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Agenda Document No 98-38



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of: 5/21/98

May 13, 1998

OK
What is the parking lot you see in the building?

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1998-07

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 21, 1998.

Attachment

DRAFT

1 **ADVISORY OPINION 1998-7**

2
3 **Christine M. Tartaglione, Acting Chairman**
4 **The Pennsylvania Democratic Party**
5 **510 North Third Street**
6 **Harrisburg, Pennsylvania 17101**

7
8 **Dear Ms. Tartaglione:**

9
10 **This responds to your letters dated April 3, and March 27, 1997, on behalf of the**
11 **Pennsylvania Democratic Party ("PDP"), concerning the application of the Federal**
12 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to**
13 **the establishment of a building fund by the PDP.**

14 ***PDP PROPOSAL***

15 **The PDP proposes to solicit contributions and donations from individuals and**
16 **corporations for the following purposes:**

- 17 **1) The establishment and maintenance of a building fund to satisfy the existing mortgage**
18 **loan debt on the PDP headquarters facility;**
- 19 **2) The establishment and maintenance of a building fund to purchase or construct a new**
20 **building to serve as the new headquarters of the PDP;**
- 21 **3) The establishment and maintenance of a building fund to purchase or construct three**
22 **new buildings to serve as new regional headquarters for the PDP in Pittsburgh,**
23 **Harrisburg and Philadelphia.**
- 24 **4) The establishment and maintenance of a building fund to pay for necessary repairs and**
25 **improvements to the existing PDP headquarters such as the construction of a new roof,**
26 **the installation of new electrical wiring, and the expansion of the size of the building and**
27 **the number of rooms within the building, and/or**

1 5) The establishment and maintenance of a building fund to purchase or construct a
2 parking lot, adjacent to the PDP headquarters, for the primary use of PDP personnel,
3 members, visitors, but with excess parking spaces being offered to the general public at a
4 usual and normal rate.¹

5 You affirm that the PDP uses its headquarters facility to influence Federal and
6 non-Federal elections and for other campaign purposes. However, the headquarters
7 facility is not used for the exclusive purpose of influencing the election of a particular
8 candidate for office.

9 You further state that the PDP would take several measures and observe certain
10 limitations regarding the establishment and maintenance of a building fund. It would
11 only solicit and accept corporate, union and individual contributions that are exclusively
12 designated for the building fund(s). It would advise all potential corporate, union and
13 individual contributors that all contributions will be used exclusively for the building
14 fund(s). A separate and segregated account would be created for the deposit of all
15 corporate, union and individual contributions designated for the building fund. All funds
16 placed in the account would be used only for the purposes detailed above.

17 Regarding the parking lot, funds obtained from the use of the excess capacity by
18 the public would either be placed in the same separate, segregated account as other
19 building funds, or placed in its own separate, segregated account. If a "parking fund"
20 were created for this purpose, you affirm that PDP would only use the funds deposited in
21 the "parking fund" to: (a) defray the ordinary and necessary capital expenses associated

¹ Your request states that the rate would be based on an independent market value of parking spaces in the metropolitan area in which the proposed parking facility is located.

1 with the operation and maintenance of the headquarters facility and parking lot (e.g.,
2 utility and property tax costs), or (b) pay for the cost of constructing or purchasing a new
3 headquarters facility (e.g., transfer to the building fund), or (c) for both purposes. You
4 explain that PDP would not use the funds deposited in the "parking fund" for the purpose
5 of influencing any Federal or non-Federal election, nor transfer such funds to any account
6 for the purpose of influencing any Federal or non-Federal elections.

7 Finally, your request notes that the Pennsylvania Election Code explicitly
8 prohibits corporations from making any contributions for any political purposes.

