**ATTACHMENT 5**

| | |
|---|---|
| STATE OF NORTH CAROLINA<br><br>WAKE COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>02 CV 010774 |
| JACK SMITH, JULIE ROBISON and TOWN OF CARY,<br><br>Petitioners,<br><br>vs.<br><br>STATE BOARD OF ELECTIONS,<br><br>Respondent. | **BRIEF OF PETITIONERS** |

This is an action for judicial review of a decision of the State Board of Elections holding that reimbursements made to candidates in Cary town elections under the town's ordinance for public funding of campaigns are "contributions" under state campaign finance law and that, consequently, the town may not pay, and candidates may not receive, more than $4,000 per election. This appeal of the State Board order is brought by the Town of Cary and by Jack Smith and Julie Robison, two candidates in the 2001 town election who have been ordered to return funds to the town. The State Board's decision was contrary to law and is arbitrary and capricious, and this brief is submitted in support of the petition.

## NATURE OF THE CASE

This is an appeal from a final decision of an administrative agency pursuant to G.S. 150B-45. In December 2000, the Town of Cary adopted an ordinance to provide for public funding of campaigns for town office. Reimbursement for actual campaign expenditures is made available to candidates who agree to voluntary limitations on spending. Several

candidates, including Jack Smith and Julie Robison, accepted public funding for the 2001 town election. On 13 July 2002 the State Board of Elections determined that the $4,000 limitation on campaign contributions in G.S. 163-278.13(b) applies to public funding. The board then ordered candidates Smith and Robison to return to the town amounts they received in excess of $4,000. This appeal of that decision is based on the State Board's action being contrary to law and being arbitrary and capricious.

**STATEMENT OF FACTS**

In 1999 Cary endured one of the most expensive and contentious municipal elections in the state's history. (R., at 106) With sharp political divisions over management of the town's extraordinary growth, one losing candidate for mayor reported spending $147,000, nearly 15 times the most that had ever been spent on the office previously. Total spending in the 1999 campaign was estimated at more than $500,000, but the exact amount cannot be known because much of it was in the form of thinly disguised "issue advocacy" by a pro-development group, CARE, and thus was not subject to public reporting.[1]

Just as the huge increases in campaign expenditures has caused Congress to debate and approve public funding of presidential elections, and has caused the General Assembly to consider public funding of gubernatorial, legislative and judicial races, the 1999 experience prompted the Cary Town Council to study the issue. As elsewhere, the

---

[1]Whether CARE's expenditures crossed the line and constituted "express advocacy" for and against particular candidates, and thus would have to be reported, has been the subject of considerable litigation. *See Community Alliance for a Responsible Environment v. Leake*, U.S. Dist. Ct., E.D.N.C., No. 5:00-CV-544-BD(3).

concerns were that the increase in the cost of campaigns put too much influence in the hands of special-interest political committees and wealthy individual contributors and candidates; that ordinary citizens would be shut out of the process; and that candidates would have to concentrate more on raising funds than debating the issues. (R., at 3, 19)

As is true with most issues in Cary, the public funding debate was public, vigorous and extensive. A proposed ordinance was posted on the town's web site and argued in the newspaper; citizens spoke up at council meetings; and the council wrestled with the question. In the end, in December 2000, the council passed an ordinance similar to most public funding plans.[2] Knowing that the United States Supreme Court's decision in *Buckley v. Valeo* prohibits direct limitations on campaign expenditures, but allows voluntary limits in exchange for public funds, the council provided for up to $20,000 in reimbursement for campaign expenditures for candidates for mayor and at-large council seats, provided they agree to limit spending to $25,000, and up to $8,000 for candidates for district seats, conditioned on limiting expenditures to $10,000. (The Town Council has two members and the mayor elected from the town at large, and four members chosen from districts; the elections are conducted under the nonpartisan primary and runoff method.) A town-wide candidate must raise $5,000 from other sources, and a district candidate $2,000, to be eligible for public funds. (R., at 3-10, 19-31)

---

[2]The text of the original ordinance is found in the Record at 3-10. A later version is found at 19-31. The changes from the first to the second version are generally technical and not significant to this appeal.

