OPINION OF THE CITY ATTORNEY

DATE: AUGUST 10, 2015

TO: TADEO DE LA HOYA, ACTING CITY MANAGER

FROM KAY MACUIL, CITY ATTORNEY

RE; CAMPAIGNING ON CITY PREMISES

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This opinion is in answer to your question regarding the “rules” regarding campaigning by candidates for office on city premises. This year one candidate took the microphone at the Mother’s Day celebration at the Senior Center to announce to those assembled that he was running for office, and other candidates have stated they have the right to campaign for council in the lobby at city hall where folks are waiting in line to pay their utility bills. The purpose of this opinion is to give guidance to these issues and to be a public record so that those who wonder why the city is acting in a certain manner, can understand the basis for those decisions.

PUBLIC FORUM AND THE RIGHT OF FREE SPEECH

The ability to campaign is the ability to exercise the right of free speech. As a result, the ability to restrict campaigning is the ability to restrict the exercise of free speech. As stated in 10 McQuillin Mun. Corp. § 28:24 (3d ed.):

> As a general rule, government ownership of property does not automatically open that property to the public. The extent to which a government may control access to government property turns on the nature of the forum.
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> There are three types of fora: the traditional public forum, the designated or limited public forum, and the nonpublic forum. Traditional public fora are those places which “by long tradition or by government fiat have been devoted to assembly and debate.”
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> Public streets and parks fall into this category. Public squares also fall into this category. Regulation of speech activity on government property that has been traditionally open to the public, such as streets and parks, is examined under strict scrutiny. When the government seeks to regulate access to the streets, free speech protections are at their strongest and regulation is most suspect. However, even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are justified without reference to the content of the regulated speech, they are narrowly

> tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the information.

TRADITIONAL PUBLIC FORUM

If a property or location is a place where "by long tradition or by government fiat have been devoted to assembly and debate" then the right to speak, or by extension, campaign, exists, and restriction is suspect. Government has the burden to show restrictions as to time, place, or manner are justified. For example, there is a right to campaign on the public sidewalk, or in a public park. But one cannot block a sidewalk, interfere in traffic, block access to public buildings, nor damage public property. So allowing campaigning in a manner that does not block traffic, block pedestrians from walking on a sidewalk, or permitting use of a public park such that it is used in a manner that does not do damage or increase maintenance, would be examples of allowing use with reasonable restrictions. San Luis lacks a true "public square". But it has parks, sidewalks, and has allowed campaigners to set up outside of its buildings on its property, as long as ingress and egress is not blocked, vehicle traffic parking is not interfered with, and damage to city property does not occur,

NONPUBLIC FORUM; LIMITED PUBLIC FORUM

As stated in 7 McQuillin Mun. Corp. § 24:434 (3d ed.):

> A limited public forum is a sub-category of the designated public forum, where the government opens a nonpublic forum but reserves access to it for only certain groups or categories of speech. With respect to a limited public forum, restrictions on speech that are viewpoint neutral are reviewed for their reasonableness. One indicia of a limited public forum is the requirement of prior permission for access to a forum. Restrictions to access to a limited public forum may be based on subject matter so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. In a limited public forum, the government is free to reserve access to the forum for certain groups or for the discussion of certain topics.

The best example of this would be the Senior Center and Mother's Day. It is traditional to allow people other than seniors to attend, and allow folks to take the microphone to wish those in attendance "Happy Mother's Day". Frequently, especially during an election year, elected officials will appear to wish ladies in attendance, a happy Mother's Day, and express their good wishes to those who have gathered. The City has allowed others to take the microphone and say the same thing. This is a restriction on certain groups to attend, namely seniors, and a restriction on a category of speech, namely in connection with the celebration of that day. But we would not allow

this to become a debate on a controversial topic, say abortion, or allow it to be a vehicle for commercialization such as 'buy your new car from Alexander Ford', or 'shop at Del Sol Market'. As a result the city has the right to limit the topic of conversation or speech and by such limitation provide that "vote for me" is not permitted. Appearing and wishing the ladies in attendance a happy Mother's Day, is fine. But taking the microphone and saying "vote for me" is not. This is a city event in a city building. The city has the right to impose reasonable restrictions and those may be imposed by the staff members whose job it is to put on the event and operate and control the premises. Limiting discussion to a particular topic or to a particular amount of time is not considered a regulating the content of speech.

The lobby at City Hall is another example of either a non-public forum or a limited public forum. Its access is limited to persons who wish to do business with the city. One counter is devoted to paying money or otherwise doing business with either the Human Relations Department, the Finance Department, Utilities, or the Department of Community Development which are housed in that wing. The second counter is devoted to doping business with the Building Safety Division, the Department of Development Services, the Information Technology Department, or the Department of Public Works, which is housed in that wing. The third counter is for those doing business with either the City Clerk, the City Manager, or the City Attorney. In that wing as well is the Mayor's office and the public relations officer. So if someone has business with these departments or officials, then this is the counter at which they appear. Behind the counters are the actual offices uses by city employees to work at their jobs. These counters and offices are a true non-public forum.