9 Therefore, your request not only inquires as to the application of the Act and related
10 regulations to your proposal, but also asks whether Pennsylvania law is preempted to the
11 extent it would prohibit your proposal.²

12 ***ACT AND COMMISSION REGULATIONS***

13 Under the Act and Commission regulations, a gift, subscription, loan, advance, or
14 deposit of money or anything of value made to a national committee or a State committee
15 of a political party, that is specifically designated to defray the costs incurred for
16 construction or purchase of an office facility, is not considered to be a contribution or

² The Pennsylvania election code provides under 25 PA CONS. STAT. ANN. § 3253 that:

It is unlawful for any National or State bank, or any corporation, incorporated under the laws of this or any other state or any foreign country or any unincorporated association, except those corporations formed primarily for political purposes or as a political committee, to make a contribution or expenditure in connection with the election of any candidate or for any political purpose whatever except in connection with any question to be voted on by the electors of this Commonwealth. Furthermore, it shall be unlawful for any candidate, political committee, or other person to knowingly accept or receive any contribution prohibited by this section, or for any officer or any director of any corporation, bank, or any unincorporated association to consent to any contribution or expenditure by the corporation, bank or unincorporated association, as the case may be, prohibited by this section.

1 expenditure, provided that the facility is not acquired for the purpose of influencing the
2 election of any candidate in any particular election for Federal office. 2 U.S.C.
3 §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). The
4 Commission has applied these provisions to permit a number of State party committees
5 and a national party committee to accept corporate donations to building funds set up for
6 the purpose of purchasing or constructing an office facility for those party committees.
7 Advisory Opinions 1997-14, 1993-9, 1991-5, 1986-40, and 1983-8; see also Advisory
8 Opinion 1996-8.

9 The Act states that its provisions and the rules prescribed thereunder “supersede
10 and preempt any provision of State law with respect to election to Federal office.” 2
11 U.S.C. §453. Congress intended that the Federal law should be “construed to occupy the
12 field with respect to elections to Federal office and would be the sole authority under
13 which such elections would be regulated.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess.
14 10 (1974). It specifically defined this field as covering “limitations on campaign
15 expenditures, the sources of campaign funds used in Federal races, the conduct of Federal
16 campaigns, and similar offenses” but not the States’ rights as to other areas such as voter
17 fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong. 2d Sess. 69 (1974).³
18 Commission regulations rely on this legislative history and embody the explicit
19 Congressional intent to preempt. They provide that the Act supersedes State law with
20 respect to the organization and registration of political committees supporting Federal
21 candidates, the disclosure of receipts and expenditures by Federal candidates and political

³ The first report cited is the report of the House Committee that drafted section 453 as part of the 1974 amendments. The second report is the Conference Committee report on the 1974 amendments.

1 committees, and the limitations on contributions and expenditures regarding Federal
2 candidates and political committees. 11 CFR 108.7(a) and (b). See Federal Election
3 Commission Regulations, Explanation and Justification, House Document No. 95-44, at
4 51 (1977).

5 ***APPLICATION TO PDP PROPOSAL***

6 ***Preemption of Pennsylvania law***

7 In all four of the opinions that were issued to State parties, the Commission
8 concluded that the Act and Commission regulations preempted the application of State
9 law with respect to the prohibitions on corporate donations to a State party office building
10 fund. Advisory Opinions 1997-14, 1993-9, 1991-5, and 1986-40. Two of the opinions
11 noted that, in addressing the building fund donations and the entities receiving them, the
12 Act spoke to a subject matter involving the areas set out in the regulations, and that
13 Congress explicitly decided not to place restrictions on the subject, even though it could
14 have determined that the purchase of such a facility was for the purpose of influencing a
15 Federal election. The opinions stated that Congress, instead, took the affirmative step of
16 deleting the receipt and disbursement of funds for such activity from the specific
17 proscriptions of the Act, and that there is no indication that Congress intended to limit the
18 preemptive effect to some allocable portion of the purchase costs. Advisory Opinions
19 1993-9 and 1991-5; see also Advisory Opinion 1997-14 and 1986-40. Therefore, to the
20 extent that PDP's proposal to purchase or construct party headquarters is consistent with
21 2 U.S.C. §431(8)(B)(viii), 11 CFR 100.7(b)(12) and 11 CFR 100.8(b)(13), the
22 Commission concludes that Pennsylvania State law is preempted with respect to the

1 prohibitions on corporate donations and contribution limitations to the PDP building
2 fund.

