

MEMORANDUM FROM THE LAW DEPARTMENT (8053)

Our File No.: B0019
Your File No.:

TO: Marc Halat
Chief License Inspector

FROM: Amanda Todd
Barrister & Solicitor

DATE: January 12th, 2004

RE: RAVE Bylaw

This memorandum is in response to a request by the licensing department to provide information regarding indemnification to The City of Calgary during RAVE events. The Law Department has also been asked to research any potential cost recoveries.

Opinion:

1. If the RAVE event is held on property owned by The City of Calgary the rental agreement stipulates an indemnification, insurance and cost recovery clause, so no bylaw changes are required to address this concern.
2. City council does not have the authority in this bylaw to require pre-payment of municipal services which might not be delivered.
3. A bond or a letter of credit are not viewed as a practical means of cost recovery.

I. Indemnification

A property owner clearly has a duty to parties lawfully on their premises. This duty applies to the condition of the premise, any activities conducted thereon, and includes the actions of third parties where the property owner knows or ought to know that the actions constitute a danger to other entrants.

As the property owner The City of Calgary can shift this duty to the RAVE organizer by contractual arrangement. The rental agreement can specify that certain contractual conditions be met.¹

Where an Extended Dance Event is held at a facility owned by The City of Calgary (e.g. the Max Bell Arena) an indemnification clause is one of the conditions of the rental agreement. The clause would be for complete indemnification. The renter would need to indemnify The City of Calgary against all action, suits, demands, payments, judgment or settlement, including solicitor client costs which arise from the use of the facility. Also the renter agrees that

¹ See example of Rental Agreement Form #R 1518 (Calgary Recreation) for City of Calgary owned facilities.

they will take all reasonable steps to ensure no unauthorized persons enter the property during the time of rental. Finally that the renter agrees to pay for all reasonable costs for any damage caused to the property during its rental.

An indemnification clause is only as good as the insurance requirement that supports it. In order that the renter can satisfy their duties under the indemnification clause the rental agreement needs to incorporate an insurance clause. The proof of insurance must be acceptable to the Insurance/Risk Management and Claims Section of the Law Department and shall name The City of Calgary.

II. Cost Recoveries

1. Authority

a. RAVE Events Held on City of Calgary Property

Again, in circumstances where The City of Calgary is the owner of the property the rental contract specifies that the renter be responsible for any reasonable costs incurred by the Municipality due to call out of municipal employees in response to management and direction of large crowds.

Two potential methods of cost recovery are the Bond and the Letter of Credit.

A rental agreement that requires the renter to post a bond with a bond company is one method to ensure a pool of money has been set aside to cover potential costs of the municipality. The drawbacks with employing this method of security are that it employs the use of a “middleman”: the bonding company. Potentially, The City of Calgary could face resistance from the bonding company when it tried to collect on the bond. The terms and the conditions of the bond could be subject to argument. Also the solvability of the bonding company may become an issue. The administrative costs of monitoring and collecting on a bond often do not make it a practical option for a relatively low overhead event. A bond is not the recommended method of security for an event the duration of which is generally one evening or weekend.

Requiring the RAVE Organizer to obtain a Letter of Credit is another method of obtaining security for costs potentially incurred by the municipality. A Letter of Credit for the benefit of The City of Calgary is an effective means of ensuring that the event organizer has a means of repayment available. Should any costs be realized by The City of Calgary the municipality could take the Letter of Credit to the issuing institution and demand the appropriate funds within the stipulated

time period. However the appropriate amount of the Letter of Credit would have to be determined in advance of the event. The municipality would have to determine which services they intend to be covered by the Letter of Credit and assign the service a value. Also it is questionable a RAVE Organizer would have access to appropriate funds to secure a Letter of Credit in advance of an event. The RAVE Organizer cannot sell tickets until they have obtained a permit therefore they cannot use advance ticket sales as a means of meeting one of the conditions of the permit. We doubt it would be practical for a RAVE Organizer to come up with funds that would appropriately compensate The City of Calgary for their municipal employee call out.

The requirement that a RAVE Organizer provide some form of security as a means of potential cost recovery must strike a balance between allowing the municipality to recover some of their costs in allowing these events on City owned property and being a practical, economic option for the RAVE Organizers to undertake. For, if the RAVE Organizer rejects the terms of the rental agreement and decides to hold the event on private property the municipality has lost its opportunity to recover any of its costs.

b. RAVE Events Held on Private Property

When the RAVE event is held on property owned by a third party The City of Calgary no longer has a one on one contractual relationship with the RAVE Organizers. Here The City of Calgary occupies the role of the regulator and derives its authority from section 8(c) of the *Municipal Government Act* RSA 2000, cM-26.² Section 8 of the *MGA* authorizes council to pass a bylaw to provide for a system of licenses, permits or approvals.

There are two subsections under section 8(c) which could possibly address potential cost recovery mechanisms; section 8(c)(i) and 8(c)(iv).

Section 8(c)(i) allows council to pass a bylaw for the establishment of fees for licenses, permits and approvals that may be in nature of a reasonable tax for the activity authorized or for the purpose of raising revenue. Section 8(c)(iv) provides that terms and conditions may be imposed on any license, permit or approval. Because call out of municipal employees is a determinable cost and not a revenue item there is strong argument that section 8(c) does not apply to cost recovery. A fee is a distinct from condition or term as used in the *MGA*. The Supreme Court of Canada has held that a Municipality has only those powers expressly conferred by statute, those necessarily or fairly implied by the express power and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the municipality.³ The *MGA* is specific in enumerating the limited circumstances where cost recovery is

² *Municipal Government Act* R.S.A. 2000, c.M-26 as amended [hereinafter the *MGA*].

permitted. The scope of section 8(c) of the *MGA* has been argued before the Supreme Court of Canada but at the time of this memorandum a decision has not been delivered by the Supreme Court. However it is clear that a license or permit process so onerous that it practically prohibits the obtaining of a permit or license, constitutes an impermissible prohibition.⁴ The *MGA* does not authorize cost recovery for emergency services. While the *MGA* permits the establishment of services and, in some instances, grants a monopoly to the municipality for providing the service it does not expressly authorize direct fees for the provision of such services.⁵

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³ *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* 2002 ABCA 131, [2002] 8 W.W.R. 51, 30 M.P.L.R. (3d) 155, 303 A.R. 249, 3 Alta L.R. (4th) 211.

⁴ *Ibid.*, paragraph 84.

⁵ See for example ambulance and fire services.