The Cary ordinance differs from many public financing plans in that the town's funds are not paid in advance but come after the election as reimbursement for actual expenditures. To assure that only serious candidates are reimbursed from public money, town funds are paid only to those candidates who make the runoff. Participation is completely voluntary. A candidate who does not wish to limit his or her expenditures, or just does not believe in public funding, may continue with traditional campaign financing with no limitations on the amount that may be spent or how the money may be used. And, of course, the funding is available to all candidates, incumbents and challengers, regardless of their views. (R., at 3-10, 19-31)

In the 2001 election four candidates chose to participate in public funding, two of whom were incumbents (though one was running for a different seat) and two who were not. Three of the four candidates made the runoffs and, after the election, received reimbursement of actual expenditures from public funds. Jack Smith, a district candidate who did not have a primary, received $6,981. Julie Robison, a successful at-large candidate who had both a primary and run-off, received $16,910. Jennifer Robinson, who was elected to a district seat, received $3,593. Don Hyatt, who ran for an at-large seat, did not make the runoff and received no town funds. Total spending of all candidates for the 2001 election was well below the 1999 levels. None of the 13 candidates — the four who sought public funding and the nine who did not — reported spending more than the $25,000 ceilings for at-large races and $10,000 for district elections, even though those limits only applied to the public funding candidates. (Cary News, 2/7/02)

After the adoption of the ordinance and before the 2001 election, the State Board

of Elections received an inquiry from the Wake County Board of Elections about the lawfulness of the town's program. In July 2001 the Executive-Secretary/Director of the State Board wrote to the Wake board that (1) the State Board did not have jurisdiction to determine whether Cary had authority to adopt public funding, (2) the State Board would have jurisdiction to determine whether reimbursements from Cary were "contributions" subject to a $4,000 limit, but that issue was not ripe for determination until the town actually had paid money to candidates, and (3) the town would not be considered a corporation for purposes of the campaign finance law prohibition on corporate contributions. (R., at 33-34)

In April 2002, five months after the 2001 election, the Executive-Secretary/Director of the State Board and the campaign finance director of the Wake board both wrote to Jack Smith and Julie Robison informing them that they needed to return to the town funds received in excess of $4,000. (R., at 58-63) The two candidates and the town requested to be heard by the State Board. (R., at 66-68) The State Board heard the matter on 25 June 2002 and issued its written decision on 13 July 2002. (R., at 118-124)

Although the question of the town's authority to enact a public financing ordinance was raised in the public discussions of the ordinance, there has been no legal challenge to the enactment other than the State Board's proceeding.

## ARGUMENT

**THE STATE BOARD'S DECISION SHOULD BE REVERSED FOR ANY ONE OF SEVERAL REASONS. THE BOARD IN EFFECT HAS ADOPTED AN ADMINISTRATIVE RULE WITHOUT FOLLOWING THE STATUTORY REQUIREMENTS FOR RULEMAKING; THE DECISION IS WRONG AS A MATTER OF LAW; AND THE DECISION IS ARBITRARY AND CAPRICIOUS IN THAT IT IS BASED ON FACTORS**

**NOT PROPERLY BEFORE THE BOARD. EVEN IF THE ORDER WERE CORRECT, IT SHOULD NOT BE APPLY RETROACTIVELY TO PUNISH CANDIDATES IN THE 2001 ELECTION.**

A. The State Board's action was contrary to law in that the board was promulgating a rule without following the requirements of the Administrative Procedure Act.

The Administrative Procedure Act (APA), Chapter 150B of the General Statutes, sets strict requirements for administrative agencies to adopt rules. Rules are binding interpretations or expansions of statutes that have general effect. The procedural requirements for proper rulemaking must be followed to allow interested parties to have sufficient notice and an opportunity to comment on the proposed regulation. The process is intended to be deliberate and difficult. In treating the Cary matter the way it did, the State Board improperly bypassed the rulemaking process, to the prejudice of the town and candidates for town office.

