

CONFIDENTIAL MEMORANDUM

**TO:** Nathan Lavery, Director of Finance, Burlington School District; Clare Wool, School Board Chair  
**FROM:** McNeil, Leddy & Sheahan, P.C.  
**DATE:** June 5, 2018  
**RE:** Capital Bond Authorization

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**Question Presented**

Is the Burlington School District’s present capital project plan within the scope of the authorization by the voters to issue general obligation bonds, approved on March 7, 2017?

**Short Answer**

Yes, the question presented to the voters was sufficient enough to show its character and purpose to accomplish capital improvements to substantially reduce the deferred maintenance of the District’s buildings, it is likely that the present project plan does not materially differ from the authorization granted pursuant to the ballot question, and prior versions of the project plan are not binding upon the District or the City of Burlington so as to require the project to take the form as it was prior to the March 7, 2017 bond election.

**Analysis**

The Burlington City Charter provides that the voters may grant authority to the City Council to “pledge the credit of the City for any purpose by issuing its negotiable orders, warrants, notes, or bonds.” 24 V.S.A. App. § 3-63.<sup>1</sup> At the January 30, 2017 City Council meeting, the Council passed a resolution to place the following question on the March 7, 2017 ballot:

“Shall Burlington’s voters authorize the City Council to issue general obligation bonds or notes in an amount not to exceed \$19 million for the purpose of accomplishing capital improvements at each of the school district’s buildings in order to eliminate or substantially reduce the deferred maintenance of such buildings in order to preserve their value for future educational use?”

Per the Declaration of Election Results from the Annual City Election on March 7, 2017, the ballot measure passed with 5,047 in favor (76.48%) and 1,552 opposed (23.52%). While the affirmative vote did not direct action by the City Council, it did grant the City Council the authority to issue up to \$19 million in bonds for the stated purpose.

In the months after the bond issue passed, the District’s capital project plan has evolved to include the construction of an addition at C.P. Smith and construction of a stand-alone building on the District Property Services property to the east of Champlain Elementary. The

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<sup>1</sup> State laws “shall not in any respect affect or apply to bonds issued under [Section 63].” *Id.* § 3-64.

initial idea behind the capital plan, even prior to the bond question approval, was for the District to address deferred maintenance costs as well as space constraints. The original plan, which focused more on repairs to the existing buildings, would have required additional costs due to displacing administrative offices and students from District school buildings. The present plan, even with the addition to C.P. Smith and the new construction at the Property Services property, still includes other repair and maintenance projects throughout the District. The present plan is expected to allow the Ira Allen building to be used as “swing space” which may be used as temporary space for students. It is anticipated that freeing up this space will ultimately reduce costs and prevent the need to lease temporary space. It is also expected to prevent sunk costs and allow for an overall reduction in deferred maintenance costs across the District’s buildings.

*1. The present capital project plan is consistent with the purpose stated in the ballot question based on a plain reading.*

The question is whether the present capital project plan, which has evolved since early 2017, is nonetheless consistent with the purpose as stated in the March 7, 2017 ballot question. Based on a plain reading of the question, it is likely that bond question covers the capital project plan in its current state.

First, the question answered in the affirmative gives the Council the authority to issue general obligations bonds in an amount not to exceed \$19 million. The project is not expected to require greater than \$19 million in bond funding so the cost of the project is not an issue at this time.

Second, the bonds are to be issued “for the purpose of accomplishing capital improvements at each of the school district’s buildings.” The City Charter provides that the legal voters may vote on a question for the purpose of making “an improvement” to a public school. 24 V.S.A. App. § 3-63. An “improvement” is generally defined as “[a]n addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance.” Black’s Law Dictionary, 9<sup>th</sup> ed. (West 2009). The Vermont bond statute, while not controlling, provides guidance in its definition of “improvement” which includes “the construction of, extension of, additions to, or remodeling of buildings or other improvements thereto.” 24 V.S.A. § 1751(3)(A). The Charter also defines “improvement” in various provisions as “any improvement, extension, betterment, addition, alteration, reconstruction, extraordinary repair, equipping, or re-equipping.” See 24 V.S.A. App. § 3-431(3) (electric plant); § 3-506(3) (waterworks or wastewater system); § 3-64b(a)(5) (airport). Thus, the new construction in the form of an addition and stand-alone building would likely be considered “improvements” as “the construction of” and “additions to” buildings. Because the plan includes projects of varying scope at all school district buildings, some capital improvements will be accomplished “at each of the school district’s buildings.”

