A LEGAL ANALYSIS OF PRIVATE PROPERTY RIGHTS & PETITION SIGNATURE GATHERERS RIGHTS

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GUIDELINES UNDER WASHINGTON LAW FOR SIGNATURE GATHERERS AND OTHERS ON STORE PREMISES

The question of solicitations and the distribution of materials by persons for commercial, religious, charitable, or political purposes on store premises in Washington is often a highly controversial one. Without getting bogged down in too many legal technicalities, the purpose of this paper is to advise Washington store owners of their rights and responsibilities.

(1) The First Amendment

Most people would assume that solicitors, whether commercial, charitable, or political, have the right of “free speech” on store premises under the First Amendment that prohibits Congress from enacting laws abridging the freedom of speech. That is not so.

The First Amendment forbids governmental action limiting speech. In a series of cases beginning with Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551 (1972), the United States Supreme Court has made it clear that private property owners may restrict speech activities on those private premises. Lloyd involved the Lloyd Center in Portland, that had extensive parking facilities, malls, private sidewalks and stairways, escalators, gardens, an auditorium, a skating rink, and multi-level buildings with stores. The Center posted notices that the areas in the Center were not public ways, but were for the transaction of business, and permission to use the public areas was revocable at any time. The Center banned all handbill distributions and enforced that policy strictly, although it made its auditorium available to the Cancer Society and the Boy/Girl Scouts. The Center also allowed American Legion veterans to sell poppies and the Salvation Army to solicit at Christmas.1 The Court ruled that the Center could ban leafleting against the Vietnam War, a matter unrelated to the Center’s operations, declining to analogize the Lloyd Center to a public business district. The Court concluded that the Lloyd Center had not been dedicated to public use so as to entitle the Vietnam War protesters to exercise their First Amendment rights there.

In Hudgens v. National Labor Relations Bd., 424 U.S. 507 (1976), the Court ruled that a shopping mall owner could exclude striking union members from picketing in front of their employer’s store leased from the mall owner.

Finally, in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court reaffirmed the basic principle that the First Amendment does not protect speech on private shopping center property, but further held that a state, under its own constitutional structure, may

1 The four dissenting justices emphasized these activities in contending that the owners had opened the premises to a wide range of public activities.
offer more expansive speech rights on private property without taking the shopping mall owner’s property. The Court upheld a shopping mall owner’s exclusion of certain students protesting a U.N. resolution against Zionism.

Thus, the First Amendment does not foreclose a mall or store owner from excluding solicitors from their premises.

(2) **Article I, § 5 of the Washington Constitution**

Although the First Amendment does not prevent a mall or store owner from excluding commercial, charitable, or political speech on mall or store premises, that does not end the inquiry. As the Supreme Court’s decision in *Pruneyard* stated, state law may authorize such speech. A short analysis of pertinent Washington cases is necessary.

A 1971 Court of Appeals opinion, *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wn. App. 833, 478 P.2d 792, *review denied*, 79 Wn.2d 1005 (1971), concluded that Southcenter and Northgate were the functional equivalent of a business district and they could not exclude signature gatherers for an environmental initiative under the First Amendment and article I, § 5 of the Washington Constitution. This decision predated *Lloyd, Hudgens*, and *Pruneyard*, and is no longer good law.

The Washington Supreme Court addressed the speech issue in malls for the first time in *Alderwood Assoc. v. Wash. Environmental Council*, 96 Wn.2d 230, 635 P.2d 108 (1981). There, the Court split evenly on the question of whether a shopping mall could forbid environmentalists from gathering signatures on its premises. The lead opinion acknowledged the *Lloyd, Hudgens*, and *Pruneyard* decisions on the First Amendment, but concluded that article I, § 5 had to be interpreted in a fashion more protective of individual speech. It asserted that no “state action,” meaning an act of government, was necessary before art. I, § 5 came into play. That opinion also asserted that “gathering signatures in some manner, at some place, is a constitutionally guaranteed practice.” *Id.* at 239.

The dissent found that there was no requirement of state action under article I, § 5, so that a speech right did not apply in the case and also found no special constitutional protection under the 7th Amendment to Washington’s Constitution (relating to initiative and referendum signature gathering).

The concurring opinion, signed only by Justice James Dolliver, agreed with the dissent on article I, § 5, but found a special protection to initiative and referendum signature gathering under the 7th Amendment. Justice Dolliver’s vote was sufficient to result in the reversal of the trial court’s order barring signature gathering at the Alderwood Mall.

