STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-12

Date issued: May 16, 1996

Requested by: Rod Backman, Director
Office of Management and Budget

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. § 16.1-10-02, which prohibits the use of state property for political purposes, creates an absolute ban on the use of state capitol buildings and grounds for political purposes.

II.

Whether N.D.C.C. § 16.1-10-02 prohibits circulation of election petitions, including initiative and referendum petitions, in the state capitol buildings and on state capitol grounds.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that N.D.C.C. § 16.1-10-02 does not create an absolute ban on the use of state capitol buildings and grounds for political purposes; it does not prohibit "trivial" uses of state property, which would include mere presence on the capitol grounds or in capitol buildings. It is my further opinion that N.D.C.C. § 16.1-10-02 permits the use of state buildings and grounds for political purposes to the extent such activity is protected by the First Amendment.

II.

It is my opinion that N.D.C.C. § 16.1-10-02 does not prohibit circulation of initiative and referendum petitions on capitol grounds or in state buildings. It is my further opinion that the circulation of election petitions on capitol grounds or in state buildings, without more, does not constitute a prohibited "use" of state property under N.D.C.C. § 16.1-10-02.

- ANALYSES -

I.

N.D.C.C. § 16.1-10-02 provides:

> Use of state services or property for political purposes.
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> 1. No person may use any property belonging to or leased by, or any service which is provided to or carried on by, either directly or by contract, the state or any agency, department, bureau, board, or commission thereof, for any political purpose.
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> 2. The following definitions must be used for the purposes of this section:
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> a. "Political purpose" means any activity directly undertaken by a candidate for any office in support of his own election to such office; or aid and assistance to any candidate, political party, political committee, or organization, but does not include activities undertaken in the performance of a duty of state office.
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> b. "Property" includes, but is not limited to, motor vehicles, telephones, typewriters, adding machines, postage or postage meters, funds of money, and buildings. However, nothing in this section may be construed to prohibit any candidate, political party, committee, or organization from using any public building for such political meetings as may be required by law, or to prohibit such candidate, party, committee, or organization from hiring the use of any public building for any political purpose if such lease or hiring is otherwise permitted by law.
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> c. "Services" includes, but is not limited to, the use of employees during regular working hours for which such employees have not taken annual or sick leave or other compensatory leave.

A. Trivial Use of State Property Does Not Violate N.D.C.C. § 16.1-10-02.

The Legislature's primary intent in prohibiting the use of state property for political purposes is to prevent "a misuse of public funds or a financial misuse of public property for political purposes." Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979). N.D.C.C. § 16.1-10-02 is not to be so broadly construed as to prohibit "trivial" uses of state property. Id. Although what constitutes "trivial" use of state property must be determined on a case-by-case basis, the North Dakota Supreme Court did provide some guidance in the Saefke decision. The court stated:

> It is a matter of common knowledge that governors and state officials are often interviewed and photographed in their respective offices during election campaigns or in regard to political matters. It would be unrealistic to contend that a governor could not answer political questions proposed by reporters while he sat at his desk in the State Capitol. Legislatures (sic) and state officials are shown sitting at their desks in campaign literature. State officials and members of the legislature are often interviewed by the media on political matters in the halls, chambers, and offices of the State Capitol. We mention these common occurrences because surely if the legislature intended such "use" of state property to be a violation of the Corrupt Practices Act, it would have so provided in specific and clear terms.

Id.

The above language indicates the court did not interpret use of state property to mean mere presence in a state building. Thus, it is my opinion that merely being present on the capitol grounds or in a capitol building for a political purpose would not, by itself, violate N.D.C.C. § 16.1-10-02. This would include a political candidate's use of the Great Hall or a meeting room open to the general public to express the candidate's views.[1]

[1] Having created a forum generally open to the public, the state cannot deny access to the forum based on content unless the state shows the denial is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (school

B. State property may be used for political purposes as required by law.

Although somewhat hidden under the definition of "property," N.D.C.C. § 16.1-10-02 contains an exception to the use of public buildings for political purposes. That exception provides that N.D.C.C. § 16.1-10-02 may not "be construed to prohibit any candidate, political party, committee, or organization from using any public building for such political meetings, as may be required by law." (Emphasis added.) This exception does not apply only to state statutory law, but necessarily includes state and federal constitutional law. Thus, when the statutory prohibition against use of state buildings for political purposes is read together with the exception, the section permits the use of state buildings for political meetings to the extent protected by the First Amendment. This conclusion necessarily raises the question of which, if any, political meetings individuals or organizations have a constitutional right to hold at state capitol buildings.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." However, "[t]he federal Constitution does not require the government to freely grant access to all who wish to exercise free speech on every type of government property, without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." City of Jamestown v. Beneda, 477 N.W.2d 830, 836 (N.D. 1991); see also Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799-800 (1985). Like any private landowner, the government may "preserve the property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, 47 (1966); see also Bolinske v. North Dakota State Fair Ass'n, 522 N.W.2d 426, 431 (N.D. 1994), cert. denied, 115 S. Ct. 1315 (1995). "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending upon the character of the property at issue." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

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district that permits its premises to be used by public organization after school hours cannot deny access to a group based on religious content of planned meetings); Widmar v. Vincent, 454 U.S. 263 (1981) (university that has created a forum generally open for use by student groups cannot deny forum to religious student group).