There should be no doubt that the State Board has adopted a rule. The state campaign finance law, and specifically the statute limiting contributions, G.S. 164-278.13(b), does not address whether a public financing payment is a contribution. In G.S. 163-278.21 the State Board is given specific authority "for promulgating all regulations necessary for the enforcement and administration of this Article [the campaign finance law]", but in doing so the agency must follow the procedures of the APA. The APA, in G.S. 150B-2(8a) defines a "rule" as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly. . . ." In this instance, the State Board has adopted a standard and statement of general applicability to implement and interpret G.S. 163-278.13(b). By pronouncing that public

financing is considered a contribution under the statute, the State Board has set a standard and statement that will apply not only to Jack Smith and Julie Robison but to any candidate who receives public funding. It has adopted a rule. *See State ex rel. Commissioner of Ins. V. North Carolina Rate Bureau*, 300 N.C. 381 (1980).

If an action by an agency constitutes a rule, G.S. 150B-18 specifies that it "is not valid unless it is adopted in substantial compliance with this Article [Article 2A of Chapter 150B]." The procedure, intended to assure full public notice and debate and consideration of all views, requires publication of notice of the proposed rule, a public hearing, the opportunity for written comments, review by the Rules Review Commission for compliance with the statutes, time for objection by the General Assembly, and publication and codification of the final rule to enable all affected parties to be aware. None of those requirements were met here. Had the proper procedures been followed, the town and candidates and prospective candidates in Cary would have known in advance of the election that the $4,000 limitation applied and would have been able to plan accordingly.

B. <u>The State Board's decision that public financing is a campaign contribution is wrong as a matter of law</u>.

The State Board's construction of the statute on campaign contributions is wrong. It is inconsistent with the campaign finance statutes when read as a whole; it ignores the history of the section in question; and it reaches a result directly opposite the purpose of the statute.

At issue is the meaning of the language of G.S. 163-278.13(b) which prohibits a candidate from accepting more than $4,000 per election from "any individual, other political

committee, or other entity." The question is whether the Town of Cary, as part of a public financing ordinance" is an "other entity" so as to prohibit it from providing, and candidates from accepting, more than $4,000 in public funds. There is nothing in the statute, or elsewhere in the article on campaign financing, that speaks directly to the issue, no definition of "entity" nor any provision speaking directly to public funding, either by a municipality or any other public body.

The only legislation on public funding of campaigns at the time the State Board made its decision showed clearly that the General Assembly did not consider the $4,000 limit to apply to public funds. When the campaign finance law was first enacted in 1973, public funding was not under discussion and there was no reason for the legislature to address the issue, either in the definition of contribution or elsewhere. In 1988, however, the General Assembly enacted the state's first public funding plan. Chapter 1063 of the Session Laws of 1987 (Second Session, 1988) became Article 22C of Chapter 163 — G.S. 163-278.46 *et seq.* — providing for public funding of campaigns for governor and other Council of State offices. The basic framework of that plan is essentially the same as Cary's: In exchange for public funds, candidates agree to spending limits, but no candidate is required to participate.[3]

The significance of Article 22C, the public funding of statewide campaigns, is what is not there. Article 22C itself says nothing about the effect of the $4,000 limitation on

---

[3]Article 22C was repealed in October 2002 in the same legislation that created public financing of statewide judicial campaigns. *See* Session Law 2002-158, § 5. The same legislation transferred to the judicial campaign fund the remaining proceeds in the Article 22C fund.

public funding, nor was G.S. 163-278.13(b) amended to address the $4,000 limit. The reason is self-evident. The General Assembly saw no need to amend the statute on contribution limits because it was clear on its face that public funding could not be and was not so limited. To place a $4,000 per election limit on public funding of a statewide campaign would have made the funding plan laughably inadequate. Thus, when the legislature enacted public funding it did not see any need to amend the statute to say that such funds were not contributions, because no one would think that the $4,000 limit applied.

