

Questions about H2GO Chairman's use of the utility's fliers to counter political opponent's claims

By [Johanna Ferebee](#) - October 29, 2019



H2GO Chairman Jeff Gerken is running for re-election. In August, Gerken directed H2GO's Executive Director to create a flier in order to combat claims made by his political opponent, Steve Hosmer. (Port City Daily photo/Johanna Ferebee)

BRUNSWICK COUNTY — In a request that appears to blur the line of using public resources for political purposes, Brunswick Regional Water and Sewer H2GO Chairman Jeff Gerken asked the utility's director to arrange to distribute an informational flier to combat claims lodged by his political opponent.

Local governments are permitted to spend public funds to advertise factual viewpoints or issues. The courts [consider factors](#) including the “style, tenor, and timing” of material to determine whether advertising is promotional or informational. Public funds may only be used for public purposes, per [Section \(2\) of Article V](#) of the North Carolina Constitution. [When challenged](#), the courts review the definition of “public purposes” on a case-by-case basis.

Related: [Heated H2GO: You've heard the rumors, here are the facts](#)

Advertising “designed to promote a viewpoint on an issue in order to influence an election,” is not permissible, per the most relevant and applicable case law.

In August, one month after Chairman Gerken’s most vocal critic filed for candidacy specifically aiming to unseat him, Gerken sent an email to H2GO Executive Director Bob Walker.

Gerken said the email had no “political motives.” Others have taken a different view.

The email

In the Aug. 22 email to Walker, Gerken outlined two particular claims his opponent, Steve Hosmer, had recently shared about him:

- “[Gerken] illegally tried to destroy the partially completed H2GO wells
- [Gerken] apparently considered illegally selling H2GO [reverse osmosis] assets”

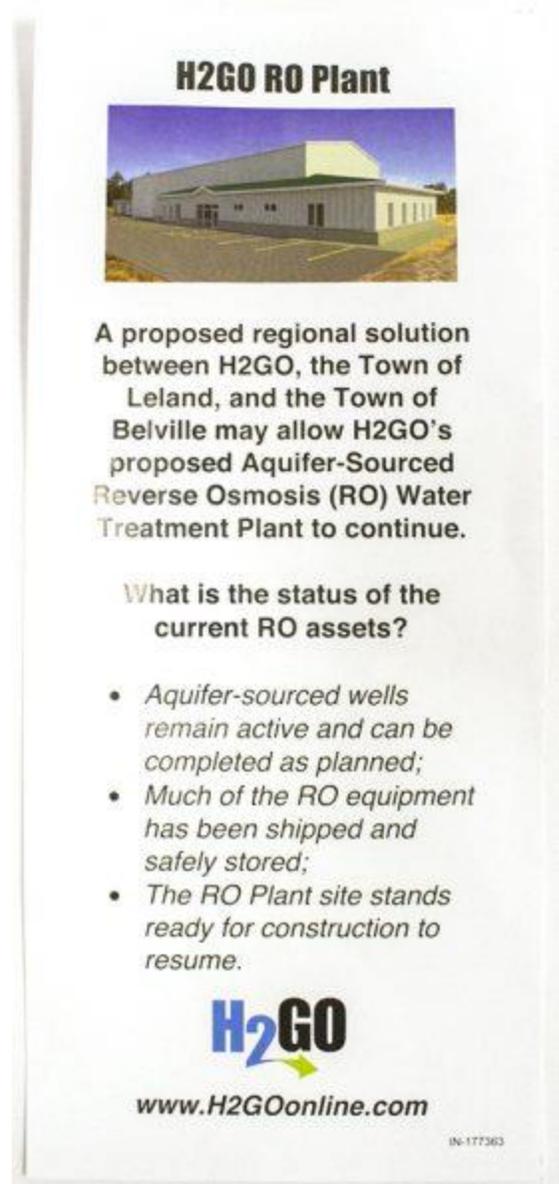
To address these claims, Gerken directed Walker to assign H2GO’s spokesperson, Tyler Wittkofsky, to create an informational bill insert:

“I would like for Tyler to put a bill insert into the next month’s statements simply laying out the true facts about the [reverse osmosis] assets, as included in your statement on Tuesday and in the affidavit you filed a few months ago.

