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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

December 23, 2003

The Honorable Bessie Moody-Lawrence
Member, House of Representatives
219 Bowser Street
Rock Hill, South Carolina 29730

Dear Representative Moody-Lawrence:

In a letter to this office you raised several questions regarding a school referendum. You asserted that citizens had believed that they were voting for the expansion of a particular school. Now an early childhood center is being built near an existing structure and a new principal is being named. You indicate that citizens are desirous that the current principal be over the entire educational facility. You specifically asked:

1. Can a school district "now change or designate a facility as new, after it was presented to, relied upon by the voting public, and placed on the ballot as a referendum for the expansion of an existing facility?"
2. Is calling a building a separate facility an attempt to circumvent the original intent of the referendum as described at the ballot box?
3. Is labeling a facility differently from what was presented to and voted on by the public a violation of the citizens' constitutional rights?

As to status of bond referendums generally, as determined in an August 22, 2003 opinion of this office, the rule in this State is that

...the courts will employ every reasonable presumption in favor of sustaining a contested election. Irregularities or illegalities are held to be insufficient to set aside an election unless the errors actually appear to have affected the result of the election. Knight v. State Bd. of Canvassers, 297 S.C. 55, 374 S.E.2d 685 (1988); Sims v. Ham, 275 S.C. 369, 241 S.E.2d 316 (1980); Gregory v. South Carolina Democratic Executive Committee, 271 S.C. 364, 247 S.E.2d 439 (1978); Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 831 (1954); Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954).

As further determined in the August 22, 2003 opinion,

Account

The Honorable Bessie Moody-Lawrence

Page 2

December 23, 2003

the general purpose of a bond referendum - like any other referendum - "must be stated with sufficient certainty to inform and not mislead the voters as to the object in view" Fairfax County Taxpayers Alliance v. Bd. of County Supervisors of Fairfax, 202 Va. 462, 117 S.E.2d 753 (1961), cited with approval by the South Carolina Supreme Court in Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290, 295 (1970). [quoting Fairfax] See also Dick v. Scarborough, 73 S.C. 150, 53 S.E. 86 (1905) ["voter should have reasonable notice of the (bond) election and the issue it involved."]; Winterfield v. Town of Palm Beach, 455 So.2d 359 (Fla. 1984) [ballot for bond referendum may not fail to adequately inform voters of the proposed project]; McNichols v. City and County of Denver, 120 Colo. 380, 209 P.2d 910 (1949) [question submitted to the electors must not be misleading, but must be specific].

Another prior opinion of this office dated May 8, 2003 stated that

...a bond referendum cannot vest a school district with any greater authority than that allowed by existing law...Moreover, a ballot referendum may not confuse or mislead the voter.... The general test applied by our Supreme Court as to whether a particular referendum is upheld or set aside is whether "when viewed as a whole, [the referendum] ... would likely mislead the average voter." Lowery v. Bright, 234 S.C. 279, 107 S.E.2d 769 (1959). It is the purpose of a bond referendum to "determine the will of the voters upon the assumption of a public debt to the amount of and for the object proposed." Fairfax County Taxpayers Alliance v. Bd. of County Supervisors of Fairfax, 202 Va. 462, 117 S.E.2d 753 (1961). The general purpose of the debt "must be stated with sufficient certainty to inform and not mislead voters as to the object in view" The painstaking details of the proposed work or improvements, of course, need not be set out in the ballot. Id.

As expressed in that same opinion, in Ex parte Tipton v. Smith, et al., 229 S.C. 471, 93 S.E.2d 640 (1956) the South Carolina Supreme Court articulated the general standard for legal sufficiency of a referendum. Quoting with approval the Massachusetts case, In re Opinion of Justices, 271 Mass. 582, 171 N.E. 294, 297, 69 A.L.R., the Court stated that the referendum

... must be complete enough to convey an intelligible idea of the scope and import of the proposed law. It ought not to be clouded by undue detail, nor yet so abbreviated as not to be readily comprehensible. It ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy. It must contain no partisan coloring. It must in every particular be fair to the voter to the end

The Honorable Bessie Moody-Lawrence
Page 3
December 23, 2003

and that the intelligent and enlightened judgment may be exercised by the ordinary person in deciding how to mark the ballot.

93 S.E.2d at 642. In Tipton, the Court found that the ballot at issue was materially misleading and thus declared the election invalid. See also Heinitsh v. Floyd, 130 S.C. 434, 126 S.E. 336, 337 ["To give effect to the [wording of the ballot] would be to approve the submission of constitutional amendments under forms which would procure their adoption by deceit."].

In summary, your specific questions regarding the referendum addressed in your letter concern the legal impact upon the referendum should it be determined that the voters in that referendum were misled by the facts presented. In short, should a court find that a material fact was omitted or the public misled by what was proposed as compared to what evolved as a result of the referendum, you wish to know the legal ramifications thereof.

