



December 7, 2009

Lauren F. Goldberg, Esq.
Kopelman & Paige, P.C.
100 Arch Street
Boston, MA 02110

Re: Wellington School Borrowing Authorization
Our File No. 2009-1423

Dear Ms. Goldberg:

You asked whether a borrowing related to a school project in Belmont is valid. For the reasons explained below, we agree with bond counsel and conclude the borrowing was not validly authorized.

As we understand the situation, the town has been reviewing options for addressing deficiencies at the Wellington Elementary School for many years. The school was originally the town's high school and due to its age and original purpose, has structural and other problems. At one time, the town considered renovating and rehabilitating the school. Eventually, it decided to construct a new facility to replace the existing structure and in March of this year, the Massachusetts School Building Authority (MSBA) approved a grant for the new construction. On June 3, 2009, the town's annual meeting authorized a borrowing of \$39,764,430 "for the design and construction of a new Wellington Elementary School" contingent on the passage of a Proposition 2½ debt exclusion for the borrowing. The vote was unanimous. Shortly thereafter, at a June 8, 2009 special election, the voters approved a debt exclusion for the bonds issued in order to "renovate and reconstruct the Wellington Elementary School" by a vote of 66% to 34%. The debt exclusion was the only matter considered at the special election, which had a turnout of approximately 40% of the town's registered voters.

Bond counsel has advised, however, that he cannot give a favorable opinion on the bond issue. He concluded that a court could reasonably find that the bonds were not validly authorized because of non-compliance with one of the statutory requirements for contingent borrowing authorizations and uncertainty about whether that non-compliance resulted in voters understanding the purpose of the borrowing and exclusion. You argue that voters were well informed about the project and they clearly intended to approve an exclusion for a new school, as indicated by the high turnout and ballot question approval percentage.

A town may authorize a borrowing that will take effect upon voter approval of a Proposition 2½ debt exclusion provided it complies with certain requirements set forth in G.L. c. 59, § 21C(m). That statute provides, in relevant part:

A town may appropriate ... from borrowing, contingent on the passage of a ballot question under paragraph ... (k), but: (1) the statement of the purpose of the appropriation shall be substantially the same as the statement of purpose in the ballot question; (2) the appropriation vote shall not be deemed to take effect until the approval of the ballot question; (3) no election at which the question appears on the ballot shall take place later than the September 15 following the date of an appropriation vote adopted at an annual town meeting, or 90 days after the date of the close of any other town meeting at which an appropriation vote was adopted ... (emphasis added).

In this case, the contingent borrowing was voted at the 2009 annual town meeting and therefore, had to be validated by a successful ballot question by September 15, 2009. The election was held before that deadline, but the project was not described in the borrowing authorization using the same language as the ballot question.

The issue then is whether the stated borrowing purpose is substantially the same purpose as the debt exclusion. The word "substantially" was inserted into the statute in 2000 to address concerns that a contingent appropriation and ballot question had to use the exact same words to describe their purposes in order for the appropriation to be valid. See St. 2000, c. 70. The amendment codified our position that the stated purposes do not have to be worded exactly the same so long as they are similar and describe the same project.

We carefully reviewed the background material you provided, which details the town's deliberations about the Wellington School over a number of years and the information available to voters about the referendum. Where the validity of a debt exclusion or other Proposition 2½ ballot question is challenged because of some deviation from or non-compliance with statutory requirements, for example, use of a non-conforming question form, we do consider, as would a court, the surrounding facts and circumstances and give effect to the election unless the irregularity resulted in voters being uninformed or misinformed of a material fact that had significant potential for influencing the outcome.

Here, the issue is the validity of the town meeting borrowing vote, not the election. Since that vote can only take effect by approval of a ballot question for substantially the same purpose, the surrounding facts and circumstances are still relevant to some extent. If the ballot question had described the purposes as "to replace" the school, for example, we believe a court would most likely decide that purpose was substantially the same purpose as the vote. Even though different words were used, the court would consider the ordinary meaning of "replace" and based on the facts and circumstances conclude that voters understood the ballot question to mean the town intended to construct a new school in place of the existing school. In this case, however, the ballot question describes a different project to voters under any ordinary understanding of the words "renovate" and "reconstruct." It informed them that the town was going to remodel, rehabilitate and repair the existing structure, which is not materially the same as building a new school. Consequently, we agree with bond counsel that a court could reasonably conclude that voters may have believed they were approving a renovation project instead.

We understand that bond counsel has proposed special legislation to make the borrowing effective. We assume town officials have also consulted with the MSBA about whether the town will be able to retain its grant pending favorable action on the legislation, or approval of a new borrowing authorization and debt exclusion referendum. If that is a concern, the special legislation could address that issue as well.

If you have any further questions, please feel free to contact us.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC
CC: Thomas G. Younger, Belmont Town Administrator
Belmont Board of Selectmen
Roger Vacco, Esq.