H2GO’s September bill insert, created after the utility’s Chairman sought to address claims lodged by his political opponent. [Click to enlarge.](#)

“I do not want you to mention my name or Mr. Hosmer’s name, since that would run the risk of your appearing to be involved in the election. As we discussed in closed session the other day, that is forbidden, and I want to protect you from that. So a simple statement that the current board, with the help of [H2GO’s litigation attorney Brian Edes], has taken the steps necessary to preserve the assets should suffice.”

Information in the flier, mailed to H2GO’s approximately 10,000 water customers alongside the September utility bill, is factual. The fliers cost H2GO \$441 to produce, according to Wittkofsky.



H2GO RO Plant

A proposed regional solution between H2GO, the Town of Leland, and the Town of Belville may allow H2GO’s proposed Aquifer-Sourced Reverse Osmosis (RO) Water Treatment Plant to continue.

What is the status of the current RO assets?

- Aquifer-sourced wells remain active and can be completed as planned;
- Much of the RO equipment has been shipped and safely stored;
- The RO Plant site stands ready for construction to resume.

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The origin of the flier, emails show, appears to be political in nature. Additionally, the flier itself contains truthful messaging but may appear to critics as promoting a political viewpoint near an election. The proposed “regional solution” referenced in the flier is a heated political topic, which Gerken’s opponents [now staunchly oppose](#). Limited information is available on the proposed settlement agreement — protected under litigation confidentiality — even though it includes the fate of approximately \$126 million in public utility assets. Leland and H2GO [had plans](#) to vote on the proposed agreement earlier this month, but Leland canceled its special meeting and a vote has yet to take place.

Reached for comment, Gerken states he does not view any portion of the flier as containing a political message. “There is nothing in that bill insert that even hints at political motives or mentions the candidates or the upcoming election,” he said.

With multiple options to correct misinformation already exhausted, Gerken said he hoped a flier would deliver accurate information to the utility’s customers.

[Editor’s note: Port City Daily ran [an article specifically addressing the allegations against Gerken](#) in early June.]

“I take my position [as] chairman of the Board of Commissioners of H2GO seriously, and I consider it my duty to fight back against comments that impugn the integrity of the company or any of its commissioners. Since those comments had been made and refuted several times, in news articles and in open meetings, I suggested that another way to try to get the message out to our customers might be through a bill insert,” Gerken said (*read his full response at the bottom of this article*).

Legal experts say state and local elections law do not apply in this matter but case law does. H2GO’s general counsel, Stephen Coble, did not respond to multiple attempts to reach him for comment.

A look at case law

Provided the basic framework of the matter, Frayda Bluestein, University of North Carolina at Chapel Hill distinguished professor of public law and government, said case law applies.

Unlike county or city employees, sanitary district employees are [not protected by parallel state statutes](#) aimed to ensure they are “not subjected to political or partisan coercion while performing their job duties,” according to Bluestein. While N.C. Supreme Court has ruled sheriff’s departments and registers of deeds are not county employees and therefore not protected under [§153A-99](#), Bluestein said no such statute was ever written to protect sanitary district employees (as a sanitary district, H2GO does not answer to any local government body).

In 2002, the N.C. Court of Appeals upheld the trial court’s preliminary injunction in *Town of Cary vs. Dollar*. This case and other relevant case laws that relate to what the government can say subject to an election, applies to this matter, according to Bluestein.

“It’s an interesting situation,” Bluestein wrote in an email. “Without the email setting out the political context, it seems to me that the [flier] might be ok if all of the information is true.”

In *Dollar vs. Town of Cary*, then-candidate Nelson Dollar [successfully sued the town](#) for spending \$200,000 in between September and November 2001 (about \$288,000 in today’s dollars) to promote “smart” and “managed growth” policies, an important issue for the impending election. Dollar didn’t agree with the town’s growth policies. Though the courts found the advertisements to be factual, they sided with Dollar:

“The advertisements, in the context of the Council elections, appear to be more than informational in nature and instead implicitly promote the candidacy of those Council candidates in sympathy with the Council’s position on the Town’s growth. It is not material that the advertisements did not directly support one candidate over another; they promoted only one point of view on an important campaign issue,” N.C. Court of Appeals’ 2002 order concludes.

