

MEMORANDUM

VIA ELECTRONIC MAIL

TO: Ron Bolandi

FROM: Tony Solimine, Esq.
Liesel Pajarillo, Esq.

RE: Use of Bond Proceeds and Procedure for the Closing/Sale of the Elementary School

DATE: October 17, 2022

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As per your request, the following memorandum outlines: (1) whether the demolition of the Elementary School is required by The Board of Education of the Township of Alexandria in the County of Hunterdon, New Jersey (the “Board” when referring to the governing body and the “School District” when referring to the territorial boundaries governed by the Board); and (2) the procedure for the closing and sale of the Elementary School, if the Board decides to sell the Elementary School.

Appropriate Use of Bond Proceeds

Specifically, at the November 2020 election (the “Election”), the voters of the School District approved the following bond proposal, which read, in part, “[t]he Board of Education of the Township of Alexandria in the County of Hunterdon, New Jersey is authorized to (a) consolidate its school facilities into one facility through the expansion and renovation/upgrade of the Middle School and the demolition and closing of the Elementary school; (b) expend not to exceed \$14,994,229 on the project; (c) apply \$2,000,000 of Capital Reserve Funds towards the Project and (d) and issue bonds in an amount not to exceed \$12,994,229 for such projects... .” The Board has subsequently issued obligations to finance the local share of the projects described therein.

The first question presented is: Does the Board need to undertake the demolition of the Elementary School, as stated in the bond proposal, even if, since the Election, the factual situation has changed and the Board now wants to sell the Elementary School?

Generally, a board of education is required to substantially provide the projects approved by the voters. Further, the Board may only use the bond proceeds for project costs for which the bonds were authorized by the voters as set forth in N.J.S.A. 18A:24-47. Any funds remaining after a project is ‘complete’ must be returned to the voters. Specifically, under the Educational Facilities

Construction and Financing Act, N.J.S.A. 18A:7G-5(o), proceeds on hand after the completion of a project¹ may only be used to pay down principal.²

As bond counsel, we typically receive questions regarding the use of bond proceeds and what a board is required to complete. The answer to this question is very fact sensitive and depends on the original intent of the Board, the understanding of the voters, as well as a determination that the particular cost is related to the implementation of project. Traditionally, the bond proposal is brief and general, as described above. Therefore, the bond proposal approved by the voters provides some flexibility because it is developed based on preliminary project schematics and an initial project scope. Projects in a referendum change and evolve during the planning and course of construction based on several factors.

The members of the Board, as the elected representatives of the School District, have the primary responsibility of determining what reasonably may or may not be included as part of the approved project. This is evidenced by their approval of the vouchers for payment of the costs. Since they are the elected body with the responsibility of making that statutory decision, the scope of review in the event of any challenge should be that the Board's position will be upheld unless they have acted in a way that is deemed to be arbitrary, capricious or an abuse of discretion. Generally the decision should be upheld if it is reasonable and supportable and rendered in good faith.

In determining whether the Board needs to undertake a specific component of the project, we generally look first at the language of the bond proposal, which is general, and then, at the schematic plans initially prepared for the project as well as the project application and cost estimate forms and preliminary and final eligible cost letters sent to the district by the department of education to approve the project. We also frequently look at the public information that was supplied by the district during the development phase of the project leading up to the referendum. The issue becomes one of intent and a determination within the parameters of reasonableness as to what is necessary to complete the project and to implement it consistent with the purpose of the project.

It is clear from the bond proposal referenced above, that the Board was contemplating and the public approved the demolition of the Elementary School. If the Board decides to keep the Elementary School, then we think a strong case can be made that the Board would need to demolish the Elementary School, as originally set forth. However, if the Board is now contemplating selling the Elementary School (the procedure for which is outlined below) because factors pertaining to the use of the Elementary School property have changed since the Election, then an argument can be made that the Board does not need to demolish the Elementary School. Specifically, the municipality has upgraded other fields and the Elementary School property is no longer needed for recreational space. Therefore, it may not make financial sense to absorb the cost of demolishing the Elementary School to simply sell it. If the Board wants to proceed in this manner, the Board would

¹ Capital projects are considered complete for purposes of determining unexpended bond proceeds when: the project has received its certificate of completion; all retainage has been liquidated and a permanent certificate of occupancy has been issued. See N.J.A.C. 6A:26-4.6(a).

