

Ten Common Mistakes in the Preparation and Adoption of Bond Resolutions

By A. Joseph Scott, III, Esq.

In the course of bond counsel practice, representing many counties, cities, towns, villages and school districts, we are called upon to review the bond resolutions prepared by local attorneys and the procedures relating to the adoption of bond resolutions by such governing bodies. Unfortunately, in our review, we often find an error or other violation of New York State law that raises an issue of the validity of the bond resolution. The typical way to correct the mistake is to revise the bond resolution and restart the adoption process, possibly causing slight embarrassment on the part of the municipality or a delay in completing the financing.

Municipalities may be able to avoid potential delays by taking note of some common errors in the preparation and adoption of bond resolutions. Familiarity with the correct processes for the issuance of serial bonds and bond anticipation notes will likely ensure a smooth, successful adoption process.

Some of the more common issues to keep in mind:

Quorum of Members: A bond resolution may be adopted only at a legal meeting of the town board, meaning a quorum of board members must be present. Under Section 63 of the Town Law, a quorum is a majority of the members of the town board. Therefore, in the cases where a town board holds five members, a quorum is a meeting with at least three members. Note further that in cases where there is a vacancy on the town board, the calculation of the quorum of the town board is not affected. For example, if the town board has five members, but there is one vacancy, the quorum requirement for holding a meeting is still three members (see Application of Crosby, 178 Misc. 746, 36 N.Y.S.2d 301 (1942)).

Vote Required to Adopt Bond Resolution: Section 33.00 of the Local Finance Law requires that any bond resolution be adopted by a two-thirds vote of the voting

strength of the town board. In cases where the bond resolution is subject to, or will be submitted to, mandatory referendum, a three-fifths vote is sufficient. A common problem with complying with this section arises if and when a town board adopts a bond resolution at a regularly scheduled meeting, but, due to weather conditions, illness or schedule conflict, only three members of the five-member board attend the meeting. Even though the three present members constitute a quorum, a 3-0 adoption does not satisfy the two-thirds vote requirement as stipulated by Section 33.00 of Local Finance Law. Therefore, a resolution adopted under these, or similar, circumstances is not valid. The solution is to reintroduce the bond resolution at the next meeting of the town board or to hold a special meeting.

SEQRA Compliance: Compliance with the provisions of Article 8 of the Environmental Conservation Law and Chapter 43-B of the Consolidated Laws of New York and any other regulations as set forth by the New

York State Department of Environmental Conservation is an important part of any capital project. Periodically, problems will arise if the bond resolution has been adopted prior to the completion of the SEQRA review. Under *Tri-County Taxpayers Association, Inc. v. Town of Queensbury*, 55 N.Y.2d 41, 447 N.Y.S.2d 699 (1982), it was settled that the SEQRA (state environmental quality review act) process must be completed before the town board adopts a bond resolution to authorize the financing of a capital project.

Bond Resolution is Subject to Permissive Referendum: Under Section 35.00 of the Local Finance Law, bond resolutions adopted by a town board are subject, with certain exceptions, to the permissive referendum procedures contained in Article 7 of the Town Law.

Certain financing has exceptions attached. Unless the bond resolution is for a financing with a maturity of less than five years, or is for a special assessment district, or is for street and/or highway

improvements that will be partially financed by the state or county, or is for the payment of a judgment or settlement, the bond resolution is subject to a permissive referendum.

Sometimes, a town board adopts a bond resolution without recognizing that the bond resolution was subject to permissive referendum. When a resolution is adopted – or should have been adopted – subject to permissive referendum, it is not valid until either the referendum period is over, or, if adequate petitions are filed, the resolution is approved at a referendum election. The failure by a town to comply with the permissive referendum provisions will raise serious questions regarding the validity of the bond resolution.

Permissive Referendum Procedures Require Publication: When a bond resolution is subject to permissive referendum, the town must follow the procedures outlined in Article 7 of the Town Law, namely the requirement that a notice describing the resolution and stating that the resolution is subject to permissive referendum must be published in the official newspaper of the town within 10 days after the resolution is adopted. A common mistake municipalities make is not taking into account the publication deadlines of its official newspaper, especially when the official newspaper is published once weekly.

Failure to Publish an Estoppel Notice: Section 80.00 of the Local Finance Law provides municipalities with protection from litigation and other challenges to bond resolutions if an estoppel notice is published after the adoption of a bond resolution. Often, towns do not realize that the publication of an estoppel notice can actually benefit the project.

