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November 22, 2010

OPINION
OF
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Opinion No. 10-04

BY: Elizabeth A. Glenn
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TO: The Honorable Phil A. Griego
New Mexico State Senator
P.O. Box 10
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The Honorable Nancy Rodriguez
New Mexico State Senator
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The Honorable Luciano "Lucky" Varela
New Mexico State Representative
1709 Callejon Zenaida
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QUESTIONS:

1. Can a school district use funds from a general obligation bond for capital projects when those projects were not included in the plan for the use of the funds that was presented to the voters?

2. Would a district need to seek the approval of the Attorney General's Office before changing the use of the bond funds?

CONCLUSION:

1. A school district is required to use funds for the purposes specified in the resolution passed by the local school board for issuing the bonds, the notice of election on the bond issuance and in the question posed on the ballot. The district is not bound by representations of district officials and employees regarding the use of bond proceeds that are not reflected in the resolution, notice and ballot question.

2. An answer to the second question is not required because New Mexico law does not permit a school district to change the use of bond proceeds from that specified in the resolution, notice and ballot.

FACTS:

The following ballot question was submitted to and approved by qualified electors of the Santa Fe Public School District in a regular school district election held on February 3, 2009:

> Shall the Santa Fe Public School District issue $160,000,000 of general obligation bonds to (1) erect, remodel, make additions to and furnish school buildings within the district (2) to purchase or improve school grounds (3) to purchase computer software and hardware for student use in public schools (4) to provide matching funds for capital outlay projects funded pursuant to the Public School Capital Outlay Act: or any combination of these purposes?

The ballot question was included in the Resolution and Proclamation issued by unanimous vote of the Board of Education for the District at a meeting on November 5, 2008. The Resolution and Proclamation was filed with the Santa Fe County Clerk and public notice of the election was published as required by applicable law. See NMSA 1978, § 1-22-5 (1991).

According to the opinion request,[1] the administration for the District prepared and distributed a "Voter's Notebook" before the February 3 election that provided

[1] The request included a legal analysis prepared by Think New Mexico. See memorandum from Fred Nathan and Kristina Fisher to Representative Lucky Varela, Senator Phil Griego, Senator Nancy Rodriguez and Attorney General Gary King (July 7, 2010). Subsequently, Think New Mexico provided us with additional information and analysis. See letter from Fred Nathan, Executive Director and Kristina Fisher, Associate Director, Think New Mexico to Attorney General King (July 28, 2010). We also received a response to Think New Mexico's July 7 memorandum from the Santa Fe Board of Education's legal counsel. See letter from Arthur D. Melendres, Modrall, Sperling, Roehl, Harris & Sisk, P.A. to the Honorable Gary K. King (Sept. 23, 2010).

information about the proposed bond issuance and corresponding mill levy. The brochure included a description of projects at specific schools that would be funded by the bonds, if approved. The District administration also held PowerPoint presentations throughout the District outlining the District's plans for the bond proceeds, including specific projects to be funded.

After the bonds were approved, the District used the proceeds for some projects that were not described in the District's plan presented to the public and voters. It is not alleged that the District's use of the bond proceeds was outside the scope of the actual ballot question.

ANALYSIS:

The New Mexico Constitution limits the purposes for which a school district may incur debt. Article IX, Section 11 provides, in pertinent part:

> [N]o school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district ... and a majority of those voting on the question has voted in favor of creating such debt.

The state constitution contains similar limitations on debt incurred by the state, counties and municipalities. N.M. Const. art. IX, §§ 8, 10, 12. Article IX, Section 9 provides:

> Any money borrowed by the state, or any county, district or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, and to no other purpose whatever.

There appear to be no New Mexico cases addressing whether a school district is bound by statements and representations made by district officials and employees regarding the use of bond proceeds. However, New Mexico judicial and other legal authorities evaluating whether a governmental entity properly spent bond proceeds under the constitutional debt limitations have not looked beyond the proposition submitted to and approved by voters.

For example, in State ex rel. Board of County Comm'rs v. Montoya, 91 N.M. 421, 575 P.2d 605 (1978), the New Mexico Supreme Court addressed a county's general obligation bonds that were "authorized and approved" and "issued by the county for the specific purpose of constructing and equipping a county detention facility." The Court held that "[t]his is the purpose for which the voters approved bonds" and the county could use the bond proceeds only for that purpose. Id. at 422-423, 575 P.2d at 606-607.

See also N.M. Att'y Gen. Op. No. 58-234 (1958) (a municipality could not divert general obligation bond proceeds from the purpose approved by voters); N.M. Att'y Gen. Op. No. 5656 (1953) (county could not change use of bond proceeds from that specified in the notice of the bond election); N.M. Att'y Gen. Op. 1807 (1916) (school district was required to use bond proceeds for purpose specified in notice of election and approved by voters).

In a slightly different context, the New Mexico Supreme Court expressly declined to go outside the language of the ballot proposition to determine voter intent. In Board of Educ. v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964), the Court addressed the constitutionality of a school bond election. The Court held the election invalid because the resolution calling for the election, notice of election and ballot broadly described the purpose of the bonds as "for school purposes," which the Court found insufficient under Article IX, Section 11. In reaching its decision, the Court rejected the contention that the language used in the election materials "sufficiently informed the electorate of the purpose of bond issue and ... does not violate the constitution because it must be presumed that the money raised from the sale of the bonds will be used for constitutional purposes...." Id. at 472, 394 P.2d at 987. According to the Court:

> we cannot, by assuming that the proceeds would be properly used, read into the language ["for school purposes"] that they would not be improperly used. There is no way to determine what was in the minds of the various electors who voted on the issuance of the bonds as to what they thought "school purposes" meant.