In *Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wn.2d 413, 780 P.2d 1282 (1989), the Court found that the followers of Lyndon LaRouche had no right under article I, § 5 to solicit contributions or sell literature at Southcenter because it was a privately owned shopping mall. The protections of article I, § 5 only extend to actions by the government (state action) and not to actions limiting speech by private persons. The Court also

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2 Article I, § 5 states: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”
rejected the idea that a shopping mall served a public function, effectively overruling *Sutherland*. The Court, in effect, adopted the analysis of the 4 *Alderwood* dissenters and Justice Dolliver on article I, § 5. Thus, in general, mall and store owners may exclude persons from engaging in political, charitable, or religious activities on their premises. The only issue is the extent to which an exception applies for initiative/referendum signature gathering.

The Court of Appeals in *Initiative 172 v. Western Wash. Fair Ass’n*, 88 Wn. App. 579, 945 P.2d 761 (1997) upheld the decision of the Association to limit initiative supporters to a specific “free speech area” at the Puyallup Fair. This was consistent with the Association’s policy of confining all commercial, charitable, and religious solicitations to specific booths or designated areas. The court recognized some special rights to initiative signature gathering but rejected the idea that the Fair was a public forum in which speech rights needed to be protected.

Finally, in *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 989 P.2d 524 (1999), initiative signature gathers sought to obtain signatures from patrons of 2 grocery stores in the Vancouver area. The stores were not shopping malls, but rather more traditional grocery stores—warehouse-type buildings surrounded by parking lots. Waremart barred all signature gathering on its stores’ premises and did not open the store premises to charitable solicitations. The Court held that *Alderwood* remained good law to the extent it recognized a limited right to gather signatures for initiative/referendum measurers, but the Court further held that such a limited right was inapplicable to Waremart’s stores rather than a shopping mall like Alderwood Mall:

We have . . . recognized a narrow exception to the property owner’s sovereignty over the property in favor of the activities of initiative petitioners in cases where the private property on which they seek to gather signatures is a shopping center that bears the earmarks of a town square or public forum.

*Id.* at 641. Thus, Washington law draws a strong distinction between malls and regular stores with respect to initiative/referendum signature gathering.

In summary, under Washington law, like federal law, a private property owner may exclude all speech-related activities from his/her premises without regard for the First Amendment or article I, § 5 of the Washington Constitution. Both constitutional provisions protect speech from government action limiting such speech, but not restrictions by private property owners. Washington seemingly recognizes a limited basis upon which signature gathers for initiatives and referenda may do so on private premises. That right, based on the 7th Amendment to Washington’s Constitution, that established the initiative and referendum, does not extend to signature gathering at traditional stores (*Waremart*), and may be the subject of place, time, and manner restrictions (*Initiative 172*). At present, the right extends only to shopping malls or other locations having the characteristics of a public forum.

(3) **Practical Guidelines on Solicitations on Store Premises**

The cases referenced above are obviously frustrating because they do not offer definitive answers to the practical questions attendant upon signature gathering at stores. A number of observations here are appropriate, however:
• **State legislation would be a bad idea.** While it is tempting to have a bill enacted that clarifies these issues, it would be “state action” and the First Amendment/article I, § 5 speech protections would come into play, likely resulting in the invalidation of any restrictions by a courts ever sensitive to government-imposed speech restrictions.

• **A challenge to whether the 7th Amendment to Washington’s Constitution protects initiative/referendum signature gathering would be a good idea.** The rationale that the 7th Amendment protects initiative/referendum signature gathering was criticized by the dissent in *Alderwood* and in *Waremart* by a concurring opinion. The author of that *Waremart* concurring opinion is now the Chief Justice of the Court. The *Waremart* majority based its decision in part on Oregon and California law. The Oregon Supreme Court in *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228 (Or. 2000), decided after *Waremart*, rejected any notion that the Oregon Constitution’s initiative/referendum provision conferred a right to gather signatures on private property over the owner’s objection. This lends support to a similar approach in Washington. See also, *Citizens for Ethical Government, Inc. v. Gwinnet Place Assocs., L.P.*, 392 S.E.2d 8 (Ga. 1990) This challenge may become even more important if Tim Eymann, Washington’s initiative maven, succeeds in placing I-517 on the ballot, a statute designed to give signature gatherers greater rights to access private property over an owner’s objections.

• **When is a mall or a store a public forum?** There is no set of clear factors for when a mall or a store has ceased being a private business premises and has become a “public forum.” The United States Supreme Court in *Lloyd* and our own Supreme Court in *Waremart* have provided some important clues as to this distinction:

  • posted notices stating that the walkways and common areas in a mall are not public ways, are intended for the transaction of business, and permission to use such areas is revocable at any time are useful;

  • the size of the premises is not a consideration as to whether a public forum is present, but a mall that has more attributes of a public square is more susceptible to being seen as a public forum than a free-standing store. *Lloyd*, 407 U.S. at 569-70; *Waremart*.

