



STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

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DECLARATORY ORDER NO. 10

LOCAL AGENCIES PROMOTING BALLOT PROPOSTIONS
(RCW 42.17.130; WAC 390-05-271 and -273)
Unless express authority is granted by an
independent source, a local agency cannot
promote a ballot proposition as "normal and
regular conduct" of the agency, for to do so
would be in violation of RCW 42.17.130.
(November 16, 1993).

Carolyn M. Van Noy, Executive Director
Seattle Ethics and Elections Commission
308 Municipal Building
Seattle, WA 98104

Dear Ms. Van Noy:

You petitioned for a declaratory order pursuant to RCW 34.05.240 and WAC 390-12-250 as to whether the Seattle Arts Commission, (hereinafter referred to as "SAC") a local agency, could use the facilities of the agency to promote funding for a concert hall, once the issue becomes a ballot measure. At our regular meeting held on October 26, 1993, we decided to issue a binding written declaratory order so as to provide guidance to agencies which might be faced with a similar situation.

Your request concerns the application and interpretation of RCW 42.17.130. It specifically focuses on subsection (3) of this statute. RCW 42.17.130 provides:

No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency: PROVIDED, That the foregoing provisions of this section shall not apply to the

*"The public's right to know of the financing of political campaigns and lobbying
and the financial affairs of elected officials and candidates far outweighs
any right that these matters remain secret and private."*

RCW 42.17.010 (10)

following activities:

(1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

FACTUAL BACKGROUND

The SAC was established by ordinance in 1971, to promote, encourage and develop an awareness of and interest in art and to advise the City about art development. Seattle Municipal Code (SMC) 3.56.010 provides in pertinent part:

There is hereby established a Seattle Arts Commission to promote and encourage public programs to further the development and public awareness of and interest in the fine and performing arts and to act in an advisory capacity to the City in connection with the artistic and cultural development of the City.

The duties and powers of the SAC is set forth in SMC 3.56.030. SMC 3.56.030 provides:

The Commission shall have the following duties and powers:

A. To hold regular public meetings and keep a written record of its proceedings which shall be a public record;

B. To make expenditures in accordance with the annual budget adopted by the City, and upon organization to prepare and submit estimates of necessary expenditures for the remainder of 1971, and thereafter to annually review the financial needs of public programs for development of the fine and performing arts and submit a proposed budget therefor;

C. To utilize the services of its Executive Director and such other staff as may be made available to the Commission;

D. To initiate, sponsor or conduct, alone or in cooperation with other public or private agencies, public programs to further the development and public awareness of, and interest in the fine and performing arts;

E. To encourage donations and grants to the Civic Arts Account of the General Donation and Gift Fund and to advise the City regarding the receipt and expenditure of such funds;

F. To advise the City concerning the receipt of or purchase of works of art to be placed on municipal property, except for museums or art galleries or works of art or to be placed in connection with projects reviewed by the Seattle Design Commission;

G. To advise and assist the City in connection with such other artistic activities as may be referred to it by the City.

A community group has been formed to propose to the Seattle City Council that it place a bond issue on the ballot for renovation of Seattle Center, to include a concert hall. As of July 8, 1993, the proposal had not yet been made. However, you believe that it is likely that the proposal will be placed on the ballot in February, 1994 or thereafter. The SAC favors such a concert hall proposal.

ISSUE

Once the proposal is a ballot measure, would activities by the SAC to support the measure be normal and regular conduct of the agency for which the facilities of the SAC could be used?¹

ANALYSIS

RCW 42.17.130 prohibits the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. This provision, which was enacted as part of Initiative 276 in 1972, was a codification of preexisting common law principles, forbidding or restricting the use of public funds for certain purposes. RCW 42.17.130 does not restrict all communications concerning ballot propositions. To that end, the statute provides for three specific exceptions to this prohibition. Your question concerns the third exception, activities which are part of the normal and regular conduct of the agency.