The specific history of G.S. 163-278.13(b) and the "other entity" language confirms that the legislature did not intend to incorporate public financing within the meaning of contribution. Until May 1999, that subsection prohibited only an "individual or political committee" from contributing more than $4,000. The "other entity" language was added by Session Law 1999-31, the title of which said it was an act to rewrite various campaign finance statutes to make changes "RELATED TO REPAIRING THE CAMPAIGN STATUTES AFTER THE DECISION OF THE FOURTH U.S. CIRCUIT COURT OF APPEALS IN NORTH CAROLINA RIGHT TO LIFE, INC., V. BARTLETT." (R., at 98-105) The decision to which the title refers is *North Carolina Right to Life, Inc., v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), holding that the state statute's definition of a "political committee" could not be applied constitutionally to groups such as Right to Life when engaged in "issue advocacy" rather than "express advocacy" for or against the election of specifically named candidates. The court also held that the state's ban on corporate political

contributions could not be applied to a nonprofit such as Right to Life with no shareholders or appreciable business income.

Because the definition of a political committee and of a corporation determined who had to file reports of contributions and expenditures, and who was restricted from making contributions or in the amount that could be contributed, the General Assembly had to rewrite the campaign finance law after the *Right to Life* decision. For the first time, the term "entity" was introduced throughout Article 22A . The definition of a political committee was revamped to list several characteristics, including that the committee was created "by a corporation, business entity, insurance company, labor union, or professional association." (R., at 98) Thereafter, the legislation refers to those organizations as "entities," as in the new section which says, "An entity is rebuttably presumed to have a major purpose to support or oppose the nomination or election of one or more clearly defined candidates if it contributes . . ." — all part of a scheme to identify when an organization had gone from issue advocacy to express advocacy and could be regulated. (R., at 98-99) The addition of the "other entity" language to the provision of G.S. 163-278.13(b) restricting contributions to $4,000 was done simply to avoid having to repeat the lengthier recitation of the various examples of political committees.

The purpose of Session Law 1999-31, as clearly stated in the title, was to narrow the definition of political committee to conform to the *North Carolina Right to Life, Inc., v. Bartlett* decision. The history of the legislation shows an intent only to reduce the number of entities to which the $4,000 limitation applied, not to broaden it. Of course, there is no mention of public funding because that was not even remotely a part of the discussion

about the 1999 amendments. The primary sponsor of the legislation submitted an affidavit that there was never any discussion about making the contribution limit applicable to public funding. (R., at 117) It is directly contrary to the clear legislative intent of Session Law 1999-31 to read into it, as the State Board mistakenly did, a significant expansion of the coverage of the $4,000 limitation without a word ever having been said on the subject.

If further support is needed, the rule of *ejusdem generis* for statutory construction should be applied. When general words follow a designation of particular subjects or things, the meaning of the general words ordinarily will be limited to things of the same kind, character and nature as those specifically enumerated. *In re Proposed Assessment v. Carolina Telephone*, 81 N.C. App. 240, 244 (1986), following *State v. Fenner*, 263 N.C. 694 (1965). Here, the statute restricts contributions from " any individual, other political committee, or other entity." Applying the rule of *ejusdem generis*, "other entity" should be read to include only organizations of the same nature as those specifically listed, *i.e.*, individuals or organizations whose purpose is to support or oppose candidates or seek political influence. A municipality providing public funding for a campaign does not fit within that list or within the intended meaning of "other entity."

Another section of the campaign finance law demonstrates further the kind of "entity" G.S. 163-278.13(b) was intended to cover. In G.S. 163-278.27(a) the act lists who may be punished for violations. The list is "[a]ny individial, candidate, political committee, referendum committee, treasurer, person or media...." Again, the list of who is specifically identified helps show that the general term "entity" was not intended to include a municipality.

Two other rules of statutory construction also belie the State Board's conclusion. First, generally a statute does not bind the State unless the statute specifically says so. *Yancey v. North Carolina State Highway & Public Works Commission*, 222 N.C. 106, 111 (1942); *State v. Garland*, 29 N.C. 48 (1846). The same principle applies to political subdivisions of the State. *O'Berry v. Mecklenburg County*, 198 N.C. 357 (1939) (county not subject to state-imposed gasoline tax when statute did not expressly say so). A municipality is a subdivision of the State. *Smith v. Winston-Salem*, 247 N.C. 349 (1954). Therefore, G.S. 163-278.13(b)'s restriction on contributions cannot and does not apply to the municipality of Cary because the statute does not expressly say it does. The other relevant rule of statutory construction is that statutes carrying criminal penalties must be strictly construed. *Vogel v. Supply Co.*, 277 N.C. 119 (1970); *North Carolina State Board of Registration for Professional Engineers v. IBM*, 31 N.C. App. 599 (1976). That is, an action should not be construed to carry criminal punishment unless the legislature has expressed a clear intent to do so. Violations of the campaign finance law are misdemeanors. Unless the General Assembly has manifested a clear intent that such criminal punishment should apply to a municipality — which, of course, as a practical matter makes little sense — the statute should not be read to apply in that manner.

