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MEMORANDUM

FROM: McCall, Parkhurst & Horton L.L.P.

RE: Frequently asked questions about permissible conduct and comments of employees and officers of political subdivisions leading up to a bond election

It cannot be overstated that when conducting a bond election the employees, officers, directors, trustees, council members, and any other member of a governing body or representative of a political subdivision (collectively referred to herein as "employees and officers") must be aware of and adhere to the legal requirements imposed on the oral and written communications they make relating to the bond election by the Election Code and the Texas Ethics Commission. The Texas Ethics Commission strictly enforces the legal requirements regarding statements made and actions taken by employees and officers of a political subdivision before a bond election, and often finds that well intentioned actions violate the law. A violation may result in a Class A Misdemeanor for the employee or officer responsible for the statement.

The following list of questions and answers is intended to provide guidance to employees and officers of political subdivisions when they are communicating, orally or in writing, regarding a future bond election of the political subdivision.

Frequently Asked Questions

Q: What actions are prohibited prior to a bond election?

A: Actions or authorizations by an employee or officer of a political subdivision involving the spending of public funds for political advertising are prohibited by Texas Election Code 255.003. "Political advertising" is a communication that advocates a particular outcome in an election and includes statements made in writing, orally, email messages, posters, newsletters, fliers, television or radio ads and Internet sites. An employee or officer who makes use of any resources of the political subdivision to engage in political advertising, including computer, copier or telephone use, is spending public funds in violation of the

Texas Election Code. Also, using paid time of employees of a political subdivision to create or distribute political advertising is prohibited.

Q: What can or can't I say about an upcoming bond election?

A: Any factual statement can be made at any time regarding the bond election without violating the Texas Election Code. All political advertising, whether in support of or against a bond election, is considered advocacy and is strictly prohibited.

Q: What's considered "advocating" for or against a bond election?

A: Most employees and officers violate the ethics laws by engaging in communication that is considered advocacy. Obviously, asking for support or rejection of a bond election is advocacy and using statements such as "Vote For X" and "Defeat Y" is also advocacy. However, one of the difficulties in understanding what is or is not advocacy comes from the Texas Ethics Commission's prior decisions that have indicated whether communication is advocacy can turn on the tone and emphasis of the statements made.

Q: How can I know if a statement I want to make is advocacy? "Tone and emphasis" of a statement is subjective and doesn't help me figure out if I'm about to make an ethical violation.

A: Unfortunately, the Texas Ethics Commission has not provided a clear answer. Prior Ethics Commission decisions are helpful in understanding the types of prohibited communications. The following statements were all considered advocacy by the Ethics Commission and provide some guidance in determining the types of statements that are impermissible:

"Although, as policy, we will not formally endorse, there is a choice there that some of our leaders highly favor. You can contact me for who and why, but I am confident all of you will research and make the right choice."

"It is very important for your children and the school district that the tax rollback election pass."

A newsletter headline indicated the governing body "seeks voter approval" and a quote stating "we want to sustain the excellence. And we are now asking voters if they too want to sustain the excellence."

"[O]ur citizens now have the opportunity to support X for the 21st Century. Please support the vision – our future depends on your commitment."

"This bond is the right thing to do for the children of this community."

The following types of terms and phrases are also considered advocating a position and should not be used:

"Best solution"

"Fantastic"

"State-of-the-art"

"Countless benefits"

"Horrible shape"

"Need"

"We must do something"

The following types of motivational slogans and calls to action are also violations:

"Good Schools are the Foundation of a Good Community"

"Every Child Deserves a Good Education"

"Put Children First"

"Show That You Care About Our Community"

Q: Is that an exhaustive list?

A: No. The comments listed above are representative of the type of statements that are considered advocacy. Any statement that is similar in tone or content to any of the above should be avoided.

Q: It doesn't seem like I can say much. What is permitted?

A: Texas Election Code 255.003(b) exempts communication that "factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure." Also, an employee or officer of a political subdivision may advocate for or against a bond election on his or her non-official or off-duty time so long as no resources of the political subdivision are used.

Q: If I'm working on an advocacy campaign in my free time, can I take phone calls at work or receive/respond to emails for that campaign from my work computer?

A: No. There is no de minimis exception to the use of equipment of the political subdivision. Brief telephone calls, one sentence emails, sending or receiving a fax, printing a single page off a work printer or making a single copy are prohibited. An employee or officer violates the Texas Election Code even if they will reimburse the political subdivision for the costs associated with using a work machine or resource. All advocacy activity should be conducted in the employee's or officer's free time and should not involve any machinery or equipment owned by the political subdivision.

Q: It is a fact that our political subdivision needs this project and will not be able to grow without it. Does the Election Code allow me to explain that?

A: No. This type of statement is prohibited and considered advocating for the project. It is for the voters to determine need and the future growth of the community, and an employee or officer cannot explain a project this way. The following objectively verifiable information, is classified as factual and is representative of the type of information that can be presented by an employee or officer of a political subdivision prior to a bond election: growth rates; student capacity of a school facility; performance data; relationship between the political subdivision's mission and public welfare; specific data on how obtaining or not obtaining bond funds will affect the political subdivision's mission and goals; age/condition of facilities; tax rate effect; cost of projects; identifying the proposed projects; information on establishment of committees to assist management of successful bond programs; efforts to provide factual information about the election; voter registration and encouraging voter turnout; voting dates; and, polling place locations.

Q: If I stick to factual information, will I avoid an ethical violation?

A: Probably, but it's necessary to remember that the tone and emphasis of the information presented, even if purely factual, may give rise to a violation punishable by the Texas Ethics Commission. Bold or italicized print in a written communication or voice inflection and intonation during an oral presentation could be viewed as advocacy even if the information presented is strictly factual.