Lastly, the capital improvements are to be accomplished “in order to eliminate or substantially reduce the deferred maintenance of such buildings in order to preserve their value for future educational use.” Per the District’s presentation on January 10, 2017, prior to the bond election, the capital needs at the District’s eleven buildings were projected at \$39 million over 10 years. As of April 2018, the identified immediate projects are estimated to cost approximately

\$13.2 million. It is expected that the revised plan will be more cost-effective than the original plan. The original plan, which focused more on repairs, required displacement of students from classrooms as well as displacement of administrative offices. It also would have presented code compliance hurdles at the Ira Allen building. The revised plan, even with the construction at C.P. Smith and on the Property Services property, is still expected to substantially reduce deferred maintenance of the district's buildings through planned projects and the anticipated cost savings which are to be reinvested in the district's existing buildings. Provided that the project continues to address deferred maintenance at the District's buildings, it will likely remain consistent with the bond authorization.

2. *Municipal authorities have discretion in carrying out the project.*

The City Council has discretion in disposing the bond proceeds and in turn, the District has discretion in implementing the project. "The general rule, therefore, is well settled that the exercise of discretionary powers by the proper municipal authorities will not be reviewed by the courts so long as they are within the prescribed legal limits, relate to public improvements of the several kinds, and concern reasonable differences of opinion which may exist in good faith, without fraud, oppression or arbitrary action." 13 E. McQuillin, *The Law of Municipal Corporations* § 37.25 (3d ed. 1995). The City Charter also provides the City Council with discretion when issuing bonds. When a bond measure is passed, it "shall give authority to the City Council thereof to pledge the credit of said City for any purpose." 24 V.S.A. App. § 3-63. A recent case from Utah addressed a municipality's discretion following a bond vote as follows:

Once voters approve a bond, the City has discretion in disposing of the proceeds and implementing the approved project. The City's discretion includes some flexibility in planning for contingencies and adapting to changes in circumstances. The City's discretion is not, of course, limitless. Voters may challenge the City's use of bond proceeds on the grounds that (1) the City exceeded the scope of its statutory or constitutional authority; (2) the City acted arbitrarily and capriciously; or (3) the City engaged in "deceit, fraud or corruption."

*Salt Lake City Corp. v. Jordan River Restoration Network*, 299 P.3d 990, 1025 (Utah 2012) (internal citations omitted). The *Jordan River* court also cited to a prior Utah case, which found that a city "must necessarily be allowed a reasonable latitude of judgment and discretion" in carrying out its specific and necessarily implied powers. *Id.* at 1025 (quoting *Gardner v. Davis Cnty.*, 523 P.2d 865, 867 (Utah 1974)).

However, while a municipality has some discretion and flexibility, not surprisingly, "[the] question submitted to the people for their vote must not be misleading." 15 McQuillin § 40.08. A vote in favor of incurring an indebtedness "is final and conclusive," but "if the vote authorizes the incurring of a debt for a particular purpose, a debt cannot be incurred or the money expended for a different purpose." *Id.* § 40.18. The "bonds issued must correspond with those voted for." *Id.* "However, it is not necessary that the entire bond ordinance be set out in the ballot." *Id.* § 40.08. The Vermont Supreme Court has agreed with this proposition, holding that a question put to the voters need not include all the details, and it is "sufficient that enough is stated to show its character and purpose." *Addison County Community Action Group v. City of*

*Vergennes*, 152 Vt. 161, 167 (1989) (quoting § 40.08) (finding that while it would have been preferable for the article questions to state specifically that funded programs would operate within the City with the funds provided, the omission was not fatal).

In *Jordan River*, the objecting citizens group argued that some courts have found that a municipality must strictly comply with the terms of a bond resolution. *Id.* at 1027 (citing *Committee for Responsible Sch. Expansion v. Hermosa Beach City Sch. Dist.*, 142 Cal.App.4th 1178, 48 Cal.Rptr.3d 705, 714 (2006) (permitting use of bond proceeds to construct a gymnasium because the bond resolution expressly stated that the proceeds would be used in such a manner); *State ex rel. Traeger v. Carleton*, 242 Minn. 296, 64 N.W.2d 776, 778–79 (1954) (holding that a village had “no discretionary power to change the authority [granted by voters], except possibly in minor details which do not affect the nature of the plan voted upon”); *Tukey v. City of Omaha*, 54 Neb. 370, 74 N.W. 613, 615 (1898) (“[W]hen the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued ...”). However, these cases involved bonds for a specific particular purpose, and such a position conflicted with the general rule that governing bodies have “some flexibility in planning for contingencies and adapting to changes in circumstances.” *Id.*

Here, the bond question did not include any specific project details. The stated purpose of the bond issuance was for “capital improvements at each of the school district’s buildings in order to eliminate or substantially reduce the deferred maintenance of such buildings.” Thus the City Council and District have the discretion to issue bonds and implement the project within the scope of this authority.