The United States Supreme Court has adopted a forum analysis in order to determine "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." Cornelius, 473 U.S. at 800. Under this analysis, the government's property is identified as one of three types of forums: The traditional public forum; the public forum created by government designation, and the non-public forum. Perry, 460 U.S. at 45-46. What activity is protected under the First Amendment depends on whether the property or area in question falls in one category rather than another.

The first category, known as traditional public forums, are places that "by long tradition or by government fiat have been devoted to assembly and debate." Perry, 460 U.S. at 45. Examples of such forums are public streets, sidewalks, and parks. Hague v. CIO, 307 U.S. 496, 515 (1939) (streets and parks "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"); United States v. Grace, 461 U.S. 171, 179 (1983) (public sidewalks are recognized as traditional public forum property). "In a traditional public forum, content-based regulations may be enforced if they are narrowly drawn to serve a compelling state interest, and '[c]ontent-neutral restrictions on the time, place, and manner of expression, are permissible if they are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.'" Markowitz v. U.S., 598 A.2d 398, 403 (D.C. App. 1991) (quoting United States v. Wall, 521 A.2d 1140, 1143 (D.C. 1987)), cert. denied, 506 U.S. 1035 (1992).

The second category of public forum, known as the "designated" public forum, "may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." Cornelius, 473 U.S. at 802. Thus, the designated public forum is public property that is not a public forum by tradition, but that the government has opened for expressed activity. The government is not required to indefinitely retain the open character of a designated public forum. However, "as long as it does so it is bound by the same standards as apply in a traditional public forum." Perry, 460 U.S. at 46.

The third and final category consists of "[p]ublic property which is not by tradition or designation a forum for public communication." Perry, 460 U.S. at 46. Regulations governing a non-public forum are

evaluated for content-neutrality and reasonableness. United States v. Kokinda, 497 U.S. 720 (1990). "In addition to time, place, and manner regulations, the state may reserve [a non-public] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

In order to determine to what extent the state of North Dakota can restrict First Amendment activities in capitol buildings, it is necessary to classify what type of forum the capitol buildings are. While doing so, it is important to remember that parts of a building may be designated a public forum while other parts of the same building can constitute a non-public forum. ACT-UP v. Walp, 755 F. Supp. 1281 (M.D. Pa. 1991) (making distinction between the gallery and the rotunda); Markowitz, 598 A.2d 398 (restricted corridor in the United States Capitol Building constitutes a non-public forum).

The North Dakota capitol grounds consist of approximately 130 acres. The capitol grounds are surrounded on all sides by public streets and within the grounds are roads or driveways and sidewalks considered necessary for the use of the general public in gaining access to the capitol buildings. Historically, the capitol grounds, including the steps to the Capitol building, have been used for various commercial activities, such as craft fairs and business displays, and for non-commercial speeches and gatherings, such as political and religious meetings and rallies, parades, and concerts. The capitol grounds, therefore, have been held open and used as a public forum for a considerable number of years. Consequently, the capitol grounds are likely to be found by a court of law to be a traditional public forum. See United States v. Grace, 461 U.S. 171 (1983) (sidewalk of United States Supreme Court constitutes traditional public forum); Adderley v. Florida, 385 U.S. 39 (1966) ("[t]raditionally, state capitol grounds are open to the public"); Edwards v. South Carolina, 372 U.S. 229 (1963) (sidewalk around state house grounds public forum); Pinette v. Capitol Square Review and Advisory Bd., 844 F. Supp. 1182 (S.D. Ohio 1993) (finding Ohio Capitol Square to be a traditional public forum), aff'd, 30 F.3d 675 (6th Cir. 1994), aff'd, 115 S. Ct. 787 (1995); ACT-UP, 755 F. Supp. at 1287 ("In general, the grounds and buildings of state and federal capitol complexes and similar buildings have consistently been held to be public fora."); Chabad-Lubavitch of Georgia v. Harris, 752 F. Supp. 1063 (N.D. Ga. 1990) (plaza of Georgia state capitol is a public forum); Jeanette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C. 1972), aff'd, 409 U.S. 972 (1972) (grounds

of the United States capitol are public forum); Up & Out of Poverty v. State, 533 N.W.2d 339, 345 (Mich. App. 1995) ("The [Michigan] Capitol grounds constitute a traditional public forum, where the right to free speech is closely guarded.").