In responding to your questions, as referenced in the August 22, opinion, it must be acknowledged that

...an opinion of the Attorney General cannot adjudicate factual issues. Therefore, we are unable to determine how many, if any, specific voters were misled by the wording of the...referendum...However, the fact that the bond referendum passed...is a matter of undisputed public record. Applying the South Carolina case law as well as the other case law referenced above, we reiterate that under these circumstances we do not envision that a court would reasonably choose as its remedy to conclude that the bond referendum is invalid. As stated in earlier opinion of this office concerning a municipal bond referendum, "the effect of the referendum question is to limit the use of the funds for the purposes set forth" in that question. Op. S.C. Atty. Gen., June 18, 1994. Thus, it is highly probable that any court remedy would go to the "application of the proceeds of the sale of the bonds" as opposed to the validity of the referendum or the bond issuance, sale, repayment, or the imposition of any tax in support thereof." Connelly v. Beason, supra. See also, Sarratt v. Cash, 103 S.C. 531, 88 S.E. 256 (1916); Redmond v. Lexington School Dist. No. 4, 314 S.C. 431, 445 S.E.2d 441, 444 (1994).

As a result, the ultimate determination of whether the information provided as part of the referendum referenced by you was in fact materially misleading or undermined the referendum must be made by a court. Likewise, only a court can determine whether bond proceeds are lawfully being expended consistent with their authorized purpose. However, to be of some assistance, I will attempt to advise you as to what we perceive the applicable law in this area to be.

As previously noted, it is clear that our Supreme Court recognized in Tipton that a referendum must "accomplish[] the fair and intelligible submission of the question to which the electorate is entitled and which the law requires." 93 S.E.2d at 644. If in fact some or all of the

The Honorable Bessie Moody-Lawrence

Page 4

December 23, 2003

electorate voting in the referendum referenced by you were led to believe one state of facts which differs from how the referendum is now being implemented, it is our opinion that such could result in a serious legal challenge by a taxpayer

As referenced in the previously cited May 8 opinion of this office, a somewhat similar situation was dealt with by the North Carolina Supreme Court in its decision in Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971). There, a suit was brought to enjoin the expenditure of funds on the basis of misleading representations by city officials as part of a bond issuance for a civic center. It was alleged that as part of the campaign leading up to the referendum, voters were led to believe that the civic center would be built on the "Brevard Street" site. No site location was actually specified in the ballot. After the election, city council approved construction of the civic center on the "Trade Street" site located four blocks away.

On appeal, the North Carolina Supreme Court noted that "[n]either the ballot, the ordinance, nor any officially adopted document, mentioned the site of the civic center." 179 S.E.2d at 441. While newspaper articles and speeches given by individuals favoring the referendum mentioned the "Brevard Street" site, no "official action on the part of the City Council concerning the site of the civic center prior to the election" was made. Id. The Court summarized the general law in this area as follows:

[i]n most jurisdictions which permit the use of such broad and general referendum ballots, in determining whether there have been misrepresentations sufficient to void the bond election, the courts have consistently looked to the notice of the election, the ballot and the ordinance authorizing the issuance of bonds, i.e. matters which constitute official proceedings in connection with the bond issue.

179 S.E.2d at 444. In addition, the Court emphasized that pursuant to generally applicable legal principles, the motives which induce voters to authorize a bond issuance cannot be inquired into by the judiciary. Id., at 445-446. Moreover, the doctrine of equitable estoppel was deemed inapplicable to the City because "[i]t is generally recognized in North Carolina that the doctrine of estoppel will not be applied against a municipality in its governmental, public or sovereign capacity." Id., at 448. In the final analysis, given the presumption of validity which must be afforded municipal bond elections, as well as all elections, the court refused to set the election aside, concluding that

The record fails to show that enough voters relied on the representations as to the site of the civic center to change the result of the election. The facts are not such as to require this Court to infer that a sufficient number of voters were misled. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 556; Talbott v. City of Lyons, 171 Neb. 186, 105 N.W.2d 918. See also 1 A.L.R.2d 350; Gordon v. Commissioners' Court of Jefferson County, 310 S.W.2d 761 (Texas 1958); Scott v. City of Orlando, 173 So.2d 501 (Fla.App., 1965).

The Honorable Bessie Moody-Lawrence
Page 5
December 23, 2003

The courts will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. Burton v. Reidsville, 240 N.C. 577, 83 S.E.2d 651; Housing Authority of the City of Wilson v. Wooten, 257 N.C. 358, 126 S.E.2d 1010.

Applying the authorities above set forth, we conclude that the misrepresentations made as to the site of the civic center did not vitiate Question No. 1 as submitted to the voters of Charlotte in the bond issue election held on 12 December 1969.

179 S.E.2d at 448-449.

Again, this office cannot make factual determinations in an opinion. As a result, a court would have to make the ultimate determination as to whether the information supplied to the electorate in the referendum cited by you was materially misleading or undermined the referendum. Again, these and other facts would have to be gathered and considered by a court as part of any suit which might challenge this portion of the bond issuance. Consideration could be given to checking with the bond attorney as to the questions you raised.

A court ultimately would need to determine factually the extent to which voters were influenced by the information provided prior to the referendum and whether that information constituted a material misrepresentation. A court would also have to determine whether the bond proceeds could be expended for the purposes desired.

Of course, as we have emphasized throughout, only a court could decide these issues. This Office cannot make factual determinations nor relate those factual findings to the law in question here. However, in our opinion, substantial legal issues are raised by your letter, issues which traditionally are adjudicated either through legal action.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General