Absent an intimate understanding of the local political nuance, Bluestein said it’s clear the email is personal. “I think the political statutes are focused more on partisan politicking — making people do things to support their actual campaigns. Here, it’s a mix.” Bluestein said, when reached by phone. “It’s hard to separate sometimes.”

Sometimes, political directives are clear: if you don’t do x, then y. But in this case, the political nature of the directive is not clear-cut, according to Bluestein. Gerken’s reference to leave out his opponent’s name could be interpreted subjectively — he could be earnestly trying to follow the law as he understands it, or alternatively, he’s working around it.

“So I think there is at least an argument that, ‘I just wanted to make sure that everybody knows the true facts,’” she said.

Origin of flier request

For over a year, Gerken has withstood consistent criticism at H2GO Board meetings. His now opponent, Hosmer, has organized the brunt of the opposition through the group Clean Water Team, aimed largely at Gerken himself but also at the anti-reverse-osmosis-plant commissioners Bill Beer and Trudy Trombley. Together, Gerken, Beer, and Trombley have held a consistent 3-2 majority block on topics of debate.

Hosmer announced his candidacy alongside fellow Clean Water Team organizer, Barry Laub, on July 11. Four days later, Commissioner Beer emailed Gerken with a pitch in an email with the subject line, “Attorney client confidential – Clearing up misinformation.” (*Author’s note: H2GO’s attorney, Coble, was CC’d. Coble provided Port City Daily’s records request and would have presumably redacted protected information.*)

Beer suggested H2GO send out an informational flier alongside water bills. “Both Hosmer and Laub have been bashing you in our Board meeting. Nothing more than a thinly veiled attempt to degrade their opponents. They and their scripted comments should not be allowed. If either Laub

or Hosmer have scripted comments that bash you it is considered electioneering regardless if those comments are read by non-candidates,” Beer wrote to Gerken.

Two days later, on July 17, Beer pitched the idea to Gerken again under the subject line “Confidential – Suggested 1st communication from H2GO.” This email did not name Hosmer or Laub, but again addressed the topic of correcting misinformation. Beer responded to a request to comment but citing personal obligations said he could not immediately address questions.

On Aug. 11, Commissioner Trudy Trombley, whose seat is expiring but is not seeking re-election, wrote to fellow majority Commissioners and others that the political group needed to “hit hard.”

Under the subject line “hope I didn’t miss anyone,” Trombley addressed the email to: Ron Batleman, husband of Leland Councilwoman Pat Batleman; former H2GO candidate and current Leland Transportation Oversight Committee board member Brayton Willis and his wife, Debra Willis, Leland Planning Board member; Mike and Ann Rush; Commissioner Beer; Chairman Gerken; Bill Puso.

“I know we’ve talked about taking the high road, but I truly believe that will not work in this campaign. We need to hit hard at the inconsistencies and collaboration between SH, BL, and MM. challenge their statements, ask who they are working for (Belville) etc. In printed material make a list of SH statements and across from that the truth,” Trombley wrote in the Aug. 11 email.

Presumably, “SH” stands for Steve Hosmer, “BL” stands for Hosmer’s running mate, Barry Laub, and “MM” stands for Mike McGill, Belville’s spokesperson.

Then, on Aug. 22, Gerken formally requested the creation of the flier, asking Walker to omit both his name and his opponent’s name.

Walker did not respond to a question asking whether he raised or had any legal concerns with carrying out Gerken’s directive. Each Commissioner and Walker personally submitted their requested electronic communication records to Coble, who then supplied the records to Port City Daily. Gerken did not include his Aug. 22 email in his batch; Walker did. Asked to explain the email’s absence, Gerken said his failure to include it was inadvertent.

Both Beer and Trombley failed to include Trombley’s Aug. 11 email in their batches, while Gerken did include the email in his. Beer failed to include his initial July 15 email in his batch, while Gerken included it in his.

Records show Walker still submits daily activity logs to Commissioners, a requirement [imposed as a response to his cooperation](#) in transferring H2GO’s assets to Belville in 2017. The specially-appointed Superior Court Judge Charles Henry ruled in April the transfer was [illegal, null, and void](#), but Belville is appealing.