² Under prior law, school bond proceeds could be re-appropriated to other purposes, however, under current law this is no longer permissible.

need to take the position that it was satisfying the will of the voters by closing the Elementary School and the demolition was simply a related step, which is no longer necessary. We are happy to discuss this with the Board if this is how they decide to proceed.

Closing of the Elementary School

We have not discussed whether the Board has officially closed the Elementary School, but we have included the requisite steps for your information. In order to close the Elementary School, the Board must obtain approval for the closing from the New Jersey Division of Administration and Finance, Office of School Facilities, PO Box 500, Trenton, NJ (the “Division”).³ The Board must provide the Division and executive county superintendent with the following assurances:

1. The proposed closing is consistent with the School District's approved Long Range Facilities Plan (the “LRFP”) because either (i) the School District has demonstrated that sufficient school-building capacity exists to house students for the five years following the closing; or (ii) the School District has demonstrated through a feasibility study that the benefits of undertaking new construction outweigh those of rehabilitating the school proposed for closure.
2. The use of temporary facilities in the remaining schools does not result or increase from an overall facilities shortage caused by the school closing.
3. The reassignment of students to other schools in the school district does not produce, sustain, or contribute to unlawful segregation, separation, or isolation of student populations on the basis of race or national origin.

The request for approval must also include the recommendation of the executive county superintendent.

Finally, a letter of approval from the Division based on the information set forth above shall be required before closing the Elementary School. The Division shall notify the Board, in writing, of its determination with respect to the requested closing, with a copy provided to the executive county superintendent.

Sale of the Elementary School

Once the Board is in receipt of approval to close the Elementary School, the sale must also be approved by the Department of Education.⁴ The closing and sale may be able to be done simultaneously. In order to receive this approval, the School District must submit a written request to the Division. The school district must send a copy of the request to the executive county superintendent, who shall then make recommendations to the Division. The executive county superintendent will provide a copy of the recommendations to the Board.

³ N.J.A.C. 6A:26-7.5

⁴ N.J.A.C. 6A:26-7.4.

The request should indicate:

1. whether the school district intends to convey the site, rights or interest therein, and/or improvements under an exception to the public sale requirements per N.J.S.A. 18A:20-6; and
2. whether the school district intends to convey the site, rights, or interest therein, and/or improvements thereon that had been conveyed to the school district from the Development Authority or funded in whole or in part by State share under Education Facilities Construction and Financing Act (the “EFCFA”).

We should also discuss how the Elementary School was initially acquired. Were any state funds utilized? If so, there may be an obligation to re-pay some of those funds after the sale of the Elementary School.

The Division shall then determine whether the disposal is consistent with the School District's approved LRFP, or has a negative impact on the educational adequacy of an individual site. The Division shall then notify the Board of its approval or disapproval and send a copy to the executive county superintendent.

Once the Board is in receipt of approval for the sale of the Elementary School, the Board may, by way of recorded roll call majority vote of its full membership, dispose of property no longer needed for school purposes, or that is no longer suitable or convenient for the use for which it was acquired.

Pursuant to N.J.S.A. 18A:20-6, any lands or rights or interests therein sold by any board of education, except lands conveyed as part of a lease purchase agreement, shall be sold at public sale to the highest bidder. The sale must be advertised in a local newspaper at least once per week for two weeks prior to the date of sale, unless the facility is sold to the State, or a political subdivision thereof, in which case they may be sold at private sale without advertisement. The Board may, by resolution, fix a minimum price on the sale, with or without the reservation of the right to accept or reject the highest bid made. The Board may accept or reject the highest bid no later than the second regular Board meeting following the sale. If the Board does not accept or reject the highest bid, said bid shall be deemed rejected. The Board may also choose to sell the Elementary School in accordance with the electronic procurement practices as per N.J.S.A. 40A:11-4.7 et seq.⁵

Please call/email with any additional questions.

⁵ The requirements for an electronic auction are outlined in N.J.A.C. 5:34-5:11.