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OPINION
OF
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Opinion No. 92-03

BY: Elizabeth A. Glenn
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TO: Honorable Ben D. Altamirano
State Senator
1123 Santa Rita Street
Silver City, New Mexico 88061

Honorable John L. Morrow
State Senator
Box 111
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QUESTIONS:

1. Would the New Mexico legislature violate the antidonation clause of the New Mexico Constitution if it provided the news media space in the State Capitol Building without charge?

2. May state and local governments provide free space in public buildings for newspaper vending machines and similar devices?

CONCLUSIONS:

1. Except for private office space it allocates to certain members of the press for their permanent use, the legislature may provide use of space in the State Capitol Building to the news media without charge.

2. Yes. State and local governments may provide free space for newspaper vending machines.

FACTS:

Space in the State Capitol Building overlooking the house and senate chambers has been designated for use by the news media during legislative sessions. In addition, offices in the Capitol have been provided to some members of the press who have set up desks and phones at their own expense to provide for easier access to the legislature and the governor during the session, and television stations have occupied other space in the building for their broadcasting functions during the session. Some of the press occupy offices year-round. Until recently, the media have not been charged for their year-round use of office space, but they have paid for their telephone and other expenses. Finally, newspapers of general circulation want to place their vending machines in state and local government buildings.

ANALYSIS:

1. Providing Space in the Capitol Building to the News Media.

The antidonation clause of Article IX, Section 14 of the New Mexico Constitution provides that "[n]either the state, nor any county, school district, or municipality ... shall directly or indirectly ... make any donation to or in aid of any person, association or public or private corporation...." A "donation" within the meaning of the provision is "a gift, an allocation or appropriation of something of value, without consideration." Village of Deming v. Hosdreg Co., 62 N.M. 19, 28, 303 P.2d 920 (1956). The antidonation clause is to be interpreted "with reference to the evils it was intended to correct," City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 276, 161 P.2d 878 (1945), and the evil addressed by the antidonation clause is the investment of public funds in private enterprises. Id. at 276-77.

We believe that providing free space in the State Capitol for use during legislative sessions is not an unconstitutional donation. Legislative sessions are required by the constitution to be open to the public. N.M. Const. art. IV, § 12. Thus, the legislature must make accommodations for public attendance at and information about its sessions. It accomplishes this by providing direct public access and by permitting indirect access through the news media. In our view, granting the media free space overlooking the chambers to view and report on legislative sessions does not amount to a benefit substantially different from the general public's use of space in the Capitol Building.

For the same reasons, we believe it is permissible for the legislature to provide free office space elsewhere in the Capitol Building for the temporary and nonexclusive use of reporters and other media representatives to facilitate their coverage of legislative sessions.¹ The service provided by the media to the legislature of informing the public about legislative activities more than outweighs any incidental benefit to the media's private business interests from the use of this space. Cf. Tarrant County v. Rattikin Title Co., 199 S.W.2d 269 (Tex. Civ. App. 1947) (abstract companies, as agents of the public, had the same right as the general public to temporary, nonexclusive use of space provided in the courthouse for inspection of public records without paying rent).

Our conclusion is different, however, as to the year-round occupancy of office space in the building by newspapers, television stations or other media entities. By providing a news entity with permanent Capitol space at no charge, the state would violate the antidonation clause because it would bestow a valuable benefit on a private entity without receiving the countervailing benefit of obtaining public access to legislative sessions. (Moreover, as a practical matter, an entity maintaining a permanent office in the State Capitol would be more likely to use the space for its general business rather than solely to facilitate its coverage of public officials located in the building.) Year round office space in the Capitol is not available to the public or news media generally, and provision of free space would relieve a news organization of an expensive obligation--rental of prime office space in Santa Fe--for which the entity would otherwise be responsible. Cf. Hutcheson v. Atherton, 44 N.M. 144, 159, 99 P.2d 462 (1940) (by issuing bonds to build an auditorium to be used by a private corporation, a county commission unconstitutionally discharged "an obligation assumed by and resting upon the corporation, viz., the furnishing of housing facilities for the celebration proposed to be held"). In this situation, permitting the entity to use the space without consideration would amount to an unconstitutional gift in aid of a private business. See Okla. Att'y Gen. Op. No. 82-109 (1982) (available on WESTLAW) (an abstractor could not maintain an exclusive, rent-free space in county clerk's office without violating the Oklahoma constitution's prohibition on the investment of public funds in private enterprises). Therefore, the

¹According to one source, virtually all states provide press office space in or near their capitol buildings. Tex. Att'y Gen. Op. No. H-920 (1977) (available on WESTLAW).

legislature should receive rent or other consideration in return for providing the space.²

The procedure for allocating both no-charge and leased space to the press should be evenhanded in order to comply with the free press requirements of the First Amendment to the United States Constitution. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (city ordinance giving the mayor unfettered discretion to grant or deny permits for installation of news racks on public property and to impose additional requirements for the permits was an unconstitutional prior restraint on speech); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (sales tax scheme which exempted newspapers and only some magazines from the tax violated the First Amendment's free press guaranty); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (striking down special use tax on publications because it singled out the press and was tailored to effectively burden only a few members of the press).

2. Free Space for Newspaper Vending Machines

As a practical matter newspaper vending machines take up only minimal space and do not require public bodies to provide any services. Accordingly, absent evidence that the vending machines take up space otherwise required for public or official use, require buildings to remain open after hours or require state agencies and local governments to provide custodial, maintenance, utility or other services, we believe that state and local governments may provide space for newspaper vending machines and similar devices free of charge without violating the antidonation clause.

Of course, nothing in this Opinion requires that they do so. Governments generally can control the use of space within their buildings, regulating the availability and location of commercial vending machines. Moreover, vending machines could be banned altogether or their owners could be charged a rental fee for the use of space. See, e.g., NMSA 1978, § 3-54-1 (Cum. Supp. 1991) (authorizing municipalities to lease their real property), § 4-

²State agencies and the legislature are empowered to lease real property "belonging" to them. NMSA 1978, § 13-6-2 to -4 (Repl. Pamp. 1988 & Cum. Supp. 1991). Thus, the legislature has the requisite authority to charge news agencies rent for space in the Capitol. See also NMSA 1978, § 2-3-4 (Repl. Pamp. 1983) (vesting with the Legislative Council "exclusive control, care, custody and maintenance of the building in which the legislature is housed").

Opinion No. 92-03
May 5, 1992
Page 5

38-13 (Repl. Pamp. 1984) (granting county commissions discretionary control over county property), §§ 13-6-2 to -4 (Repl. Pamp. 1988 & Cum. Supp. 1991) (authorizing state agencies to lease real property belonging to them). In regulating the sale of newspapers, a government choosing to make space available should allocate that space on an equal and content-neutral basis to avoid First Amendment questions.



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