(Author’s note: Read the aforementioned emails in their entirety at the bottom of this article)



Steve Hosmer is running for a seat on H2GO's Board of Commissioners alongside running mate Barry Laub. Both aim to unseat Chairman Gerken; Commissioner Trudy Trombley is not seeking re-election. (Port City Daily photo/Johanna Ferebee)

The claims

Hosmer said the first claim that Gerken “illegally tried to destroy” H2GO’s wells should have perhaps stated “considered plugging” instead of “tried to.”

The topic of supposedly destroying H2GO assets is a [hotly debated one](#), with Walker affirming in an affidavit no Commissioner ever directed him to concrete the wells. Hosmer cites Commissioner Rodney McCoy as a source of this claim, and cited a (previously unreported) legal letter sent to H2GO from Belville to stop any action at the wells. Belville’s spokesperson confirmed the 2018 letter but could not provide it, citing legal confidentiality.

As for the second claim, Hosmer cited a comment Trombley made at a December 2018 board meeting, “looking directly at Gerken,” according to Hosmer. At the meeting, Trombley said she thought certain reverse osmosis [equipment was going to be sold](#) during a discussion about storage costs.

Hosmer said regardless of the absolute validity of the claims, his conclusion remains:

“None of this provides justification for what Gerken did (using staff time and organization funds for a politically motivated communication) except in his own mind and in the minds of his running mate, wife and friends. If we look at the facts, my comments did not attack H2GO, they were directed only at the Chairman based on information I received or actions I viewed.

“No specific harm was done to H2GO based on either of these claims therefore a response from H2GO was neither required nor appropriate nor, perhaps, legal. To my way of thinking, this was still a personally directed effort to create political advantage or to fight perceived political disadvantage in an election year during the campaign.”

Call for investigation

The accusation of using public funds for a political purpose is a familiar one for Gerken. In 2017, he called for an investigation into the use of H2GO’s funds that paid for the communication services of WaterPIO, owned by Mike McGill.

McGill was hired to promote the reverse osmosis plant in May 2017 by H2GO’s board in a split 3-2 vote. Gerken [told WECT](#) he was concerned WaterPIO’s resources would be used to try and influence the election. In a Facebook post days after the election, McGill wrote his company spent significant time “trying to help some good people at H2GO win final support for their construction of a new water plant,” but lost the third-place spot by 18 votes (indeed, Beer’s election swung the board’s power in opposition to the plant).

McGill defended himself to WECT, stating he didn’t promote any candidate at any time.

Gerken said he does not see any parallels between his 2017 concern about the use of WaterPIO and the current matter involving the fliers. “I do not see any parallel between that concern and this attempt to correct false information that had been sent to a number of members of the public,” Gerken wrote in a statement.

Hosmer’s claims in question involve Gerken, not H2GO as an entity. Asked why Gerken felt it was necessary to correct misinformation through H2GO as an entity, rather than doing it personally, he said, “His claims were not directed at me personally, they were aimed at my actions as a commissioner. Hence, it would certainly have been appropriate to address those claims through the company’s communications channels.”

McGill, speaking personally and not as Belville’s spokesperson, is calling for an investigation into Gerken’s “possible violation of election law” (McGill is currently contracted with Belville, a contract that transferred along with H2GO’s assets in 2017 and has since been renewed).

(Author’s note: Monday afternoon, McGill’s company WaterPIO shared a press release on behalf of Belville Mayor Mike Allen which critiques Gerken and his running mate, John Bradley. Port City Daily is reviewing the potential issues relating to this use of public resources for a potential political purpose).

“It’s clear that – in a directed response to allegations made by his political opponent – Chairman Gerken required H2GO staff to perform work specifically designed to benefit his political campaign on H2GO time,” McGill wrote in a statement (*read his full statement below*).

“Since Gerken called for an investigation into my work using the same allegation, today I call for an investigation into his possible violation of election law,” he said.