Finally, the State Board's view of the $4,000 contribution limitation is directly contrary to the purpose of the campaign finance law. The State Board, despite its responsibility to implement and encourage controls on the excesses of campaign financing, has puts the campaign finance law on its head, effectively negating the one method which has proven successful in reducing campaign abuses. The very purpose of

Article 22A was a post-Watergate attempt to reduce the ability of a few wealthy individuals and organizations to control elections. By limiting the amounts of contributions and requiring reporting, lawmakers intended to return campaigns to the public at large. *See* North Carolina Legislation 1974, "Campaign Financing", at 24-28 (Institute of Government, UNC at Chapel Hill, 1974) (discussing intent of legislation to prevent "big money" interests from exercising "inordinate 'muscle' in political campaigns and thus in legislative policy-making"). And, as the Supreme Court recognized in *Buckley v. Valeo*, 424 U.S. 1, 91 (1976), in upholding the public financing of presidential campaigns, public funding has the very same purpose: "Congress was legislating for the 'general welfare' — to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraisers."

The common purpose of limitations on campaign contributions and public funding were summarized in a North Carolina Law Review note discussing the state's 1988 public financing law:

> Campaign reform measures range from disclosure requirements and contribution and expenditure limitations to public financing of candidates. They have been enacted to different extents by all fifty states and the federal government. The goals of these reform efforts . . . are basically to reduce the potential for corruption of candidates, eliminate the advantage that wealth candidates have over less wealth opponents, increase political participation at all levels, and improve the quality of the electoral process by changing campaigning from media contests to competitions of ideas.

67 N.C. Law Rev., No. 6, at 1349-50 ( Sept. 1989).

It is ironic and troubling that the State Board of Elections, an agency entrusted by the General Assembly with responsibility for the control of campaign finance, would reach out, take a statute that does not speak at all about public funding, and read into it an illogical prohibition on public expenditures that may be the best means for accomplishing the goal of the statute. Public funding limits the dependency of candidates on wealthy contributors; reduces the time that must be spent on fundraising; opens campaigns to candidates who otherwise could not afford to run; and allows candidates to focus on issues rather than soliciting money. Because public funding is open to all comers, regardless of point-of-view or incumbency, it carries none of the dangers of individual and political committee contributions intended to be ameliorated by the $4,000 limitation. Rather than fulfilling its duty of effectuating campaign finance reform, the State Board has abused its authority by striking down an ordinance that offers a real opportunity to accomplish the purposes of the statute.

C. The State Board's decision was arbitrary and capricious in that it was based on factors not properly before it.

The issue before the State Board was whether the $4,000 contribution limitation applied to public funding. The board was obligated to decide that issue on the basis of the meaning of G.S. 163-278.13(b). To the extent the board considered and was influenced by other factors, its decision was arbitrary and capricious.

Although the State Board neither videotaped nor recorded nor otherwise preserved

a verbatim record of the hearing to enable a proper review of its decision, there was no doubt at the hearing that the board was strongly influenced by an issue not properly before it, whether Cary had authority to enact the public funding ordinance without specific authorization from the General Assembly. Communications from Wake County Board of Elections staff had raised the issue before the 2001 election; documents provided to State Board members by their staff included information about town-requested legislation on other campaign finance measures unrelated to public funding (R., at 85-87); State Board staff had questioned the town's authority (R., at 88); the board accepted other documents arguing the issue (R., at 74); and the Board's order in ¶ 12 of the "Findings of Fact" says the board "has concerns as to the [sic] whether the Town of Cary, or any other municipality, has the power to establish a plan of public financing of election [sic] without enabling legislation from the North Carolina General Assembly."

