turned down the NDP prayer service request. A week or so prior to the May, 1998 National Day of Prayer, the citizens filed a civil rights action in Federal Court. The lawsuit proceeded under two basic theories. First, the plaintiffs contended that the Village Hall was still an open forum and excluding religious activities was an abridgement of their free speech rights. They also contended the Policy gave the administrative officials what the law calls "unbridled discretion" to grant or deny applications on administrative whim--also in violation of the First Amendment. Plaintiffs sought a preliminary injunction to allow them to hold the 1998 NDP service at Village Hall.

The Village adopted a very fact-intensive defense strategy in response to the Motion for Preliminary Injunction. The assembled records demonstrated the Policy had established a nonpublic forum; the administrative standards were clear; and the only applications granted were each a "civic program or activity" sponsored by local groups. Much of Plaintiffs' attack was that we were allowing "national groups" such as the local chapter of the NAACP or League of Women Voters to use the facilities. In fact, the sponsors were the Oak Park chapter of these groups.

Plaintiffs ultimately withdrew their Motion for Preliminary Injunction and held their 1998 prayer service elsewhere. The parties conducted expedited discovery. Plaintiffs' attorneys deposed the various administrative officials of the Village (attorney, clerk and deputy clerk) regarding the specifics of the policy and application process. In their depositions, plaintiffs gave very limited descriptions of what actually goes on at an NDP prayer service. At the time, their understated explanation was not of any particular relevance in light of Plaintiffs' theories.

In the fall of 1998, the parties filed cross motions for summary judgment. During the briefing on the cross motions, Plaintiffs' attorneys changed their strategy. They now claimed the National Day of Prayer service, which focused on prayer for national, state and local leaders, was really a "civic activity and program" within the scope of the Policy; it was therefore discriminatory for the Village to deny their application. As the Village Attorney aptly put it in his deposition, praying that the Chicago Bears win a football game is not a sporting event; it is a religious activity. Similarly, prayer for government leaders is not a civic activity. It is a religious event which falls outside of the policy no different than 9:00 Sunday mass.

In February 1999, District Court Judge Aspen granted Plaintiffs' Motion for Summary Judgment. 53 F.Supp.2d 982 (N.D.Ill.1999). He accepted Plaintiffs' theory that a very limited prayer service for state, local and national leaders was a civic activity within the context of the policy. Judge Aspen concluded the Village had violated Plaintiffs' First Amendment rights by denying them use of the Village Hall for their civic activity prayer service. The Judge also found two other aspects of the policy to be unconstitutionally vague or overbroad. DeBoer I, 53 F.Supp.2d 982 (N.D. Ill. 1999).

The Village appealed in March of 1999. At the same time, Judge Aspen's opinion

revealed some of the Court's own discomfort with its ruling. It emphasized on several occasions that the Court was relying on Plaintiffs' own very limited description of a very limited prayer activity. Different facts might yield a different result, the Judge cautioned.

In his deposition, the lead plaintiff testified the NDP services were the same from year to year. The Village did not seek any stay of the District Court's summary judgment order, and allowed the 1999 NDP prayer service to take place at the Village Hall. One of the Village attorneys attended the service and tape recorded it. The Village prepared a transcript from that recording and presented it to Judge Aspen.

The results were dramatic. It now became clear the lead plaintiff was not forthcoming in his deposition testimony. The NDP service was a full blown religious service replete with Christian Bible quotations, hymn singing, sermons and prayer. There was now no question that the NDP service was a sectarian Christian religious activity, not the civic program contemplated by Judge Aspen.

The Village filed a Motion to Reconsider under Federal Rule 60 on the ground that the NDP transcript was "newly discovered evidence." The Village requested the Seventh Circuit stay the appeal. The Seventh Circuit did not do so without a finding from Judge Aspen that the new evidence was likely to yield a different result. After reviewing the transcript, Judge Aspen made such a finding.

Plaintiffs moved to strike the Motion to Reconsider. They claimed not only that the evidence was not "newly discovered" or relevant: They also charged that the Village Attorneys engaged in illegal and unethical conduct by "eavesdropping" on the NDP service. The service, of course, was conducted in a public building and was open to all. The Judge found that the transcript was not obtained unethically. More importantly, he found this evidence to be the best evidence available and that we had engaged in conduct of the highest ethical order in bringing the true facts to light. DeBoer II, 90 F.Supp.2d 922 (N.D.Ill.1999).