Id. at 472-473, 394 P.2d at 988.

The majority of cases from other states addressing the issue hold that statements and representations made by public officials, the news media and others to the general public in a campaign for or against a government bond issue do not affect the validity of the bonds unless they are part of the official proceedings necessary for the issuance of the bonds. See Associated Students v. Board of Trustees, 155 Cal. Rptr. 250 (Cal. Ct. App. 1979) (pre-election statements of college officials and other interested persons regarding the intended use of bond proceeds did not bind the college board of trustees); Sykes v. Belk, 179 S.E.2d 439 (N.C. 1971) (press releases and public speeches identifying a specific site for civic center to be funded by bonds did not prevent the city from building on a different site where nothing in the ballot, ordinance or official document mentioned a location for the center); Sooner State Water, Inc. v. Town of Allen, 396 P.2d 654 (Okla. 1964) (otherwise regular bond proceedings are not invalidated by representations during the campaign that are not part of the official bond proceedings); Taxpayers for Sensible Priorities v. City of Dallas, 79 S.W.3d 670, 672 (Tex. Ct. App. 2002) (holding that "the bond proposition itself is the contract between voters and the City and extraneous documents not approved by the City Council do not form any part of that contract"); King County v. Taxpayers of King County, 700 P.2d 1143 (Wash. 1985) (statements of

public officials during campaign did not affect unambiguous language of bond measure approved by voters).[2]

An important reason underlying the majority view, which the New Mexico Supreme Court touched on in Board of Educ. v. Hartley, is that the official proceedings – the election resolution, notice and ballot – are the most reliable indicia of the voters' intent. For example, in City of Los Angeles v. Dannenbrink, 234 Cal. App. 2d 642, 44 Cal. Rptr. 624 (Cal. Ct. App. 1965), the California Court of Appeals addressed allegations that voters were misled by campaign statements made by public officials and private citizens in connection with a charter amendment authorizing revenue bonds. According to the court:

> [I]f the enlightenment of the electorate should be a subject of judicial inquiry, the court could not infer that the knowledge of the voters was limited to what appeared in the campaign propaganda of the protagonists. The full text of each proposed charter amendment ... was mailed to every voter well in advance of election day. No public official or private citizen is authorized to change the substance or effect of such a proposal by the characterization he employs in advocating its adoption or defeat.

44 Cal. Rptr. at 632. Accord Mills v. S.F. Bay Area Rapid Transit Dist., 261 Cal. App. 2d 666, 68 Cal. Rptr. 317, 320 (Cal. Ct. App. 1968) (citing Dannenbrink for the proposition that "statements disseminated to the general public" before a bond election "cannot be deemed to modify the intentionally broad language of the proposition in fact submitted to the voters, the call of election published to them, and the statutes authorizing the procedure adopted"). See also Detroit United Ry. v. City of Detroit, 255 U.S. 171 (1921) (refusing to invalidate an election approving the acquisition of a city railway system based on city officials' representations regarding the election's purpose and effect: "the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry ... so long as the means adopted for submission of the question to the people conformed to the requirements of the law"); Public Serv. Co. of Ind. v. City of Lebanon, 46 N.E.2d 480 (Ind. 1943) (addressing a challenge to a utility purchase approved by voters and holding that "courts may not go behind the result of an election to ascertain the persuasions that motivated the voters").

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[2] In its memoranda provided to this Office, Think New Mexico relied on Texas judicial and attorney general decisions suggesting that representations made by government officials outside of an official bond election proceeding might create a binding agreement with voters. See Devorsky v. La Vega Independent Sch. Dist., 635 S.W.2d 904 (Tex. Ct. App. 1982); Tex. Att'y Gen. Letter Op. No. 92-71, 1992 WL 525309. In Taxpayers for Sensible Priorities, cited above in the text, the Texas Court of Appeals expressly rejected the reasoning used in those opinions. See 79 S.W.3d at 676. Aside from Devorsky, the cases cited in Think New Mexico's memoranda are distinguishable because they do not address statements and representations made outside the official bond proceedings.

Limiting evidence of voter intent to the official proceedings avoids the uncertainty regarding the results of an election that would otherwise inevitably result. As observed in the Associated Students opinion, "if whenever a group of voters considered that their electoral will had been frustrated, they could argue for implementation of *their* understanding of the sense of official assurances, preelection statements, publicity and unofficial discussions, an intolerable number of disputes would result." 155 Cal. Rptr. at 255.

In light of the arguments expressed by the majority view, as discussed above, we believe that a New Mexico court reviewing the issue would conclude that a school district may use bond proceeds for the purposes specified in the bond resolution, notice of election, ballot proposition and other official bond proceedings. Unless they are part of the official proceedings, statements made by school officials and members of the administration regarding the use of the proceeds or the effect of the vote taken at the election cannot be used to modify the ballot proposition and do not bind the district.

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