HAWLEY TROXELL

MEMORANDUM

FROM: Hawley Troxell Ennis & Hawley

DATED: Updated to June 2021

RE: *Advocacy in Bond and Levy Elections*

A. Introduction

An Idaho public entity, such as a School District (the "District"), undertaking a bond election must take care to comply with Idaho's bond election laws, including the limitations on using public resources for communications to voters. As a general rule, the District may use its resources and time to prepare and provide educational materials to explain the issues in a fair and impartial manner, but the District may not use public resources and time to advocate in favor of the bond issuance.

The permissible and prohibited conduct was somewhat codified in Idaho Law by House Bill 620 enacted by the 2018 Legislature ("HB 620"). This Memorandum summarizes HB 620, and the code sections I.C. 74-601 *et seq.* where it now appears, and provides general guidelines and a FAQ section in order to provide guidance on activities in bond elections that may, and may not, be funded with public funds and resources.

There have not yet been any cases brought lending further interpretation to HB 620. However, case law predating HB 620 offers some examples and holdings that remain valid. In fact, it can be argued that HB 620 simply codified existing law, so the best practice guidelines have not changed a great deal under the new law.

B. Idaho Code Title 74, Chapter 6

HB 620 states that public entities and their employees and public officials, are not authorized to use public funds, property or resources to advocate for or against a ballot measure or candidate. Idaho Code 74-604. That is certainly the basic rule and was true before HB 620 was enacted. A benefit of HB 620 is that it added specific "exclusions" from what is considered advocacy and are therefore permitted actions and activities. Idaho Code 74-605 states that, among other things, nothing in Title 74, Chapter 6 shall prohibit:

> (1) A public official or employee from speaking, campaigning, contributing personal money or otherwise exercising the public official's or employee's individual first amendment rights for political purposes, provided no public funds are used for expenditures supporting the public official or employee in such activity;
> (2) A public entity, public official or employee from the neutral encouragement of voters to vote;
> (3) An elected official or employee from personally campaigning or advocating for or against a ballot measure, provided no public funds, property or resources are used for supporting the elected official or employee in such activity;
> (4) A public entity from preparing and distributing to electors an objective statement explaining the purpose and effect of the ballot measure, including in the case of bond or levy elections the cost per taxpayer or taxable value, or similar information based on reasonable estimates prepared in good faith;
> …
> (6) The publication of information described in .....provisions of law requiring notices and disclosures in connection with elections and ballot measures; or
> (7) A balanced student classroom discussion or debate of current or pending election issues.

I.C. 74-605.

These exclusions, especially the conduct in (4) allow the District to prepare materials explaining the numbers and impacts as provided by the District's facilities and finance departments as well as those provided by outside advisors such as the architects and municipal advisors. In distributing such information that the District should use care to emphasize that the numbers are estimates and that a

taxpayer's taxes may increase or decrease depending on a number of factors outside the District's control.

C. General Guidelines and Idaho Case Law

Whether a school district's participation in a bond election can be considered "impartial" or "neutral" is a factual analysis that depends on all the surrounding facts and circumstances. However, in addition to the new guidance provided in HB 620 regarding specific permissible actions, the District may better ensure it complies with restrictions on advocacy by adhering to the following guidelines:

- Prohibit the use of district resources and time to prepare and disseminate election advocacy materials.
- See that a separate entity, such as a non-profit corporation, is formed to run the advocacy campaign.
- Bear in mind that the advocacy group is subject to the "Sunshine" law on campaign finance disclosures, so should have a formal committee, treasurer and keep sufficient records to comply with Idaho Code 67-6600 *et seq.* to the extent applicable.
- Explain the issues in an "educating" rather than "advocating" manner.
- There is a misconception that all communication which does not say, "VOTE YES!" is permissible. Exaggerating the impacts of the bond election failing, or strategically leaving out certain damaging information may go too far if the intent is to advocate in favor of voting yes.
- The case law indicates that the District could comply with the requirements by providing supporters and opponents of the bond issuance equal access to district resources and time, but most Districts find this approach unworkable. Instead, Districts should carefully limit their activities in support so as not to create the obligation to provide equal time.
- Organized opposition to the bond proposal will often allege that public funds are being improperly used, so as to make an issue of the campaign itself. Such assertions, even if untrue, are natural fodder for media attention and put the District on the defensive. Accordingly, a "better safe than sorry" approach makes sense.