3 *Establishment and uses of building fund*

4 The Commission notes that your proposal to establish a building fund would, for
5 the most part, fall within the parameters established by the opinions cited above. For
6 example, in Advisory Opinion 1993-9, the Commission permitted a State party to use a
7 building fund to pay off the balance of its land contract on an existing party headquarters.
8 The Commission reasoned that this was a necessary part of the transaction to enable the
9 party to acquire new office space. Therefore, the Commission concludes that PDP may
10 use a building fund to pay off the existing mortgage loan debt on a current or future PDP
11 headquarters or office facility.

12 However, you also delineate several other uses of the moneys collected for the
13 building fund. These include the rebuilding of the current Party headquarters (including
14 related improvements, such as new roofing and improved electrical wiring) and the
15 purchase of multiple offices located throughout the State. The Commission concluded in
16 Advisory Opinion 1983-8 that the building fund exception extends to donations to defray
17 costs incurred for the construction or purchase of an office facility, but does not extend to
18 donations to pay such ongoing, operating costs as property taxes and assessments. See
19 Advisory Opinions 1991-5 and 1983-8. However, the Commission has not previously
20 detailed the specific ways in which a building fund could be used in accordance with
21 section 431(8)(B)(viii) and Commission regulations.

22 A parallel may be made between permissible uses of the building fund and the
23 description and treatment of capital expenditures found in the Internal Revenue Code and

1 related IRS regulations. Under the IRS regulations, a capital expenditure includes the
2 cost of the acquisition, construction, or erection of buildings, machinery and equipment,
3 furniture and fixtures and similar property. 26 CFR 1.263(a)-1 and 1.263(a)-2. Under the
4 Internal Revenue Code, while business expenses produce tax deductions, no deduction is
5 permitted for capital expenditures. Therefore, the distinction between what is a business
6 expense and what is an capital expenditure has important tax consequences. 26 U.S.C.
7 §263(a) and 26 CFR 1.263(a) -1. In the same manner, items that would fall under the
8 category of capital expenditures would also be considered the type of expenditures that
9 are legitimately part of the construction of a Party office facility. Items which instead are
10 classified as business expenses would be seen as operating expenditures that fall outside
11 the scope of the Act's building fund exception.

12 In the Internal Revenue Code, a distinction is made between capital expenses and
13 "the cost of incidental repairs which neither materially add to the value of the property
14 nor appreciably prolong its life, but keep it in an ordinary efficient operating condition."
15 26 CFR 1.162-4. The latter is not considered a capital expense. However, past case tax
16 law has determined that when repair work reaches a level to constitute wholesale
17 restoration or renovation of a structure, those expenses that might have individually
18 constituted repair work were then treated as capital expenditures. See *True v. United*
19 *States*, 894 F.2d. 1197 (10th Cir. 1990) and *Stoelizing v. C.I.R.*, 266 F.2d 374 (9th Cir.
20 1959). Since the type of reconstruction proposed (the necessary repairs and
21 improvements to the existing PDP headquarters, the construction of a new roof, the
22 installation of new electrical wiring and the expansion of the size of the building and the
23 number of rooms within the building) in your request would fall under the definition of

1 capital expenditures, the Commission concludes this use of the building fund would also
2 meet the requirements of the Act and Commission regulations.

3 Regarding the construction of State party office headquarters in separate
4 locations, the Commission concludes that this also falls within the parameters of section
5 431(8)(B)(viii) and Commission regulations. Other than specifying that the office facility
6 may not be used to support a specific candidate, the Act and Commission regulations do
7 not specify the number of office facilities that are permitted under the building fund
8 exception or where they must be located.⁴ Moreover, ^{is} it not unreasonable for a State
9 political party to construct office facilities in three different cities where each city, as is
10 the case here, is classified as a distinct Metropolitan Statistical Area by the United States
11 Census Bureau.

