Steven B. Long
Partner
Telephone: 919.835.4683
Direct Fax: 919.834.4564
stevenlong@parkerpoe.com

Parker Poe

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

December 11, 2015

Ms. Kim Strach
Executive Secretary-Director
North Carolina State Board of Elections
P.O. Box 27255
Raleigh, North Carolina 27611-7255

Re: Advisory Opinion regarding referenda committees

Dear Kim:

I am writing on behalf of our firm's client, Connect NC Committee, a referendum committee ("Referendum Committee") that is registered with the State Board of Elections to promote the bond referendum to be voted upon by the public on March 15, 2016 ("Bond Referendum"). The bonds proposed would fund repairs and improvements to State facilities used by our community colleges, universities, state parks, and other institutions.

On December 4, 2015, you issued an Advisory Opinion pursuant to N.C. Gen. Stat. § 163-278.23 ("Advisory Opinion") in which you concluded that (1) the costs of an "*electioneering communication*" produced by an organization in coordination with a candidate would constitute a "contribution" to the coordinating candidate, and (2) the costs of a *communication advocating for or against a referendum* and produced by a referendum committee in coordination with a candidate is a "coordinated expenditure" and also constitutes a "contribution" to the coordinating candidate, as those terms are defined in N.C. Gen. Stat. § 163-278.6.

We ask that you reconsider the conclusion reached in the Advisory Opinion regarding express advocacy communications because, if not amended, your legal interpretation will dramatically and seriously inhibit the ability of the Referendum Committee, as well as others that follow, to communicate with the public about the advantages and disadvantages of ballot referenda. The Advisory Opinion will have the effect of preventing elected officials from attending forums or other meetings where ballot referenda are addressed out of concern that the cost of the gathering, partly paid with corporate funds, will be treated as an illegal contribution to their campaigns if they attend and speak up. In the case of Connect NC Committee, which hopes to work with a bipartisan group of elected officials, the Advisory Opinion means that the very legislators who carefully crafted the bond proposal after lengthy hearings, discussions and reports, and then passed the legislation authorizing the bond referendum with the reasonable expectation that they would be able to work with the committee formed to advocate for its passage now cannot assist the Referendum Committee in explaining why the proposed bonds are

needed. Under the Advisory Opinion, an elected official, who is also a candidate and who helps the Referendum Committee prepare a television advertisement promoting the bond by allowing use of his office to film the ad or by verifying facts in a script, would be deemed to have received an illegal campaign contribution because he coordinated with the Referendum Committee in preparing the advertisement. That would be the case even if the candidate was never mentioned or pictured in the advertisement. This cannot be the result intended by the Legislature.

Connect NC hopes to work with a bipartisan group of elected officials in communicating with the public about the Bond Referendum. Virtually all of those elected officials are also candidates for re-election. Thus, for example, if the Referendum Committee distributes a newspaper or radio advertisement by two legislators – both from different political parties – explaining why the bonds are a fiscally sound way to finance repairs of community college facilities, the cost of that communication is deemed a contribution to the two legislators' candidate committees and, because the Referendum Committee accepts corporate contributions, the contributions would be prohibited and expose the legislators to election law penalties. Already, elected officials have asked us if they can even attend events sponsored by the Referendum Committee without the cost of the event being treated as an illegal campaign contribution to them.

Although we agree with your conclusions regarding coordinated *electioneering communications*, we do not agree with your conclusion regarding coordinated *express advocacy communications* made by a referendum committee in support of a referendum. The conclusion reached regarding coordinated express advocacy communications by a referendum committee is not based upon a plain reading of the relevant statute or the legislative intent behind the statute.

The State's election code states expressly that the cost of an electioneering communication developed in coordination with a candidate is a "contribution" to the coordinating candidate.[1] However, it treats coordinated express advocacy communications by a referendum committee differently. The code does not include in the definition of a "contribution" the cost of an express advocacy communication coordinated with a candidate unless the "coordinated expenditure" is used to advocate for or against a *candidate*, not a referendum.[2] To reach a different conclusion is to read additional words into the statute, something which an administrative agency may not do.

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[1] N.C. Gen. Stat. § 163-278.6(6) (If …any individual, person, committee, association, or any other organization or group of individuals…makes, or contracts to make, any disbursement for any electioneering communication…; and …(t)hat disbursement is coordinated with a candidate, an authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee that disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party.")

[2] N.C. Gen. Stat. § 163-278.6(6) ("The terms "contribute" or "contribution" mean any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money

It appears that your Advisory Opinion reaches its conclusion regarding coordinated express advocacy communications by a referendum committee based upon the presumption that if the Legislature meant to inhibit *electioneering communications* produced in coordination with candidates then it surely must have meant to inhibit all *express advocacy* communications produced in coordination with candidates, whether the advocacy is for or against a candidate or a ballot measure. But that is not what the statute's wording suggests.

Referendum committees normally do not distribute electioneering communications. Electioneering communications are typically aired by political organizations or issue-oriented, tax-exempt organizations supporting or opposing specific candidates. Thus, the treatment of electioneering communications coordinated with candidates as "contributions" to the coordinating candidates is a rule aimed not at referendum committees but at political organizations and independent, tax-exempt groups that engage in advocacy for or against candidates. In fact, the statutory provision regarding coordinated electioneering communications does not even mention a referendum committee specifically but applies the rule to "any…organization" that distributes electioneering communications. As noted, in common practice, that group does not include referendum committees.[3]

One cannot glean from a rule directed at activities almost never engaged in by a referendum committee a legislative intent to restrict candidate involvement with a referendum committee's express advocacy communication. In other words, a ban on coordinating activity rarely, if ever, done by a referendum committee should not be construed as supporting a ban on coordinating activities for express advocacy communications by a referendum committee.

We submit that the express terms of N.C. Gen. Stat. § 163-278.6(6) can lead to no other conclusion but that a "coordinated expenditure" does not give rise to a "contribution" to a candidate unless the expenditure is used to support or oppose a *candidate,* not a referendum. For that reason, we request that you reconsider and revise your December 4, 2015 Advisory Opinion as it relates to express advocacy communications by a referendum committee.

In addition, we request, pursuant to N.C. Gen. Stat. § 163-278.23, that you clarify whether the Referendum Committee may invite candidates to promote the bonds at public events and in other ways that do not include direct expenditure of committee funds directly tied to the candidates' promotion of the bonds. For example, if the Referendum Committee sponsors a meeting of business leaders in a county, can it invite local elected officials, who are also candidates, to speak at the meetings if the elected official did not help plan the meeting but simply appear to make remarks regarding the Bond Referendum?

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or anything of value whatsoever, made to, or in coordination with, a candidate to support or oppose the nomination or election of one or more clearly identified candidates, to a political committee, to a political party, or to a referendum committee, whether or not made in an election year, and any contract, agreement, or other obligation to make a contribution …") (emphases added).

[3] N.C. Gen. Stat. § 163-278.6(6)

Because of the short election period before the March 15 primary and the dramatic change in communications that the Advisory Opinion would have on the Referendum Committee, we request that you consider our request at your earliest possible convenience.

Thank you for your assistance.

With best regards, I am

Sincerely,

Steven B. Long

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cc: Robert Orr, Esq.
President, Connect NC Committee