There is not an overwhelming amount of Idaho case law addressing the use of public funds and resources for advocacy in elections. However, attached hereto as Exhibit A is a detailed memorandum briefing various cases and analyzing the permissible and/or impermissible use of funds and resources. Exhibit A is rather lengthy, but the objective is provide the details and facts from cases in order to illustrate specific examples of the above guidelines.

D. Frequently Asked Questions

We routinely address specific questions about what public entities may or may not do in a bond election. These questions, and our responses, are set forth below in a FAQ format.

1. *May employees/directors of the District work on the campaign during working hours?*

No. The District may not use District facilities during working hours, such as employee working time, to advocate for the bond election. If the District's employees are working on the campaign during work hours, the District would effectively be "lending" its resources to the campaign, and impermissibly advocating for one side in the election. Directors are not employees of the District, however we view their time at Board of Director meetings to be "working time" and thus they should not engage in advocacy during that time.

For certain District employees, such as salaried management, there are no set working hours, as there are for hourly employees. As a salaried employee, officers will be viewed as representing the District at all times, and therefore should never engage in campaigning and should limit all communication regarding the bond election to informational only. See FAQ #8 for examples of appropriate communication.

2. *May employees/directors of the District serve on an election advocacy committee? Could they attend a meeting during business hours?*

The free speech rights of employees and directors of the District include the right to serve on an election advocacy committee in their individual capacities on their own time, and such service may not be prohibited by the District. However, the District should take care not to allow the employee's service in this capacity to occur during work time because the District would thereby be "lending" its employee to advocate in the election.

3. *May employees of the District contribute to an advocacy fund?*

Yes. See response to Question 2. Employees and directors likewise are allowed to contribute in their individual capacities.

4. *Can the election committee meet on district facilities?*

Probably not. As noted above, the District cannot lend its resources to assist one side in the election. Allowing the advocacy committee to meet on district facilities would be "lending" its facilities to the group. An equal time approach -- for opposing and favorable groups -- is unworkable. Invariably there will be a debate about what is "equal" and more than one opposition group may seek "equal" time. The safest course of action is for the committee to meet elsewhere.

5. *May the Trustees attend the Advocacy Committee meetings*?

Yes. If Trustees attend as a group, they must use care to not create a "meeting" under the open meeting law at which they deliberate or make a decision, but they may attend advocacy committee meetings.

6. *May the District officials provide information to the Campaign Committee and may the Campaign Committee use the same information that the District has developed about the bond in the Advocacy Campaign?*

Yes. This is not the situation you read about in the political world where "independent committees" in theory may not "coordinate" their efforts with the Candidate's own campaign. The Campaign Committee needs to provide accurate information and the primary source of that will be the District.

7. May the Campaign Committee obtain from the District name and address information of parents and students.

Generally, No. Privacy laws govern student information that, unless waived, limit its uses. Ideally the Campaign Committee will develop its mailing and contact lists from other sources.

8. *What are permissible talking points for salaried management employees?*

The following facts, provided they are accurately portrayed, are safe talking points.

- Size, details, and description of facilities
- Purposes and goals of the overall Project
- The District's reason for running election
- Estimated taxpayer impact

9. *Are the Elected School Board Trustees subject to the same limitation as employees*

No. School Board Trustees may advocate for a favorable vote in their individual capacities provided they are not using District resources. For example, any Board member could speak at a service club or community meeting and advocate for a yes vote, but the Board should not use a board meeting on District grounds to endorse or advocate for the bond.

E. Conclusion

The District is permitted to do quite a bit with its own resources such as brochures, website and District's regular newsletters and emails. The key is that the content of communications from these sources be educational and informative and not advocative. The District can certainly inform parents of the election, of the projects proposed to be financed, and of the proposed tax impact. We find, and the case law illustrates, the most questionable actions often occur when districts try to explain the "need" for the new facilities. Such explanations can be seen as advocating for the bond measure even if the information is inherently factual. Stating the crowding issues or age of facilities, while perhaps factual, may be better left to foundation and committee members. Because such analysis is inherently contextual, we would be happy to review any proposed materials should the District have any questions throughout the election process.