The Public Disclosure Commission's ("PDC") interpretation of this statute can be found in two rules; WAC 390-05-271, which deals with general applications of RCW 42.17.130 and WAC 390-05-273,

¹ An analysis of whether an activity of a public agency is in violation of RCW 42.17.130 ultimately turns on the specific facts surrounding the activity in question. Since your question merely states activities which would promote a ballot measure, and does not cite examples of specific activities, this analysis cannot speak to any specific activity which may be contemplated.

which defines "normal and regular conduct".² WAC 390-05-271 specifically provides:

General Applications of RCW 42.17.130. (1) RCW 42.17.130 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of facilities of a public office or agency.

(2) RCW 42.17.130 does not prevent a public office or agency from (a) making facilities available on a nondiscriminatory, equal access basis for political uses or (b) making an objective and fair presentation of facts relevant to a ballot proposition, if such action is part of the normal and regular conduct of the office or agency.

The phrase "normal and regular" is not defined in statute. WAC 390-05-273 defines this phrase as follows:

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional charter, or statutory provision separately authorizing such use.

The policy that is reflected in these rules is relatively strict. Under the rule, the activity must satisfy two tests. First, the activity must be "lawful", that is, specifically authorized by statute, resolution or other appropriate enactment. An example is the publication of the voters pamphlet by the Secretary of State. This activity is authorized by Chapter 29.81 RCW. Therefore, although candidates are entitled to include their own statement in the pamphlet, which assists the candidate's campaign, it is normal and regular conduct for the Secretary of State because of the specific statutory authorization to publish the pamphlet.

The second test for normal and regular conduct is that the activity must be "usual". The agency or official must show that the activity is not a one time occurrence during an election campaign but is part of a course of conduct which is usual for that official or agency.

² Additional interpretations by the PDC can be found in Declaratory Rulings 1, 2, and 4 and in prior enforcement cases.

The last sentence of the rule emphasizes the narrow interpretation given to normal and regular conduct. It makes it clear that a local agency, such as the SAC, cannot pass a law or resolution which would authorize itself to engage in activity that would otherwise be prohibited by RCW 42.17.130. Authorization to engage in such activity must come from an independent source. To do otherwise would render the prohibition practically meaningless.

The SAC was created for the purpose of promoting public programs that further the performing arts. SMC 3.56.010. You stated in your request that a concert hall would be a public program that would further the performing arts. As such, you argue that promoting a ballot proposition which promotes the funding of a concert hall would be normal and regular conduct of the SAC. We cannot agree.

Generally speaking, the powers of a local agency are strictly construed. If there is any doubt as to the existence of a power, it is usually denied. See, State ex rel. Eastvold v. Maybury, 49 Wn.2d 533, 304 P.2d 663 (1956). Moreover, while a different rule applies in the case of first class cities, this is only so with respect to official actions of the municipal legislative body acting as such. See, Winkenwerder v. Yakima, 52 Wn.2d 617, 328 P.2d 873 (1958), which states that cities of the first class cannot act in contravention to any constitutional provision or any legislative enactment.

You have cited the authority granted to the SAC as set forth in SMC 3.56.030. None of the powers directly authorize the SAC to promote ballot propositions regarding the arts. Any possible authority of a public agency to expend funds in an election campaign must be viewed with special strictness. See, AGO 1975 No. 23. As pointed out in previous Attorney General Opinions, the rule in this state has long been that such expenditures are contrary to public policy and illegal in the absence of express authority either from the state legislature or governments which come under the "Winkenwerder rule".³ Because there is no express independent authority to expend public money by the SAC to promote a ballot proposition and based on the rules regarding interpretation of authority for a local agency to act and the interpretations of RCW 42.17.130, we do not believe that the SAC can use their facilities to promote a ballot promotion which would fund a concert hall.

CONCLUSION

Based on the facts as presented and the law referenced above, we hold that the SAC cannot use their facilities to promote a ballot proposition which would fund a concert hall. This does not prevent the SAC or its individual members from engaging in those

³ See AG opinion of March 4, 1969, to Senator Huntley and memorandum opinion of August 28, 1969, to the state auditor.

activities outlined in WAC 390-05-271.

This written, binding Declaratory Order was adopted at the regular commission meeting in Olympia, Washington on November 16, 1993. by a vote of 4-0

CHAIR

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