

**LETTER OPINION
2012-L-09**

July 5, 2012

Mr. Steven J. Lies
Wahpeton City Attorney
PO Box 275
Wahpeton, ND 58074-0275

Dear Mr. Lies:

Thank you for your letter asking whether the city may lawfully permit the use of its city hall and broadcasting facilities by a non-profit organization to air presentations by opposing candidates for public office, or presentations by proponents and opponents of state or local ballot measures. Based on the following, it is my opinion that it would not violate the state's Corrupt Practices Act, N.D.C.C. §§ 16.1-10-01(3) and 16.1-10-02, for a city to allow a non-profit organization to use its city hall and broadcasting facilities to air presentations by opposing candidates for public office, or by proponents and opponents of state or local ballot measures.

ANALYSIS

You indicate that in the past, the city has permitted the use of its city hall and broadcast facilities by the American Association of University Women to present a "Get to Know the Candidates and Issues" program. Candidates at these events were permitted to present their positions and views and such events were equally available to all candidates who wished to participate. The city facilities were also made available for proponents and opponents of state or local ballot measures. You indicate that a citizen has questioned whether it is legal for the city to allow its facilities to be used for such purposes. State law provides as follows:

16.1-10-01. Corrupt practice – What constitutes. A person is guilty of corrupt practice within the meaning of this chapter if the person willfully engages in any of the following:

.....

3. Is guilty of the use of state services or property or the services or property of a political subdivision of the state for political purposes.¹

Section 16.1-10-02, N.D.C.C., further provides that:

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, commission, or political subdivision thereof, for any political purpose.
2. The following definitions must be used for the purposes of this section:
 - a. "Political purpose" means any activity undertaken in support of or in opposition to a statewide initiated or referred measure, a constitutional amendment or measure, a political subdivision ballot measure, or the election or nomination of a candidate to public office²

The statutory definition of "property" includes buildings and equipment.³ "Services" are defined by the law to include "the use of employees during regular working hours for which such employees have not taken annual or sick leave or other compensatory leave."⁴

In construing the predecessors to these statutes, the North Dakota Supreme Court stated that "[w]e believe that it was the primary intent of the legislature that there should not be a misuse of public funds or a financial misuse of public property for political purposes."⁵

The question you raise differs from the usual inquiries about violations of this aspect of the Corrupt Practices Act. Typically, there is a complaint that one side or another of a political race or measure utilized public property or services to promote a particular candidate or a particular side of a ballot measure. In this instance, you indicate that these candidate or ballot measure events were intended to inform the public on the views of opposing candidates or of the measure's proponents and opponents and that the use of the public facilities has been made equally available to all. In the situation you present, it appears

¹ N.D.C.C. § 16.1-10-01.

² N.D.C.C. § 16.1-10-02(1) and (2).

³ N.D.C.C. § 16.1-10-02(2)(b).

⁴ N.D.C.C. § 16.1-10-02(2)(c). In your letter, you state that during these candidate or ballot measure events, a city employee is on duty operating the public access television equipment. You did not indicate whether these events took place during the regular working hours of the city employee operating the equipment.

⁵ Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979).

that these candidate and ballot measure events are intended to educate members of the public in a balanced way in order that they may more intelligently cast their votes either for a candidate for public office or for or against a ballot measure. No one participant has any unfair advantage in a situation like this. These presentations utilizing city property do not fit within the typical notion of what is commonly thought of as a “corrupt” practice.⁶ It does not seem that such a balanced educational event could be reasonably characterized as a “misuse of public funds” or a “financial misuse of public property” as described by the North Dakota Supreme Court.⁷

Even assuming the activities you describe would implicate the Corrupt Practices Act, this law does provide exceptions. Section 16.1-10-02(2)(b), N.D.C.C., states that “nothing in this section may be construed 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.”⁸ Hiring the use of a public building is otherwise authorized by N.D.C.C. § 48-08-06, which provides, in part, as follows:

The governing body of any county, city, or township may permit the use of or may lease any public building or any part of a public building under its charge for any legal purpose, giving equal opportunity to all persons, and without religious or political distinctions, and may make such reasonable rules and restrictions on the use of such building as may seem necessary, and shall fix proper rentals and fees for such use.⁹

In your letter, you state that the city has not previously charged for the use of the facilities or staff services for operating the cable system, although it could have, based on what it would have determined to be a proper rental or fee.

