

How School Boards Can (Legally) Help Secure Voter Approval for School Construction Projects



In March of this year, New Jersey voters in five school districts approved more than \$100 million in new spending. The construction bond referendums will allow the school districts to pay for projects that can't be funded through their annual operating budgets, such as enhanced school security, HVAC upgrades, and new science and technology labs.

As municipal and county budgets remain tight, an ever-increasing number of school districts are turning to referendums. For school board members, it is important to understand how to advocate for referendums without violating your ethical obligations under New Jersey law.

School District Referendum Process Under New Jersey law, a ballot question is required if any school district seeks to issue new bonds for capital improvements to improve existing facilities or to build new facilities. Once voters sign off, a bond referendum authorizes bonds to be sold to raise funds for school projects. The bond debt is subsequently paid off using taxpayer funds over the course of several years.

When bonds are issued, among the funds available to school districts are the "Public Schools Facilities Loan Assistance Fund" and the "New Jersey Public Schools Code Compliance Loan Fund." Under the Public Schools Facilities Loan Assistance

Fund, districts may receive low interest loans to finance not less than 25 percent, and not more than 50 percent, of the total cost of any project, in accordance with the certain criteria contained in the statute, for the purpose of renovation, repair or other alteration of existing school buildings, for construction of new school buildings or for the conversion of existing school buildings to other instructional purposes, whether or not that renovation, repair, alteration, construction or conversion is required to bring buildings that, at the time of application do not meet state health and safety code requirements, into compliance with those requirements. The New Jersey Legislature is required to maintain a minimum of not less than \$105 million on hand to guarantee bonding for school districts at all times. Under the "New Jersey Public Schools Code Compliance Loan Fund," schools districts may receive low interest loans to renovate older buildings that at the time of application, do not meet state health and safety code requirements. Common projects under the fund include removing asbestos and replacing HVAC equipment.

Expenditure of Public Funds While school construction projects provide much-needed improvements for students, they also often come with a hefty price tag, which can often make bond referendums a tough sell to voters. In 2017, 66 percent of school construction proposals were approved by voters, according to the New Jersey School Boards Association. The approval rate was 61 percent in 2016. To secure approval of a construction bond referendum, it is essential to educate the voters of the school district about the merits of the project. However, for school boards and their members, there is a fine line between supporting a referendum and

running afoul of state ethics laws.

As the New Jersey Supreme Court made clear in *Citizens v. Parsippany-Troy Hills*, 13 N.J. 172 (1953), a school board may expend reasonable funds to educate voters about the referendum, but may not spend taxpayer money to advocate for one particular side. “The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint,” the court explained.

In *Citizens*, the New Jersey Supreme Court held that the board’s expenditure was unlawful and outside its authority because the board used public funds to advocate only one side of a controversial issue “without affording the dissenters the opportunity by means of that financed medium to present their side.” In support, it noted that “the exhortation ‘Vote YES’ is repeated on three pages, and the dire consequences of the failure so to do are over-dramatized.” Nonetheless, the court emphasized that other board expenditures would be within the board’s authority to educate voters, such as conducting a public forum at which all may appear and freely express their views pro and con, or radio or television broadcasts taking the form of debates between proponents of the differing sides of the proposition.

It is important to note that subtler advocacy than “vote yes” is still improper. In *Enterline v. Board of Education of the Township of Hillsborough* (1996), the case centered on a newsletter published by the board of education regarding a proposed bond issue. The court held that the newsletter, which involved the expenditure of public funds, advocated passage of the public question and thus exceeded the board’s authority. As noted by the court, phrases like “An approved referendum enables us to continue providing the quality education our children deserve” and

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“responsibly planning...is what the March 28 bond referendum is all about” were functionally exhortations to vote “yes.”