Ultimately, Judge Aspen did reconsider his earlier summary judgment. Upon reconsideration, the Court reversed the earlier opinion and granted summary judgment in favor of the Village. Judge Aspen now firmly held that prayer services are not civic activities, and the Village had the right to exclude Plaintiffs under the Policy. The Court found the NDP prayer service was not a civic activity; the plaintiffs were not being honest in their description of their activity; and that on an ongoing basis, prayer services are inherently non-civic, so that the Village was absolutely correct in prohibiting the use of its nonpublic forum for this religious activity. DeBoer III, 86 F.Supp.2d 804 (N.D. Ill. 1999).

Plaintiffs have appealed. The case was briefed and argued before Good News Club was decided.

IV. CONCLUSION

Let us now return to "Bayport" and assess the applications for use of the Council Chambers. One has little difficulty in concluding the first group is constitutionally entitled to use the facility to discuss the merits of the Ordinance from the Christian viewpoint. But what of the second group? Is it in fact hopelessly quixotic for a municipality to attempt to distinguish between the "subject matter" of a worship service as opposed to a religious viewpoint on a permissible subject matter? Can a municipality rely on Justice Thomas's implication that a mere religious worship is not a

civic event? Or, will Justice Souter's fear be confirmed that a municipal facility opened for civic matters must now be available for use by a church, a synagogue or mosque? Finally, would the allowance of such use of a public building be mere neutrality or affirmative support of religion?

The uncertainties which exist today could produce a result feared by Justices Kennedy in Forbes: a closing of municipal and school public forums. As one of the early commentators noted after Good News Club:

After Good News, there will be a painful day ahead for many school districts. These educators serving heterogeneous communities will discover that while Good News may make good law, it does not necessarily make good policy when attempting to manage a limited public forum. The coordination and monitoring necessary for the initial authorization and ongoing compliance of expressive groups may contend with the underlying education mission. After Good News, the closing of the educational forum may become Plan A on the administrator's policy list.

James & O'Dell, "The 'Good News' Ruling." National Law Journal Supreme Court Review, National Law Journal (August 6, 2001), at C10. For some municipalities, the delicate line-drawing called for by these cases combined with a possible political hostility to making "civic" buildings freely available for "religious" events may yield the conclusion that keeping a limited public forum open is not worth the effort.

ⁱ For an excellent and comprehensive discussion of this semantic minefield, see Note, "Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine," 52 Stanford Law Review, 929 ("In practice, though, Government has so rarely created a designated public forum that was truly open to all speakers in all topics that the terms designated public forum and limited public forum are today used largely interchangeably."). See, also, "The Public Forum Doctrine: A Primer for Municipal Attorneys." Municipal Lawyer (Jan.-Feb., 2000), at 18.

ⁱⁱ It should be noted these cases have been decided under the Free Speech Clause of the First Amendment, not the Free Exercise Clause.

ⁱⁱⁱ The Campbell opinion denying rehearing was issued some months after the Supreme Court granted certiorari in Good News Club. The Campbell court stated:

There is a powerful argument that such a prohibition against the use of facilities for a religious purpose [court's emphasis] is facially invalid as inevitably presenting viewpoint discrimination. This sharply contrasts with St. Tammany's Parish prohibition of a religious service [court's emphasis]. In St. Tammany's Parish, the request was to "worship the Lord in prayer and music..."

The baseline of both the majority and the dissenting opinions in the Second Circuit's decision in Good News Club was that a worship service could properly be excluded. In a limited form created by St. Tammany's Parish, there is no restriction upon religious activity, including teaching from a religious perspective, attending use of the school facility, unless it was a partisan political activity, for-profit activity, or a religious service...Fairly read in context, the rule draws a clear, common sense distinction. That the meaning of a rule prohibiting a religious service can be taxed at its margins is no fatal vice.

Five members of the Fifth Circuit dissented from the denial of rehearing *en banc*.

^{iv} 4The NDP group was allowed to use the park—the case relates to the city’s financial participation in support of the service.

^v5The undersigned is Attorney of Record for the Village of Oak Park in DeBoer.