3. *The City Council has authority to issue bonds for the project, provided it does not materially differ from the project approved by the voters.*

In *Jordan River*, a citizen group objected to a bond issuance, arguing that the proposed project – the acquisition and construction of a recreational complex – was only half the size of the project the voters agreed to fund. *Salt Lake City Corp. v. Jordan River Restoration Network*, 299 P.3d 990, 1024 (Utah 2012). The court, addressing the issue as a mixed question of fact and law, disagreed. *Id.* at 1027. The court first determined that it “must compare the project the City presented to voters with the currently proposed project and then make a legal determination whether the two materially differ.” *Id.* at 1022. “[A] governing body exceeds the scope of its constitutional authority if it uses bond proceeds in a manner materially different from the uses approved by voters.” *Id.* at 1026 (citing *Busse v. City of Golden*, 73 P.3d 660, 666 (Colo. 2003)). The bond proposition presented to the voters stated simply that its purpose was to construct a “multi-purpose regional sports, recreation and education complex and related roads, parking and improvements.” *Id.* Therefore, the court determined that the language only required the city to construct a complex that included sports, recreation, and education components, and although the project was half as large as expected prior to the vote, the project was still consistent with the project presented to the voters. *Id.*

Similarly, the District's capital project plan in its present state does not materially differ from the project presented to the voters. The ballot question here stated that the purpose was to accomplish capital improvements at each of the school district's buildings in order to eliminate or substantially reduce the deferred maintenance of such buildings. No specific project details were stated. Thus, the project must only accomplish capital improvements at the school district buildings in order to substantially reduce the buildings' deferred maintenance. The present plan appears to be consistent with this purpose and has not materially changed the project.

4. *Statements or presentations made by District officials prior to the bond election do not bind the City or the District.*

When statements regarding the project are provided to voters in anticipation of a bond vote, the bonding authority is not bound by those representations unless given by an act of the governing body. See *Davis v. Duncanville Independent School District*, 701 S.W.2d 15 (Tex. App. 1985). In *Davis*, a bond vote was set which would ask the voters to authorize bonds "for the purpose of the construction and equipment of school buildings in the District." *Id.* at 18. Prior to the election the school superintendent and school board members represented that bonds were needed to finance construction of new facilities because of anticipated growth in the district, and represented that if the school population did not grow then the bonds would not be sold. *Id.* at 17. The bonds were approved by the voters but the school population did not grow as expected. *Id.* Nonetheless, the school board decided to use a portion of the bond funds to build a natatorium and taxpayers objected. *Id.* But the court denied the taxpayers' challenge, finding that none of the representations were formally adopted by the board as a body at a called meeting and therefore the district was only constrained by the general language in the bond question. *Id.* at 17-18.

Likewise in *Jordan River*, the court found that the city would only be bound by statements made in statutorily required notices, and that collateral statements and documents, including discretionary voter information pamphlets, did not impose binding terms on the city. *Jordan River*, 299 P.3d at 1021-24. The citizen group's argument was that the city could not provide specific project details to obtain voter approval only to then change the project after the bond election. *Id.* at 1027. The citizen group cited cases where courts have held that specific details in a bond proposition constrain the discretion of the issuing authority. See *O'Farrell v. Sonoma Cnty.*, 189 Cal. 343, 208 P. 117, 119 (1922) (holding that identification of road length and designation of beginning and ending points for the road eliminated the issuing county's discretion to build only a portion of the road); *Marteeny v. Louth*, 197 Ill. App. 106, 113, 115 (1915) (holding that a bond proposition that proposed construction of specific road segments at a cost of \$40,000 eliminated the highway commissioner's discretion to select more expensive construction materials and build only a portion of the road segments). However, the *Jordan River* court rejected the citizen group's reliance on *O'Farrell* and *Marteeny*, noting that the ballot question language at issue did not include specific project details. *Id.* at 1027. Even a statement of the Director of Public Services, admitting that the city intended voters to rely on a pamphlet that included information about the project, did not bind the city because the statement did not amount to a clear and unequivocal statement that the city be bound by the pamphlet's terms. *Id.* at 1023-24.

Similar to *Davis* and *Jordan River*, there were no representations by the District or the City Council made as an act of the respective governing body that would operate to bind either to the prior project plan. Nor was there any representation made as to the scope of the project that amounted to a clear and unequivocal statement that the District be so bound. Moreover, over 75% of the voters approved the bond. It is unlikely that any statements related to prior project plan swayed the electorate to vote in favor of the bond.

### **Conclusion**

Overall, provided that the capital project plan does not materially differ from the purpose as set forth in the bond question, the City Council and School District have discretion as to the character and extent of the improvements. The present capital project plan appears to fulfill the purpose of the bonding authority in making capital improvements to substantially reduce the deferred maintenance of the District's buildings. The District has flexibility in accomplishing the anticipated capital improvements, so long as the plan remains consistent with the bonding purpose.