Town leaders should be aware that they also must publish an estoppel notice in all designated official papers. It's also worth noting that Section 81.00 of the Local Finance Law originally required the municipality to publish the full bond resolution with the estoppel notice. This section was amended many years ago to permit a municipality to publish a summary of the bond resolution with the estoppel notice, therefore reducing publication costs to the municipality.

Resolution Subject to Permissive Referendum and Publication of Estoppel Notice: As described above, Section 80.00 of the Local Finance Law provides significant benefits to municipalities. In cases where the bond resolution is subject to permissive referendum, the town must be careful to coordinate the publications of the permissive referendum notice and the estoppel notice.

As provided in Section 81.00b of the same law, the permissive referendum notice must be published first and within 10 days of the adoption of the board resolution. Then, once the 30-day permissive referendum period has elapsed, the estoppel notice may be published, assuming that a petition has not been filed. In other words, the two notices must be published consecutively, not concurrently.

Bond Resolution Does Not Follow Local Finance Law Form: Section 32.00 of the Local Finance Law provides a description of certain items that must be contained, in substance, in any bond resolution adopted by a town.

Examples of the mandatory elements include a description of the project, a statement of the amount of bonds to be issued, an estimated period of probable usefulness of the project and whether

the term of the financing will exceed five years. Failure to satisfy the requirements of Section 32.00 may invalidate the bond resolution and require adoption of an amended bond resolution.

Project Description of PPU Problems: Problems can arise with the description of the capital project contained in the bond resolution. One common problem is that the description of the capital project is too specific and does not provide the town with any flexibility in undertaking the capital project.

An example of a too-detailed project description would be the use of a specific description of particular pieces of highway equipment rather than a general description.

Another common problem is that any capital project to be financed must have a period of probable usefulness (PPU), described in the Local Finance Law. Creation of a PPU within Section 11.00 is the legislature's authorization for a municipality to bond for that purpose. Be careful to assign the correct PPU. For example, if a bond resolution for the construction of a wood-frame building is on the table, providing for a 30-year PPU, and, therefore, a 30-year financing term, check your terms for the construction of a wood-frame building. Under Section 11.00 of the Local Finance Law, a wood-frame building is a Class C building with a 15-year PPU and, therefore, only a 15-year financing term.

Bond Amount Insufficient: Once a town adopts a bond resolution authorizing the issuance of bonds and bond anticipation notes,

Continued on page 17

Continued from page 16

and property costs that may be used to calculate the tangible property tax credit component must exclude the acquisition cost of any item of property for which an allowable credit existed for another taxpayer. The new Brownfield Cleanup bill also establishes a Brownfields Advisory Board to receive information and comment upon the implementation of the Brownfield Cleanup program. More importantly, the bill requires that a developer and its lessees must submit an annual report to NYSDEC for 11 years following the execution of a brownfield site cleanup agreement. The report must provide the actual or estimated state and local taxes generated by the brownfield site, including income, wage, business, corporate and property taxes. Finally, the tangible property tax credit component caps do not apply to any site which NYSDEC has accepted into the Brownfield Cleanup program before June 23, 2008. A first review of the bill does not yield a clear prediction of

whether it will discourage the use of the Brownfield Cleanup program by developers. However, the cap on the tangible property tax credit component does not appear to create a serious limitation on tax credits for upstate projects. With the exception of the new

annual brownfield redevelopment report requirement, the bill does not too significantly diminish the attractiveness of the program. For information about the New York State Brownfield Tax Credit Program, contact Dennis Harkawik @ 716-843-3848.

Continued from page 15

the town may not exceed the principal amount specified in the bond resolution without amending the bond and redoing certain procedural steps.

There are several common reasons why the bond amount specified in the bond resolution would be insufficient.

For example, the failure to include inflation in the project cost or the Map, Plan and Report for special district projects, particularly where a referendum or approval of the state comptroller is required; the spike in energy costs has driven inflation past the level of many contingency budgets; and, possibly, a failure to include preliminary site development costs or ancillary equipment costs. It is essential that all costs necessary for the project be

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included in an MPR and the project description.

A common mistake is to forget the supporting equipment or installation cost necessary to bring new equipment on line. Finally, do not forget to include closing costs, including printing, publication and bond counsel fees.

Many of the mistakes that can occur during a bond resolution process can be corrected, but nearly all will require additional action by the town board and will increase costs and result in time delays. Careful planning during the preliminary stages of the project and the retention of a competent team of professionals, including bond counsel, will assist the town in avoiding these common mistakes.