Regardless of whether a rental or other fee were collected, it would not be a violation of the Corrupt Practices Act to permit the use of city hall where, as here, equal opportunity was available to all persons without political distinctions.

Another exception to the prohibition of using political subdivision property for a political purpose is also stated in the statute: “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”¹⁰

⁶ The term “corrupt” is variously defined as: “[m]arked by immorality and perversion . . . [m]arked by venality and dishonesty . . . [t]o destroy or subvert the honesty or integrity of . . . [t]o taint; contaminate.” The American Heritage Dictionary 327 (2d coll. ed. 1991).

⁷ See note 5 above.

⁸ N.D.C.C. § 16.1-10-02(2)(b).

⁹ N.D.C.C. § 48-08-06.

¹⁰ N.D.C.C. § 16.1-10-02(2)(b) (emphasis supplied).

This office has previously construed this exception in N.D.A.G. 96-F-12 which concluded, in part, 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.”¹¹ Although this opinion dealt with the use of state buildings and grounds for political purposes, I believe the reasoning is equally applicable to the use of political subdivision buildings and grounds for political purposes. This opinion went on to explain that this “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”¹² and noted “[t]his exception does not apply only to state statutory law, but necessarily includes state and federal constitutional law.”¹³

The opinion further discussed the “forum analysis”¹⁴ courts have established in determining the allowable use of government property for First Amendment purposes and explained the forum category which appears to be most appropriate to your question:

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.” 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.”¹⁵

Examples of traditional public forums include city hall steps¹⁶ or a city hall plaza long used for speech purposes.¹⁷ An example of a designated public forum would be a city hall lawn

¹¹ N.D.A.G. 96-F-12.

¹² Id.

¹³ Id.

¹⁴ N.D.A.G. 96-F-12. The use of governmental property for speech activities has been characterized as “one of three types of forums: The traditional public forum; the public forum created by government designation, and the non-public forum.” Id. (citing Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983)).

¹⁵ N.D.A.G. 96-F-12 (citations omitted).

¹⁶ Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).

¹⁷ Housing Works, Inc. v. Kerik, 283 F.3d 471 (2nd Cir. 2002).

area designated by the governing authority.¹⁸ In a number of instances, however, courts have declined to hold that public access channels themselves are public forums.¹⁹

Because the city has permitted or “designated” the American Association of University Women to host a candidate or measure event, the use of city hall and its related facilities would likely be considered a designated public forum by the courts (with the possible exception of the public access channel itself) and would be subject to the requirements of the First Amendment for so long as the city permitted the activity in city hall. Thus, it would meet the other exception to the prohibition on use of public buildings for political purposes contained in N.D.C.C. § 16.1-10-02(2)(b) discussed above.²⁰

Based on the foregoing, it is my opinion that N.D.C.C. §§ 16.1-10-01(3) and 16.1-10-02 do not prohibit the use of city buildings and broadcast facilities for political purposes to the extent such activity is protected by the First Amendment; the designated use of city hall and related broadcast facilities by a non-profit organization to present candidate forums or ballot measure forums would not violate this aspect of the Corrupt Practices Act.

Finally, you ask whether my opinion would change if candidates or measure proponents or opponents were unable or unwilling to be part of the scheduled event. I do not believe it is material whether or not all invited sides actually choose to participate in the forums as long as the use of the city hall and related facilities was equally available to all candidates and measure proponents or opponents.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pab

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 question presented is decided by the courts.²¹

¹⁸ Osediacz v. City of Cranston, 414 F.3d 136 (1st Cir. 2005).

¹⁹ See Griffin v. Pub. Access Cmty. Tel., 2010 WL 3815797 (W.D. Tex., Sept. 27, 2010); Demarest v. Athol/Orange Cmty. Tel., Inc., 188 F.Supp.2d 82 (D. Mass. 2002); Glendora v. Hostetter, 916 F.Supp. 1339 (S.D.N.Y. 1996).

²⁰ As noted above, the government is not required to indefinitely retain the open character of a designated public forum, so it would be in the purview of the city to terminate the use of city hall and its cable facilities if it so desired.

²¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).