In general, state and federal capitol buildings have consistently been held to be public forums. ACT-UP, 755 F. Supp. at 1287. However, each area of a capitol building or other public building must be examined to determine whether the particular area constitutes a public forum or a non-public forum. For example, government offices in the capitol building are not by tradition or designation a forum for public communication. Similarly, the supreme court chambers and court room are not traditionally open to assembly and debate. See Pearson v. United States, 581 A.2d 347, 353 n.13 (D.C. 1990), cert. denied, 502 U.S. 808 (1991). However, capitol rotundas are traditionally open to the public for debate and assembly. ACT-UP, 755 F. Supp. at 1287; Reilly v. Noel, 384 F. Supp. 741, 744 (D.R.I. 1974).

Access to the Great Hall in the North Dakota state capitol has been allowed to the public over the years. Historically, the Great Hall has been used for speeches, exhibitions, concerts, and awards ceremonies. Therefore, it is likely that the Great Hall would be found a designated public forum by a court of law. It is also likely that meeting rooms in the state capitol, which are generally open to the public, would be found to constitute designated public forums. Private offices, chambers, the supreme court courtroom, and other areas not generally available to the public, likely would be found to constitute non-public forums. To the extent that a question exists regarding whether a particular area in a public building constitutes a public forum, the historical uses of that area, the state's policy and practice regarding that area, and the area's compatibility with expressive activity would have to be considered on a case-by-case basis.

It is my opinion that the state capitol grounds constitute a traditional public forum. It is also my opinion that parts of the state capitol building, such as the Great Hall and meeting rooms generally permitted to be open to the public, constitute designated public forums. Accordingly, any policies adopted by Facility Management regarding the use of the capitol grounds and these portions of the capitol building must satisfy the standards established by the United States Supreme Court for traditional public forums. In other words, content-based regulations must serve a compelling state interest and be narrowly drawn to achieve that end,

and content-neutral regulations on the time, place, and manner of expression must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication. Whether any particular restriction on the use of the capitol grounds or a state building is constitutionally valid must be addressed on a regulation-by-regulation basis.[2]

In conclusion, N.D.C.C. § 16.1-10-02 does not create an absolute ban on the use of state capitol buildings and capitol grounds for political purposes. N.D.C.C. § 16.1-10-02 does not prohibit "trivial" uses of state property, which would include mere presence in a state building. N.D.C.C. § 16.1-10-02 also does not prohibit political uses protected by the First Amendment to the United States Constitution.

II.

N.D.C.C. § 16.1-10-02 does not prohibit circulation of initiative and referendum petitions on state capitol grounds or in state buildings. As defined in N.D.C.C. § 16.1-10-02(2)(a), "political purpose" relates to activities taken by a candidate in support of election to an office or aid and assistance to any candidate, political party, political committee, or organization. "Political purpose" does not refer to initiative or referendum measures. See Letter from Attorney

[2] The following cases provide guidance regarding appropriate restrictions in public forums. Lubavitch of Iowa, Inc. v. Walters, 684 F. Supp. 610 (S.D. Iowa 1988) (Jewish organization found not to have First Amendment right to erect 20-foot high menorah on state capitol grounds and leave it standing for duration of Hanukkah), aff'd, 873 F.2d 1161 (8th Cir. 1989); Simpson v. Municipal Court, 92 Cal. Rptr. 417 (Cal. Ct. App. 1971) (upholding statute forbidding peaceable, nonobstructive picketing within interior of state capitol building); Coppock v. Patterson, 272 F. Supp. 16 (S.D. Miss. 1967) (upholding prohibition against occupying the roads, streets, or walks located within the capitol grounds in such manner as to hinder their proper use); Markowitz, 598 A.2d 398 (ban on parading, demonstrating, or picketing within restricted areas of United States capitol building does not violate First Amendment); Farina v. United States, 622 A.2d 50 (D.C. App. 1993) (upholding statute making it unlawful for any person or group of persons to impede passage through or within the United States capitol grounds); Up & Out of Poverty v. State, 533 N.W.2d 339 (Mich. App. 1995) (upholding procedures that limited time to 15-hour period during day that protests may be held on capitol lawn).

General Nicholas J. Spaeth to Representative Diane Larson (July 7, 1989).

Circulation of election petitions would constitute activity directly undertaken by a candidate in support of his or her own election to an office or assistance to a political candidate, depending on who was involved in the circulation. Such activity, therefore, constitutes a "political purpose" under N.D.C.C. § 16.1-10-02(2)(a). However, as previously discussed, a circulator's presence on capitol grounds or in capitol buildings is not likely to be found to constitute a prohibited "use" of state property unless a circulator uses state property or resources in some more identifiable or consumable way.

It is my opinion that N.D.C.C. § 16.1-10-02 does not prohibit circulation of initiative and referendum petitions on state capitol grounds or in state buildings. It is my further opinion that the circulation of election petitions on state capitol grounds or in state capitol buildings, without more, does not constitute a prohibited "use" of state property under N.D.C.C. § 16.1-10-02.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

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