Read Chairman Gerken’s full response below:

Thank you for the opportunity to respond to your questions about the email that I sent to Mr. Walker on August 22, suggesting that he take steps to clarify some statements that had been made in an email sent out by Steve Hosmer to the effect that I had 1) illegally tried to destroy the partially completed H2GO wells, and 2) considered illegally selling H2GO assets. Mr. Hosmer made those statements in spite of the fact that Mr. Walker had explicitly refuted those allegations during the H2GO Board meeting the night before. Additionally, the Port City Daily had previously published an article which included Mr. Walker’s sworn statement that those charges were not true.

I take my position [as] chairman of the Board of Commissioners of H2GO seriously, and I consider it my duty to fight back against comments that impugn the integrity of the company or any of its commissioners. Since those comments had been made and refuted several times, in news articles and in open meetings, I suggested that another way to try to get the message out to our customers might be through a bill insert.

H2GO does from time to time include bill inserts to advise our customers of ongoing matters of interest. Those inserts are composed by the staff and then reviewed by the commissioners before being sent out. You have included a copy of the insert that went out after my suggestion. It speaks about the proposed regional solution which would allow the RO plant to be built, and then also includes three bullet points about the status of the RO assets, including the wells. There is nothing in that bill insert that even hints at political motives or mentions the candidates or the upcoming election.

With that, I will respond to your specific questions:

- *My failure to include the subject email was totally inadvertent. I responded to your public records request as quickly as possible, and in my haste, I failed to notice this one. It appears that you received a copy of it, probably from Mr. Walker’s response to the public records request, so the public was not harmed by the omission.*

- *In the last paragraph of the email, I made it clear that I did not want this to be a campaign-related request, precisely because I did not want to have Mr. Walker do anything that might violate his duties as an officer of H2GO. I simply wanted to make sure that the public did not have any impression that I, in my capacity as chairman of the board of H2GO, had directed anyone to commit acts that could have been seen as illegal. Note that Mr. Walker had already*

submitted an affidavit stating that there had been no effort or action to waste any of the assets. The issue in 2017 involved my concern that the board at that time had inappropriately used the services of a contractor for their own political purposes. I do not see any parallel between that concern and this attempt to correct false information that had been sent to a number of members of the public

- *The two claims cited in my email to Mr. Walker were re-statements of information that had been disseminated by Mr. Hosmer to the effect that I, in my capacity of chairman of the board of H2GO, had ordered acts that Mr. Hosmer deemed to be illegal, acts which had not occurred. His claims were not directed at me personally, they were aimed at my actions as a commissioner. Hence, it would certainly have been appropriate to address those claims through the company's communications channels.*

- *When false claims are made about the organization of which I am the chairman of the board, I feel that it is necessary to counter those claims. I am being attacked on social media right now for having not corrected some information on the H2GO website that I consider political and/or misleading. I have chosen not to do so primarily to avoid the impression that I might be trying to influence the election.*

- *The bill insert that I had suggested was to correct misinformation about H2GO that had been sent out at a time when we were in the middle of intense negotiations to bring about a negotiated settlement of the lawsuit that has kept the communities inflamed for nearly two years. The timing of that false information is, in my mind, highly suspect.*

- *I don't see anything that even hints at a political viewpoint in the bill insert that was sent out.*

Read Mike McGill's full response below:

Two years ago, Jeff Gerken falsely accused me of illegally working on a political campaign while I was under contract to H2GO.

He stated on WECT that my writing [fliers] with positive information about the RO plant was a possible violation of election law and called for an investigation into my H2GO work.

This effort to harm my firm fell in line with a previous email to supporters stating he would punish me and my firm after the election was over.

Gerken withdrew his call for the investigation days later after my public records request revealed the "Punish McGill" email. He decided he wanted to "move on."

Two years later, now-H2GO Chairman Gerken did exactly what he falsely accused me of in 2017. And it's all in writing for everyone to see.

It's clear that – in a directed response to allegations made by his political opponent – Chairman Gerken required H2GO staff to perform work specifically designed to benefit his political campaign on H2GO time.

Since Gerken called for an investigation into my work using the same allegation, today I call for an investigation into his possible violation of election law.

To be clear, I do so not as a representative of Belville, but as a person falsely targeted by Jeff Gerken while I was under contract to H2GO back in 2017.