In July 2001 the Executive-Secretary/Director of the State Board wrote to the Wake board: "First, we choose not to determine if Cary has the authority to provide public financing as we believe, based upon jurisdictional maters, that it is not a proper issue for resolution by this office." (R., at 33) At no time after that did the director or board indicate that there had been any change of view on that issue. There certainly was nothing in the correspondence leading up to the hearing to lead anyone to believe that the State Board had changed its mind and wanted to debate the town's authority to enact public financing. Yet, as the documents in the record show, and as ¶ 12 of the order manifestly demonstrates — and as was apparent at the hearing — the board clearly was influenced by questions about the town's authority. Instead, the board should have begun with the

premise that the Cary public financing ordinance is valid and should not have let its views on the issue control the decision about the $4,000 limitation. By reverting to the question of the town's authority, the board acted on a basis beyond its jurisdiction and on a basis entirely different than the issue actually before it, and in doing so the board acted arbitrarily and capriciously. The effect of the State Board's action was to do indirectly — effectively void the Cary ordinance — what it admitted it did not have authority to do directly.

If it were in issue, the town has authority to enact public funding on its own. In G.S. 160A-4 the legislature has declared that "the provisions of this Chapter [160A] and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." The North Carolina Supreme Court has said, "We treat this language as a 'legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A.' [citations omitted]." *Homebuilders Assn. of Charlotte v. City of Charlotte*, 336 N.C. 37, 44 (1994).

The explicit powers of a municipality include the power to determine the form of government and election for the municipality (G.S. 160A-101); to regulate acts "detrimental to the health, safety or welfare of its citizens" (G.S. 160A-174); to regulate solicitations for private purposes (G.S. 160A-178); and to promote equality among all citizens of the community (G.S. 160A-492). A municipality is free to legislate in these areas as long as its own ordinances do not conflict with state law. The General Assembly has made no attempt to address the question of public funding of municipal campaigns. The

legislature's approval of public funding for Council of State and statewide judicial campaigns establishes that Cary's ordinance is firmly in line with state law. Additionally, the United States Supreme Court held in *Buckley v. Valeo* that public funding of campaigns was intended to serve the general welfare.

Most significantly, since the Cary public funding ordinance was first enacted in late 2000, no one has challenged the town's authority to act in this area. In the absence of such a challenge, the State Board was obligated to accept the validity of the ordinance and to attempt to construe it and state law in a way to make them compatible. Instead, the board, in the guise of considering the meaning of G.S. 163-278.13(b), decided to become the arbiter of the town's authority and declare the ordinance unusable. In acting as it did, the State Board exceeded its authority as an administrative agency and acted arbitrarily and capriciously.

D. Even if the $4,000 limitation is applicable, it should not be applied retroactively to the 2001 election and be used to punish candidates who relied upon the town's ordinance.

The State Board's decision that the $4,000 limitation applies to public financing came in July 2002, eight months after the election to which it applied. It is fundamentally unfair to the affected candidates to have the State Board's decision apply retroactively.

Candidates running for Cary offices in 2001 had to decide in the summer of that year whether to seek public funding or engage in their own fundraising. At the time, they would have known from newspaper accounts that the town's authority to provide public funding without legislative approval was open to debate, and candidates who already on the council would have known that questions had been raised about the $4,000 limitation.

What all candidates also knew, however, was that no one had legally challenged the ordinance; that the legislature had seen no reason to address the issue while in session after the ordinance was passed; and that no court had acted to stop implementation of the plan. In that circumstance, candidates were justified and entitled to rely on the validity of the ordinance and to plan accordingly. They should not now be punished for doing so.

The consequence of the State Board's decision, if applied retroactively to the 2001 election, is to punish only the candidates. Whether the town receives back the several thousand dollars provided to the candidates is not a significant issue for the municipal government, but the obligation to repay that money is of great importance to Jack Smith and Julie Robison. If the State Board order is upheld, the candidates' choices will be to repay the money from their own funds, attempt to engage in political fundraising over a year after the election, or risk contempt by not paying. Any one of those options is a substantial burden on the individual and results in punishment to a party who was not at fault.