  • to the extent that mall or store walkways and common areas are opened indiscriminately to groups for charitable, political, or religious solicitation, the greater the risk that the premises take on the characteristics of a traditional public square or business district where speech on the public sidewalks or common areas must be respected; in *Lloyd*, for example, the mall prohibited distribution of hand bills on its premises, an enclosed mall. 407 U.S. at 555-56. *Waremart* prohibited any noncommercial activities on its premises and provided no places for shoppers to congregate. 139 Wn.2d at 636-37.
merely having other types of businesses such as coffee shops or cafes, pharmacies, banks, etc. is not enough to transform a store into a public forum, but if there places in the mall or store where people can “congregate” without a clear business purpose, the risk that a public forum has been created is greater. Thus, a food court is not necessarily a public forum as its business purpose is clear. An open area, by contrast, with benches and no business purpose is more problematic. The issue is ultimately not the nature of the commercial activities but rather the speech-related activities.

Is it permissible to allow some solicitors such as the Boy and Girl Scouts, etc. onto store premises? The answer to this question is generally yes. A problem arises when everyone is allowed on the premises. At that point, the property starts to take on more of the appearance of a “public forum” as described in Waremart. The Waremart court found it particularly important that Waremart invited no one for noncommercial purposes onto its store premises. 139 Wn.2d at 636-37. Once a property becomes a “public forum,” initiative/referendum signature gathering is likely more permissible. Plainly, a clearly articulated policy on access to store premises by groups making charitable, religious, or political contacts with patrons is imperative.

Can an owner impose time, place, and manner restrictions on persons or groups making charitable, religious, or political contacts with patrons? Assuming the mall or store owner wants to allow some contacts with patrons and not to ban such contacts entirely, the answer is generally yes. An owner is entitled to take such steps as to ensure that the essential commercial purpose of the premises is maintained. Our Supreme Court in Southcenter approved of that mall’s regulations relating to the use of its "public service centers" throughout the mall. 113 Wn.2d at 416. An owner can require entities wishing to solicit on store or mall premises to submit an application in which such applicant acknowledges the owner's rules regarding such activities and identifies a contact person. Such rules should be applicable to anyone utilizing the mall or store premises for speech activities and should be provided to the applicant. The owner may limit the time and location for speech activities. An owner may even require identification of the signature gathering group or even liability insurance. See Robertson v. Westminster Mall Co., 43 P.3d 622 (Colo. App. 2001).

Is it permissible to limit signature gatherers and other solicitors to a particular area with particular rules for such activities? After Initiative 172, referenced with approval in Waremart, 139 Wn.2d at 635, and Southcenter, the answer is yes. The limitations must, of course, be consistent and reasonable. For instance, in Initiative 172, the court disapproved of the Puyallup Fair limiting “free speech area” activities to 4 days of the Fair’s 17-day run. A balancing of interests is necessary. The signature gatherers have a right to gather signatures, based on the 7th Amendment, not to raise money, carry signs, install lights or sound systems, or otherwise disrupt the core commercial purpose of the premises.
• Can signature gatherers be banned from parking lots? Again, so long as the overall premises are not a public forum, the answer is yes.

• What steps can be taken to ensure that persons who engage in solicitation on mall or store premises are subject to appropriate sanctions if they violate mall or store solicitation rules? A mall or store owner can certainly make past violation of rules a reason for denying access. A violation of the rules may also make the violator subject to a criminal trespass charge. RCW 9A.52.070. These individuals are invitees on the premises. If they exceed the scope of the invitation, they are trespassers. See RCW 9A.52.010(5). In order to facilitate a potential criminal charge, mall and store owners should maintain strong lines of communication with local law enforcement. In Lloyd, the mall employed security guards who had special commissioned status from the City of Portland. 407 U.S. at 554. A final option for mall or store owners is to take civil enforcement action. In addition to being a crime, trespass is a tort in Washington. Restatement (2d) of Torts § 158; Phillips v. King County, 136 Wn.2d 946, 957 n.4, 968 P.2d 871 (1998) (“A trespass is an intrusion onto the property of another that interferes with the other’s right to exclusive possession.”) The real inhibition on civil action is the limited damages that may be collected from a defendant. Legislation to provide for the recovery of actual damages, or, at the election of the mall or store owner, a fixed figure, perhaps $2500, plus attorney fees, might be a significant deterrent.