12 *Establishment and uses of "parking fund"*

13 Your proposal regarding the "parking fund" is more problematic. The
14 Commission notes that parking areas provided for the PDP headquarters would be an
15 expected and, in many cases, necessary part of any office facility. However, the
16 construction or acquisition of additional parking space capacity, not needed for the direct
17 use of the Party (for its personnel and visitors to the Party office), would fall outside the
18 building fund exception. The construction costs of additional parking space would be
19 revenue-producing disbursements, rather than directly related to the Party office's parking
20 needs. Therefore, the Commission concludes the PDP must apportion the costs
21 associated with the construction or purchase of parking space. Only those costs related to

⁴ In Advisory Opinion 1983-8, the requester was permitted to establish and maintain a building fund with reference to office headquarters consisting of several buildings at one location.

1 acquiring the parking space capacity adequate to satisfy the Party's own needs would
2 receive the benefit of the building fund exception. Costs apportioned to the excess, or
3 public access parking space, may not be covered with funds donated under the Act's
4 building fund exception.⁵ Furthermore, Pennsylvania State law would not be preempted
5 regarding the funds donated and used for the portion of the cost to acquire the additional
6 parking space capacity.⁶

7 Your request describes two different uses for the funds generated from the parking
8 spaces that are available to the general public. One of these proposals is to use these
9 funds for the creation of a new building fund. This choice would receive the benefit of
10 the Act's exception. However, the Commission notes that section 431(8)(B) requires that
11 anything of value given for a building fund be specifically designated by the donor for
12 that purpose. See Advisory Opinion 1991-5. Therefore, in these circumstances, PDP
13 must adopt procedures which permit each customer of the public portion of the parking
14 facility to designate that the customer's fee will be deposited in the building fund.

15 A second possible use, you describe, is to expend the funds for what you describe
16 as the ordinary and necessary "capital expenses" associated with the operation and
17 maintenance of the headquarters facility and parking lot, (e.g., utility and property tax
18 costs). As noted above, the Commission has previously concluded that, while the

⁵ For example, if the parking lot is designed to have capacity for 200 vehicles, with space reserved to PDP for 50 vehicles, then 25% of its acquisition costs could be financed from the building fund. The remaining 75% would have to be financed by other lawful means.

⁶ The Commission notes that the same analysis would apply to the space in the Party headquarters which is acquired for rental purposes, rather than the Party's own use. Funds donated or otherwise obtained to cover such costs would not receive the benefit of 2 U.S.C. §431(8)(B)(viii) and 11 CFR 100.7(b)(12) and 100.8(b)(13). Therefore, the Party would have to comply with any prohibitions and limitations found in State law or any applicable provision in the Act or Commission regulations. See Footnote 7.

1 building fund exception extends to donations to defray costs incurred for the construction
2 or purchase of an office facility, it does not extend to donations to pay such ongoing
3 operating costs as property taxes and assessments. See Advisory Opinions 1991-5 and
4 1983-8. Therefore, the revenues lawfully received from the parking facility and deposited
5 in the building fund account may not be expended this purpose. Furthermore, they would
6 be subject to any applicable State law.⁷

7 This response constitutes an advisory opinion concerning the application of the
8 Act, or regulations prescribed by the Commission, to the specific transaction or activity
9 set forth in your request. See 2 U.S.C. §437f.

10 Sincerely,

11
12 Joan D. Aikens
13 Chairman
14

15 Enclosures (AOs 1997-14, 1996-8, 1993-9, 1991-5, 1986-40 and 1983-8)

⁷ The Commission notes that this opinion does not address any issues concerning application of its allocation and related regulations to the revenues raised by the parking facility under this variant of your proposal because those questions were not posed in your request. See generally, 2 U.S.C. §431(4)(C), 433, and 434; 11 CFR 100.5(c), 102.5(b), and 106.5.