The campaign finance law includes a mechanism for avoiding this very situation. One part of the statute, G.S. 163-278.23, specifically directs that the Executive-Secretary/Director of the State Board "shall issue written opinions to candidates, the communications media, political committees, referendum committees or other entities upon request, regarding filing procedures and compliance with this Article." When such opinions are issued, they are filed with the Codifier of Rules and are published in the North Carolina Register. By that means, all potentially affected parties are put on notice as to the State Board's view of the meaning of the campaign finance law. Moreover, the statute

specifies that compliance with a published opinion bars prosecution or a civil penalty for violation of the campaign finance law. Here, although the State Board had received an inquiry dealing specifically with the $4,000 limitation, the Executive-Secretary/Director chose not to answer the question and to leave candidates without any specific direction as to what to do. While the Executive-Secretary/Director's decision to delay a decision may have been altogether reasonable, it is not reasonable at this point to apply the $4,000 limitation retroactively and use it to punish candidates who relied upon the validity of the ordinance.

The inequity of the State Board's decision is greatest when applied to Julie Robison. Ms. Robison was not an incumbent member of the council, had not participated in the council's discussions of the ordinance nor heard the advice of the town's attorneys nor been party to the communications to and from the State Board. No one from the Wake County Board of Elections or the State Board notified her of their concerns about the public funding plan. She was simply a citizen who was interested in running for a council seat and who accepted that the town's ordinance must be valid if it had not been challenged. It is manifestly unfair, now, to tell her that she could not rely upon a municipal ordinance and must bear individual responsibility for correcting what the State Board now says, months after the election, was done wrongly.

In considering the effect of the State Board ruling on Smith and Robison, the court again must take note that violations of the campaign finance law are misdemeanors. The firmly established constitutional principle of *ex post facto* laws prohibits the State or any other governmental body from making an act criminal retroactively. Yet, that will be exactly

the result here if the State Board's order is upheld. Mr. Smith and Ms. Robison will have engaged in behavior that was lawful at the time they did it, but be told well after the act that their conduct now is considered criminal. The court must not allow such a result.

E. Even if the $4,000 limitation per election is applicable, it was applied incorrectly in directly Julie Robison to repay $12,910.

Under G.S. 163-278.13(b), a candidate is prohibited from receiving more than $4,000 per election from an "other entity." A primary and a runoff are considered separate elections, meaning that a candidate who has both a primary and a runoff may accept up to $8,000. The State Board ignored this provision in directing Julie Robison to repay to the

town $12,910. Ms. Robison was a candidate for an at-large seat in the town's nonpartisan primary and runoff method of election. A nonpartisan primary was held to reduce the number of candidates for each seat to two, and then the runoff determined the winner. Ms. Robison ran in both the primary and the runoff; thus, she ran in two elections. Ms. Robison received $16,910 in public funding from the town, and the State Board ordered her to repay all of that amount except $4,000. Even if the $4,000 limitation applied to the town — a view which Ms. Robison strongly rejects — she would be entitled to accept $8,000 rather than $4,000.

**CONCLUSION**

The State Board of Elections' decision should be reversed. The decision amounts to rulemaking, but was done without following the required procedures of the Administrative Procedure Act. Even if the State Board could act without rulemaking, the

decision exceeded its authority. The board's conclusion was wrong as a matter of law — ignoring the wording, history and purpose of the campaign finance law — and it was entered arbitrarily and capriciously because it was based on an issue, the town's authority to enact public financing, not before the board. If the decision were correct, it still should not be applied retroactively to punish candidates who did nothing more than rely upon an ordinance whose validity had not been challenged.

RESPECTFULLY SUBMITTED, this the ____ day of October 2002.

THARRINGTON SMITH, L.L.P.

Michael Crowell
State Bar No. 1029
Post Office Box 1151
Raleigh, North Carolina 27602
Telephone: 919-821-4711
Facsimile: 919-829-1583

Attorneys for Petitioners

(57)

**CERTIFICATE OF SERVICE**

I certify that a copy of this **Brief of Petitioners** was served this day by United States first class mail addressed to:

Susan K. Nichols
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

This _____ day of October 2002.

_____
Michael Crowell