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OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

August 22, 2003

The Honorable James H. Harrison
Member, House of Representatives
512 Blatt Building
Columbia, South Carolina 29211

Dear Representative Harrison:

You note in your recent letter that this Office issued opinions on May 8 and May 14 concerning the purchases of property for Dreher High School expansion and the expenditure of the proceeds of bonds authorized by a referendum held on November 5, 2002. The first opinion letter was, of course, issued at your request. A follow-up question concerning judicial remedies was presented to us by Representative Leon Howard, to which we responded on May 14. Apparently, you have not seen this opinion letter and we are enclosing a copy thereof for your information. In light of the letter to Representative Howard, you now seek additional explanation regarding the law governing the validity of the bond referendum and the bonds issued pursuant thereto.

You state that it is your information that no proceeds from the November 5, 2002 referendum were "used ... to acquire land for the expansion of Dreher High School." Instead, you indicate that "proceeds of bonds issued under the School District's constitutional debt limit of eight percent (8%) of the assessed value of all taxable property of the District under Article X, § 15(6) of the South Carolina Constitution" were used for the property purchases for Dreher expansion. You have also enclosed the election results of the bond referendum which demonstrate that the referendum passed by a nearly two to one margin.

Your question, quoted from your letter, is as follows:

> [w]ould the facts assumed above and in the earlier opinions cause a court to apply the Constitution and laws of South Carolina to invalidate the referendum and (i) enjoin the issuance of the referendum bonds thereunder or (ii) enjoin either the repayment of such bonds once they have been issued, or the imposition of a tax therefor?

Law / Analysis

It is not necessary to consider the new assumptions you recite to answer your questions, so we do not. Your central questions are answered by our opinions of May 8 and May 14 which are

summarized below. As we previously concluded in those opinions, South Carolina law makes it highly unlikely that a court would invalidate the November 5 referendum or enjoin the issuance of the referendum bonds thereunder. Nor, in our view, is there a reasonable likelihood under South Carolina law that a court would enjoin either the repayment of such bonds once issued, or the imposition of a tax therefor.

Our May 8 opinion discussed the general law governing any alleged material ambiguity or misrepresentation which a court would consider concerning any court action relating to the November 5 bond referendum. We noted therein that, generally speaking, 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, Stackhouse v. Floyd, 248 S.C. 183, 149 S.E.2d 437 (1966), citing Ex Parte Tipton v. Smith, 229 S.C. 471, 93 S.E.2d 640 (1956); 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].

Also, we recognized in the earlier opinion that the general law would extend the presumption of validity to a bond referendum and would not set aside such election unless it were demonstrated that enough voters had relied upon the alleged misrepresentations to change the result of the bond election. May 8 Opinion, supra at p. 13. We quoted the North Carolina case of Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971), a case which refused to set aside a bond referendum for an alleged misrepresentation because it could not be demonstrated that enough voters had been misled to set aside the election. While our May 8 opinion contained somewhat broader language in places, our conclusion therein was that the likely remedy by a court for any alleged misrepresentation in the referendum process would concern the "expenditure of bond [revenues]" relating to the Dreher High School expansion.

We reiterated and elaborated upon this conclusion in the follow-up letter to Representative Howard on May 14. The May 14 letter emphasized that a court "rather than setting aside the bond referendum" would likely fashion its remedy for any alleged misrepresentation based upon the expenditure of bond proceeds for the Dreher expansion. We cited cases where bonds had been approved by voters for one purpose and subsequently used for purposes beyond the scope of such approval. We noted that the typical remedy imposed by the courts was to limit the expenditure of bond proceeds to the specifically authorized purpose. See e.g., Little Portion Franciscan Sisters, Inc. v. Boatright, 26 S.W.2d 443 (Mo. 2000).

The general rule in South Carolina 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). See also, Sykes v. Belk, supra. Quoting our Supreme Court in Connolly v. Beason, 100 S.C. 74, 84 S.E.297 (1915), in the typical situation, a variance in the bond referendum "does not affect the validity of the bonds .... It goes only to the application of the proceeds of the sale of the bonds."

As we emphasized in our opinion of May 8, 2003, 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 November 5 bond referendum. Nor, as stated above, can we make any determination or assumptions regarding what types of funds were or were not already used to purchase the property for the Dreher expansion; we do not deem this issue to be relevant to the question of the validity of the November 5 referendum. However, the fact that the bond referendum passed by a large margin of nearly 2 to 1 is a matter of undisputed public record. Applying the South Carolina case law as well as 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 an 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).

In Commissioners of Public Works of Town of Summerville v. Bank of Dorchester, 115 S.C. 183, 105 S.E. 32 (1920), the South Carolina Supreme Court succinctly summarized the law in this area as follows:

> [t]hat there is an ice-manufacturing plant in connection with the electric lighting plant, which is to be included in the purchase as part of the latter [is not controlling]. That is no objection to the validity of the bonds. The purchaser of the bonds is not bound to see that the commissioners apply the proceeds to the purposes intended, and no other. He may presume that the commissioners will proceed according to the law in the performance of their duties. Jones v. Camden, 44 S.C. 319, 23 S.E.141, 51 Am.St.Rep. 819.

105 S.E. at 33.

Other cases are in accord. See, Banister v. Lollis, 183 S.C. 218, 190 S.E. 511 (1937) [every reasonable presumption will be indulged to sustain an election and the manner and form of an election will not be allowed to defeat the undoubted will of the people clearly expressed] Clinkscales v. Fant, 116 S.C. 206, 107 S.E. 515 (1921) [irregularities in bond referendum "did not appear to have affected that result of the election"]; Jones v. City of Camden, supra [bond purchasers "could not be affected by any misapplication of the proceeds of the bonds."]; Verner v. Muller, 89 S.C. 117, 71 S.E. 654 (1911) [irregularity not sufficient to affect the result will not vitiate a bond election]; Yonce v. Lybrand, 254 S.C. 14, 173 S.E.2d 148 (1970) [same].

Conclusion

Once again, to summarize our opinions of May 8 and May 14, the judicial remedy for any alleged material misrepresentation concerning the November 5 bond referendum for Richland District One would likely relate to the expenditure of the bond proceeds rather than the validity of the bond referendum or the bonds themselves. The case law in South Carolina is clear that the likely remedy, if any is warranted, would focus upon the expenditure of the proceeds of the bond sale, rather than the validity of the referendum or bonds.

I trust this letter answers your questions.

Yours very truly,

Henry McMaster

HM/an
Enclosure: Op. S.C. Atty. Gen., May 14, 2003