Q: We want to prepare a newsletter/article/pamphlet/advertisement/press release explaining the bond election. Do these same issues apply?

A: Yes, the same legal requirements apply to oral and written communications. Material produced by a political subdivision cannot contain advocacy. It is important to allow both opponents and proponents of a measure to use material produced by the political subdivision in their efforts. Favorable treatment to one side must be avoided. Extra copies of materials produced by the political subdivision should not be provided to either side and they should make copies at their own expense.

Q: Can we provide space on property owned by the political subdivision for advocacy groups to distribute literature or advocate for their side?

A: Advocacy literature produced by proponents or opponents cannot be distributed or available on property owned by the political subdivision, even if equal access is allowed to both sides. The one exception to this is that a political subdivision can establish a public forum reserved for discussion of certain topics, at which advocacy literature may be made available by the advocacy groups. A public forum or public debate is permitted if all sides have the same opportunity to participate and viewpoint discrimination is prohibited and restrictions on the public forum must be reasonable in light of the purpose served by the forum.

Q: How serious is this type of ethical violation? What are the penalties?

A: A person who violates Texas Election Code 255.003 commits a Class A misdemeanor punishable by a civil fine of up to \$5,000, or, for a sworn compliance deemed frivolous, up

to \$10,000. If the violation was intentional or knowing, criminal charges, including bribery, coercion of public servant or voter, abuse of official capacity or official oppression, could be brought. Each of these violations is against the employee or officer committing the offense and not against the political subdivision.

Examples

The following are summaries of certain decisions of the Texas Ethics Commission that, in light of the rules described above, offer insight into what is and is not permissible:

Ethics Advisory Opinion No. 443 (2002)

Placement of campaign flyers in an area restricted to employees of the political subdivision is prohibited because it necessarily requires political subdivision employees to transport the flyers to the restricted area on work time. Allowing equal access for political advertising did not make the distribution of campaign flyers permissible.

Ethics Advisory Opinion No. 343

A forum in which all candidates in an election are provided the same opportunity to appear and speak is not a forum in support or opposition to any individual candidate, regardless of how the candidates actually perform.

Ethics Advisory Opinion No. 198 (1994)

Corporations are prohibited from making expenditures for communications if they "expressly advocate" the election or defeat of a candidate for public office.

Ethics Advisory Opinion No. 77

Under an "express advocacy" analysis, a corporation could not pay for the printing or mailing of postcards stating "let's elect judges by qualifications," and then listing the winners of a county bar poll.

Ethics Advisory Opinion No. 172 (1993)

A state employee could not be used as a political or personal scheduler but nonetheless found that directing a state employee to keep track of a legislator's overall schedule would not be a misapplication of the employee's time. The use of a state employee's work time to handle campaign transactions is a misapplication of employee's time unless it is incidental and unavoidable (e.g., forwarding campaign contributions to a campaign office.)

Sworn Complaint Order SC-230963

Mayor, city manager, city clerk and city attorney participated in the taping of a television program where they discussed proposed charter amendments and the effects of passing the amendments, including arguing in favor of the amendments. The television program was broadcast violating the Texas Election Code.

Sworn Complaint Order SC-230309

Dissolution of a city was proposed and the residents were sent a letter from the Mayor listing sixteen things that would happen if the city were dissolved and encouraging residents to "keep the control here – among the residents – not in the hands of outsiders." The Mayor was held to have violated the Texas Election Code.

Sworn Complaint Order SC-230205

Despite factual descriptions in a brochure, when considered in its entirety, it advocated a vote in favor of a bond proposition.

Sworn Complaint Order SC-220574

An advertisement in the local newspaper in the last edition prior to an election outlined a disagreement between two parties and linked the complainant by name to the disagreement, which involved taxes and water rate hikes. The Ethics Commission found these circumstances linked the complainant to two issues that can be perceived as unpopular and was therefore a violation of the Texas Election Code.

Sworn Complaint Order SC-210541

A school district trustee wrote two letters supporting his reelection and placed them in internal school district mailboxes. Even though the superintendent granted permission and called the other candidates and offered them the same opportunity, the trustee violated the Texas Election Code.

Sworn Complaint Order SC-210426

Mayor violated the Texas Election Code by directing his secretary to distribute a media release asking people to vote for a specific result in a referendum, despite a subsequent media release later that day stating the first media release had inadvertently contained the statement seeking support, acknowledging the first media release was improper and stating the city would be reimbursed for any costs involved with the error.

Sworn Complaint Order SC-210101

School employees who created a flyer advocating a position in the upcoming election on school district computer and made copies on school copiers before the school day began violated the prohibition against spending or authorizing the spending of public funds for political advertising.

Sworn Complaint Order SC-970852

Political advertising cannot be inserted into the city's water bill that is mailed by the city.

Sworn Complaint Order SC-200416

General manager of a metropolitan transit authority violated the Texas Election Code by preparing a PowerPoint presentation that included a number of endorsements of a bond proposition from community organizations (e.g., "we support the light rail measure 100%").

Sworn Complaint Order in the Matter of Jim Richardson

A hospital district administrator violated the prohibition against the use of public funds for political advertising, despite the respondent having reimbursed the district for the funds spent on political advertising.

Sworn Complaint Order SC-93029

A school district superintendent violated the Texas Election Code by circulating a cover memo stating "Be aware! Beware! Share!" to which was stapled a political advertisement distributed by the candidates in an upcoming election.

Sworn Complaint Order SC-231180

A circular prepared by a school district was deemed political advertising because it advocated passage of a bond measure by stating that the "best solution" to the school district needs would be to do exactly what the school district has proposed to do with the proceeds of the bonds.