
Coates' Canons Blog: Getting Your Message Across: What Can Public Officials Say In Support of Pending Policies or Proposals?

By Frayda Bluestein

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After a grueling budget season, the county board of commissioners has cut, and cut, and cut. The board members have come to the conclusion that, to avoid serious diminution in services, they must increase revenue. The next step is to put the local option sales tax on the ballot and hope that they can convince the citizens of the need to approve it. Meanwhile, the city council, facing the same budget woes, has decided to cut back on library and other popular services, and charge or increase fees for things like recreational programs. City and county officials want to make sure that citizens understand the trade-offs and hard choices they're having to make, and feel that if they can just get their message out, they can reduce opposition to the increased taxes and fees. There are many options for communication, including community meetings, public service announcements, development of talking points for elected officials to use, videos, printed pamphlets, and postings on governmental and personal social media sites. Are there any legal limitations on getting the message across?

Probably fewer than most people think. If you've been around government for any amount of time, you probably have a sense that there's a limitation of some kind on the extent to which government officials can promote one side of the debate on policies or issues affecting their jurisdictions. There is a limitation and it comes from case law involving challenges to **the use of public funds for promotional material in connection with elections**. A review of several North Carolina cases provides an overview of the law, and helps identify both what is, and what is not, off limits.

In 1991, the Guilford County board of commissioners, on a divided vote, authorized one of its members, commissioner Arnold, to prepare brochures informing voters about two pending referenda; one involving a change in the electoral districts for county commissioner seats, and one involving the merger of the Guilford county school systems. Brochures and newspaper advertisements were prepared at a cost of \$35,000, paid for with county funds. Citizens sued and obtained an injunction preventing the distribution of the materials, and then sought recovery from the individual board members for the public funds that were spent. The North Carolina Court of Appeals, in *Bardolph v. Arnold*, 112 N.C.App. 190 (1993), held that the individual commissioners were not personally liable, and that the expenditures were statutorily authorized. Rejecting the plaintiffs' contention that the expenditures were for a "private political purpose," the court relied on prior case law upholding the expenditure of public funds for lobbying state legislators on behalf of local governments. The court said: "The courts of North Carolina have determined that lobbying by local government to create support for local issues is permissible," citing *North Carolina ex. rel. Horne v. Chafin*, 62 N.C.App. 95, 302 S.E.2d 281, *aff'd*, 309 N.C. 813, 309 S.E.2d 239 (1983), *appeal dismissed*, 466 U.S. 933, 104 S.Ct. 1902, 80 L.Ed.2d 452 (1984). That case involved a challenge to the use of public funds for a reception held to present local issues and interests to the Legislature. The Court in *Horne* had held that "(u)rging policies which benefit their constituents is one of the ways local officials promote their constituents' interests."

Fast forward to the municipal elections of 2001. The Cary Town Council decided to initiate a public information campaign promoting the Town's growth management policies. The record indicates that the town spent \$200,000 of public funds on mailings, services, and other media to promote smart growth and managed growth, starting in September and continuing through mid-November – the peak of the election season. Though no sitting board members were seeking reelection, the record indicated that several candidates had “aligned themselves” with slow growth policies. J. Nelson Dollar, however, was not such a candidate, and he sued the Town, alleging that the expenditures were unlawful and that their primary purpose was to influence the outcome of the election. The North Carolina Court of Appeals, in *Dollar v. Town of Cary*, 153 N.C.App. 309 (2002), held that the expenditures were invalid.

The *Dollar* case adopted and applied the legal standard that has been used in cases around the country when faced with this issue: “Local government advertising on particular issues is allowed where the advertising is of **an informational nature**,” citing *Dennis v. Raleigh*, 253 N.C. 400, 405, 116 S.E.2d 923, 927 (1960), which held that a city is permitted to advertise its advantages. “Where the advertising, however, is designed to **promote a viewpoint on an issue in order to influence an election**, it is impermissible,” citing David M. Lawrence, *Financing Capital Projects in North Carolina*, at 87 (2d ed.1994), and cases from other states that apply this standard.

These cases tell us that the public officials are limited to informational communications when they are 1) using public funds to pay for the communications; and 2) when the communications are designed to address an issue that may affect an upcoming election (whether a specific matter that is the subject of a referendum, or apparently, under the holding in *Dollar*, issues that have significance in a general election). Keys to the holding in *Bardolph*, were the court's conclusion that the communication was informational, and its rejection of the plaintiff's claim that the board members' intent was to influence the outcome of the election. In contrast, the court in *Dollar*, found that the materials “in the context of the Council elections, appear to be more than informational in nature and instead implicitly promote the candidacy of those Council candidates in sympathy with the Council's position on the Town's growth.” The timing of the communication influenced the court's conclusion that the campaign was inappropriate.

It may be challenging to identify which types of communications are “informational” as opposed to “promotional.” Courts look at factors including the “style, tenor, and timing” of the material. (*Dollar* at 311, citing *Stanson v. Mott*, 551 P.2d 1,12 (1976)). In many cases though, the matter is put to a referendum after it has been approved by the board itself – as is the case with a referendum on a local option sales tax or bond approval for planned projects that have been approved by the board. So the board must have the legal ability to provide information in support of its decision to move the issue forward. On the other hand, there is a need to avoid using public funds to promote only one side of an issue. David Lawrence articulates very succinctly, why board restraint is important to the legitimacy of the process: “When the law shifts basic decision making from the government to its voters, the legitimacy of the decision making depends on each side in the debate having a fair chance. If the government funds one side only, the debate may well not be fair. If the voters then approve the issue, the public acceptability of the outcome may be significantly undermined because of the government's financial involvement. For that reason, promotional expenditures are improper.” Lawrence, *Financing Capital Projects*, at 88.

Finally, it is important to note that these cases do not present any limitation at all on statements by individual public officials (whether elected or appointed) or even by the board as a whole, when no public funds are involved. Furthermore, it appears that the cases upholding the use of public funds for lobbying and general promotion of the local government would support the use of public funds to explain and even promote acceptance of policy decisions contemplated or already made by the governing board, so long as they are not intended to influence an upcoming election. And individuals are free to publicize their own views about issues facing their jurisdictions even in connection with an election, so long as they don't use public funds to do it.