The lobby is limited in the topics of public communication, namely transacting business of some sort. As to the Council Chambers, it is limited to the meetings that occur there. At a Council Meeting, for example, is 'Call to the Public'. Its purpose is limited to address council on a matter of public concern or city policy or city business. It is limited to a particular time on the agenda and is limited further in amount of time. It would be improper to use the podium to encourage folks to shop at Albertson's, or drink Coca-Cola. Likewise stating that one is running for office and to use the time to campaign would again be subject to the gavel of the Mayor to limit the topic of conversation to be one within the proper scope of Call to the Public[1]. Some meetings are designed for public hearings, or other public meetings. But public involvement again is limited to the topic at hand. Shouting at the top of one's lungs that "Hitler was Bad" or "Buy only goods made in China" would never be within that scope, and the person or persons in charge of the meeting would have the right to control the topic of

[1] At Call to the Public the Mayor reads a prepared statement regarding the scope and the limitations of what can be said during this time.

conversation. See *Arrington v. Moore*, 31 Md. App. 448, 358 A. 2d 909 (Ct. Special Appeals 1976). (It must be emphasized that limiting speech to a topic is not considered limiting speech.)

The following cases illustrate the point that the public does not have the right of free speech just anywhere they want simply because it is public property. In *Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133 (2d Cir. 2004), the court held that the welfare office waiting rooms were nonpublic forums and the staff was proper to bar the speech that was attempted in that case. According to the court, for free speech purposes, the “limited public forum” is a subset of the designated public forum, and it arises where the government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects, and that a nonpublic forum, in which restrictions on speech need only be reasonable and viewpoint-neutral, is public property not traditionally open to public expression or intentionally designated by the government as a place for such expression. Accordingly, the court concluded that the agency’s exclusion of the advocacy organization from nonpublic forums of welfare waiting rooms did not discriminate on basis of viewpoint.

The court in *Galena v. Leone*, 638 F.3d 186 (3d Cir. 2011), found that a citizen’s removal from a county council meeting for interrupting the proceedings in contravention of the council’s administrative code was not a violation of his First Amendment free speech rights guaranteed in a limited public forum. As a result, the court found that the plaintiff’s rights to free speech and to petition government were not violated when the chairperson ejected him pursuant to a reasonable time, place, and manner restriction that limited public participation to specific portion of meeting.

A trespass arrestee brought an action against county and city employees, alleging that her arrest after refusing to leave county offices, where she was lodging a tax protest, constituted an infringement of her free speech rights in *Helms v. Zubaty*, 495 F.3d 252 (6th Cir. 2007), where the court held that the county executive’s office space or common reception area outside his office was not a designated public forum and the county official reasonably restricted the arrestee’s speech by calling the police after she refused to leave.

Township officials did not violate a landowner’s First Amendment free speech rights by curtailing his speech during a public meeting. *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004).

A homeless man challenged the constitutionality of city library rules regarding the use of library and behavior in it, the court determined that the library was a limited public forum and the rules did not violate the First Amendment. *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992).

For First Amendment purposes, the main entrance lobby of a federal building was not a traditional public forum but rather was a nonpublic forum that was dedicated to use for either communicative or noncommunicative purposes but was never designated for indiscriminate expressive activity by general public. *Claudio v. U.S.*, 836 F. Supp. 1219 (E.D. N.C. 1993), summarily aff'd, 28 F.3d 1208 (4th Cir. 1994).

A public hospital refused to permit a group to register voters and distribute leaflets in the lobby of an outpatient clinic building, the hospital's lobby was neither a public forum nor a limited public forum, so that the group was not entitled to use the lobby to register voters and distribute leaflets. *Low Income People Together, Inc. v. Manning*, 615 F. Supp. 501 (N.D. Ohio 1985), opinion amended on other grounds, 626 F. Supp. 1344 (N.D. Ohio 1986).

A nonprofit corporation that sought to sell literature and solicit public contributions and memberships outside post office brought an action challenging the Postal Service regulation prohibiting solicitation on postal premises, the Postal Service regulation was held not to violate the First Amendment. *National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984).

Purposely blocking or impeding the entry into a public building enjoys no First Amendment protection, certainly none sufficient to require proof of an imminent breach of the peace before persons who refuse warnings to desist may be punished. *Tetaz v. District of Columbia*, 976 A.2d 907 (D.C. 2009).

Finally, we have the Arizona case of *Phoenix Elementary School Dist. No. 1 v. Green*, 189 Ariz. 476, 943 P.2d 836, 120 Ed. Law Rep. 1170, 240 Ariz. Adv. Rep. 15 (Ct. App. Div. 2, 1997). As written by Judge Florez:

> A school is generally considered a nonpublic forum for purposes of the First Amendment. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); *Hedges v. Wauconda Community Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir.1993); *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th Cir.1991). Moreover, school officials have great latitude to regulate activities in a manner "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. at 571, 98 L.Ed.2d at 604.
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> The Academy closely monitored nonstudents, including parents, who came onto the campus. It never had an "open door" policy . . . The trial court correctly concluded that the Academy is a nonpublic forum.

CONCLUSION

City staff controls city buildings and has the right to do that. As the County Executive had the right to control county offices and the lobby in *Helms v. Zubaty*, 495 F.3d 252 (6th Cir. 2007), and could call the police, City Administration can control the use of City buildings in like manner. The City has provided several places on public sidewalks and public grounds outside of its buildings where one may campaign if one wants to. There are ample alternative channels for communication. As a result the right of free speech has not been banned, simply restricted as to time and place.