School Ethics Commission Offers Guidance for School Board Members

Individual school members must also tread carefully when supporting a bond referendum. School board members are subject to the School Ethics Act (N.J.S.A. 18A:12-21 et seq.) and the Code of Ethics (N.J.S.A. 18A:12-24.1), which prohibit a wide range of conflicts of interest and require board members to adhere to a strict Code of Ethics. For instance, board members may not share any confidential information about a proposed project or the referendum process. In addition, any information that a board member provides must be accurate.

The Code of Ethics for School Board Members also states that members must abide by the following: “I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.”

Accordingly, school board members are obligated to inform the public when they are acting in their official capacities and when they are acting as private individuals. This is particularly important when advocating in favor of or against a bond referendum. As the Appellate Division of the New Jersey Superior Court made clear in *Cullum v. Board of Education, North Bergen Tp.*, 27 N.J. Super. 243, 248 (App. Div. 1953), “The members of the board of education of a municipality are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been appointed or elected to serve.”

The School Ethics Commission (SEC) has issued several advisory opinions that provide additional guidance on when school board members can engage in private actions or speech with respect to matters impacting the school district. In Advisory Opinion A03-07, the SEC confirmed that board members can write letters to the editor expressing their opinions about the budget (or other school district matters) as long as, in the letter, that person (1) identified himself/herself as a board member; (2) indicated that the letter is not authorized by or written on behalf of the board; (3) provided accurate information that is not confidential; (4) and ensured that his/her private action does not compromise the board.

In Advisory Opinion A36-14, the SEC addressed a school board member’s use of lawn signs, pamphlets, and social media to endorse candidates for election to the board. “You do not give up your fundamental rights as a citizen upon being seated on a board of education,” the SEC advised. “However, as you suspect in your inquiry, certain precautions are necessary.”

With regard to any pamphlets or other publications created by a board member, the SEC advises that they must include a disclaimer, making it clear that the endorsement is as a private citizen and not as a member of the board or on behalf of the entire board. Such a disclaimer would

not be necessary on a generic party-created sign, endorsing the candidate(s) and placed on the lawn of a private residence.

Similarly, use of social media, such as Facebook, Twitter, and Instagram, would require the disclaimer that the endorsement is a personal one and not as a board member or an endorsement on behalf of the entire board. In addition, such posts may only be published on the board member's personal social media account and not one representing the board or the board member in an official capacity, i.e. "Name, Local Board of Education Member."

As for the form of the endorsement, the SEC does not provide specific language. Rather, it advises that "the language must be clear, visible, and indicate your endorsement is as a private citizen and not as a member of the Local Board of Education, nor is the endorsement on behalf of the entire Board."

Establishing a Public Question Political Committee To boost the likelihood of passage and avoid potential ethical concerns, many school districts establish political committees, which are dedicated to advocating for the passage of the referendum. Pursuant to

N.J.A.C. 19:25-1.7, a political committee is defined as follows:

[A]ny group of two or more persons acting jointly, or any corporation, partnership, or any other incorporated or unincorporated association, which is organized to, or does, aid or promote the nomination, election, or defeat of any candidate or candidates for public office, or which is organized to, or does aid or promote the passage or defeat of a public question in any election if the persons, corporation, partnership, or incorporated or unincorporated association raises or expends \$ 2,800 or more to so aid or promote the nomination, election, or defeat of a candidate or candidates or the passage or defeat of a public question.

Political committees must register with the New Jersey Election Law Enforcement Commission (ELEC) and comply with New Jersey's campaign finance regulations. With regard to participation by school board members, it is permissible for them to make con-

tributions in their individual capacities. However, the political committee may not use any resources of the school district to conduct its activities, such as holding events at school facilities or using district email accounts.

Key Takeaway for School Board and Their Members When pursuing a bond referendum, the most important guideline for board members to remember is that providing objective information about the potential benefits and disadvantages of a proposed bond referendum is almost always legal. However, board members must be careful not to use their official positions to convince school district residents to vote yes or no.

For school boards, it is imperative to make sure that all referendum materials are closely reviewed, ideally with the assistance of experienced counsel. When public funds are used, all materials must be objective and balanced. Again, they may not advocate for a particular outcome.

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