EXHIBIT A
FULL CASE LAW SUMMARY

A. Idaho Case Law

The Idaho Supreme Court articulated the rule regarding permissible public entity activities in elections in *Ameritel Inns, Inc. vs. Greater Boise Auditorium District*, 119 P.3d 624, 141 Idaho 849 (2005) (hereinafter "**GBAD"**). In GBAD, hotel owners and voters residing within an auditorium district brought an action against the auditorium district seeking to restrain it from using public funds to advocate in an election concerning whether to approve issuance of bonds to fund the district's convention center. The Court began by examining the broad powers granted to the auditorium district by statute and concluded that the "use of public funds to campaign in a contested election is not one of the powers expressly granted to the [district]." *Id.* at 628, 141 Idaho 853. Then, because the Court had not previously addressed the issue of whether a governmental entity such as the district has such powers by implication, the Court examined the rulings of the California Supreme Court in two similar cases.

First, in *Mines v. Del Valle*, the California Supreme Court upheld judgments against public officials for attempting to influence voters to approve a bond issue to expand the Los Angeles municipal electrical generating system. 257 P. 530 (1927) (overruled by *Stanson v. Mott*, 17 Cal.3d 206 (1976) insofar as the case held a public official was strictly liable for any expenditures of public funds later determined to be unauthorized) (see further discussion in Section C below). In so doing, the California Supreme Court reasoned that, "to use public funds to advocate the adoption of a proposition which was opposed by a large number of electors

would be manifestly unfair and unjust [and]. . . cannot be sustained, unless the power to do so is given. . . in clear and unmistakable language." *Id.* at 537.

Second, in *Stanson v. Mott*, the California Supreme Court held that the director of the California Department of Parks and Recreation was required to repay public funds withdrawn from the state treasury to pay for advertising that promoted the passage of a bond issue to fund park projects. 551 P.2d 1 (1976). The California Supreme Court summarized the law on permissible public entity activities in bond elections as follows: "every court which has addressed the issue has found the use of public funds for advocacy in bond campaigns improper, either on the ground that such use was not explicitly authorized or on the ground that such use is never appropriate." *Id.* at 8-9. In essence, the government may not "take sides" in bond elections. *Id.*

With these cases in mind, and due to the fact that the Court could find no statutory or common law authority supporting the proposition that the legislature intended to authorize public entities such as the auditorium district to use public funds to influence bond elections, the Court held in GBAD that the district had no express or implied authority to use public funds in such a manner. *GBAD*, 119 P.3d at 630, 141 Idaho at 855.

GBAD is the only Idaho case on point to date. However, numerous cases in other states have addressed the scope of a governmental entity's ability to use its public funds to provide information to voters in elections. These are generally consistent with the *GBAD* decision that a public entity may "inform and educate" but may not "influence or advocate."

B. Other Case Law

- *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills TP*, 98 A.2d 673 (N.J. 1953): The New Jersey Supreme Court considered whether expenditures of money for distribution of booklets advocating a favorable vote at a bond election were improper. First, the court found that the school district did have the power to inform voters of relevant facts, which power was implicit and incident to a school district's power to build, repair, enlarge, and furnish schoolhouses. *Id.* at 676. The Court went on to discuss the scope of this power in great detail:

> The power so implicit plainly embraces the making of reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal.
> . . . .
> The need for full disclosure of all relevant facts is obvious, and the board of education is well qualified to supply the facts. But a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences as may be foreseen. If the presentation is fair in that sense, the power to make reasonable expenditure for the purpose may fairly be implied as within the purview of the power, indeed duty, of the board of education to formulate the construction program in the first instance.

Id. at 677 (emphasis added).

In this particular case, the court found that a fair and accurate presentation of the facts was within the scope of the district's power. *Id.* However, the district had gone beyond merely presenting the facts, and instead had attempted to advocate to voters to "vote yes." *Id.* Thus,

"[i]n that manner, the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure." *Id.* (emphasis added). Had the district refrained from advocating one side, and presented the facts fully and fairly to the voters, the district's brochure would have been proper. *See, e.g., Palm Beach Co. v. Hudspeth*, 540 So.2d 147, 154 (Fla. App. 1989) ("While the county not only may but should allocate tax dollars to educate the electorate . . . , it must do so fairly and impartially. . . . The appropriate function of government in connection with an issue placed before the electorate is to enlighten, NOT to proselytize").

- *Stanson v. Mott*, 551 P.2d 1 (Cal. 1976): The Department of Parks and Recreation (the "Department") spent roughly $5,000 to promote the passage of the ballot proposition. It did so in the following ways: (1) When the plaintiff requested information, the Department responded by sending "promotional material in favor of the . . . Bond Act;" (2) the Department also sent "promotional materials written by Californians for Parks beaches and Wildlife," which was a private organization formed for the purpose of helping to pass the bond; (3) the Department expended funds for travel expenses and speaking engagements designed to promote the Bond Act; and (4) a three-person staff, authorized by the Department, to work specifically on the Bond Act, i.e. time and state resources. *Id.* at 4.

- *In re Abbott Funds ex rel. Bd. of Educ. Of City of Elizabeth*, 2009 WL 2496724 (Aug. 18, 2009) (unpublished opinion): The City of Elizabeth Board of Education (the "Board") distributed a twenty page brochure and televised communication to the public. The print and television communication "advocated for the purchase of two parcels of land in connection with

a campaign to build new schools in Elizabeth." Carlos Cedeno, who was a member of the Board and also a candidate for City Council, running in the primary election two months later, was featured in two of the three television ads and his picture was in the brochure. One of Cedeno's *own* City Council campaign fliers "criticized local politicians for an alleged attempt to sell the same parcels of land [that the Board hoped to purchase] to a political contributor at ten percent of its value." Both forms of communication discussed the Board's desire to acquire the two parcels of land; however, it did not state that it did not have State approval to do so. Instead, the communication gave "the false impression that it had secured State approval, particularly since the brochure emphasize[d] that such construction would be financed by the State" and was the "perfect location" for a new school. *Id.* at 1-2.

- *Citizens to Protect Public Funds v. Board of Educ. of Parsippany-Troy Hills TP*, 98 A.2d 673 (1953): The Parsippany-Troy Hills Board of Education (the "Board") spent $358.85 to printing and circulate an 18-page booklet entitled Read the Facts Behind the Parsippany-Troy Hills School Building Program. All but on page of the booklets depicted pictures illustrating facts like the tripling of the student population, the inadequacies of existing facilities, the proposed expansions, and the principal and interest costs. However, "Vote Yes" appeared on the cover and "Vote Yes-December 2, 1952," appeared on a page. Additionally, the following is a replica of another page:

> What Will Happen if You Don't Vote Yes?
> - Double Sessions!!!
> - This will automatically cheat your child of 1/3 of his education (4 hours instead of 6).
> - Yearly school changing and hour long Bus rides will continue for many children.
> - Morning Session (8:30-12:30). Children will leave home ½ hour earlier.

> - Afternoon Session (12:30-4:30). Children will return home 1 ½ hours later (many after dark).
> - Children in some families would be attending different session (depending upon grade).
> - Transportation costs will increase (could double) with 2 sets of bus routes per day.
> - Temporary room rentals will continue ($4,000 per year).
> - Double use of equipment will necessitate more rapid replacement.
>
> Note: Operating expenses will continue to rise as the enrollment increases (more teachers, more supplies, and equipment for children. This Will Be So Whether We Build Or Not.)

Id. at 674 (explaining the "dire consequences of the failure to [vote yes] are over-dramatized on the page reproduced above").

- *Mines v. Del Valle*, 257 P. 530 (1927): The City of Los Angeles (the "City") spent $12,415.15 printing and circulating cards, banners, bumper stickers, car banners, labels, circulars, hand bills, dodgers, and post cards. It also constructed a float and advertised in the local newspapers. All of this was done with the City's funds and personnel, "with the intent of influencing the electors of said municipality to vote in favor of said bond issue." *Id.* at 532. *See also id.* at 533 (explaining the City still had no right to expend public funds to "advocate the adoption of a proposition," despite the fact opposition groups were distributing misleading, deceptive, and untruthful reports; the City could still only inform and educate).

- *Porter v. Tiffany,* 502 P.2d 1385 (Or. 1972): The Eugene Water and Electric Board (the "EWEB") spent roughly $13,000 in connection with two election measures. "The television and radio time, newspaper advertising, voter surveys and other materials purchased by EWEB with the disputed funds strongly advocated a favorable vote on the referendum." *Id.* at 1386.