

BEFORE THE SECRETARY OF STATE  
STATE OF COLORADO

CASE NO. OS 96-06

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INITIAL DECISION

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IN THE MATTER OF THE COMPLAINTS FILED BY MIKE COAN REGARDING  
ALLEGED CAMPAIGN REFORM ACT VIOLATIONS BY THE WELD COUNTY Re-  
3(J) SCHOOL BOARD

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Hearing in this matter was held on October 16, 1996, before Administrative Law Judge Nancy Connick. Michael Coan appeared *pro se*, and the Weld County Re-3(J) School Board ("Board") was represented by Thomas S. Crabb, Miller, DeLay & Crabb, P.C. This Initial Decision is issued pursuant to Section 24-4-105(a), C.R.S. (1996).

PRELIMINARY MATTERS

An Amended Complaint was filed without objection at the outset of the hearing. The Amended Complaint clarifies that the annexation ballot question at issue is a referred measure and that the statutory basis for asserted liability is thus Section 1-45-116(1)(a)(I)(C), C.R.S. (1996). The parties are in agreement that the annexation question is indeed a referred measure.

At hearing the Board filed a hearing brief, which was accepted by the Administrative Law Judge. In addition, the parties stipulated to Undisputed Facts 1 and 4 of the Complainant's Prehearing Statement and Undisputed Facts A, B, and C of the Board's Prehearing Statement. The parties further stipulated that the Bond Campaign Leadership Committee is a political committee. These stipulations are reflected in the Findings of Fact.

ISSUES AT HEARING

Coan has filed three complaints with the Secretary of State asserting that the Board has violated the Campaign Reform Act of 1974. The first complaint asserts that two Fact Sheets mailed to District residents at Board expense fail to contain arguments against the bond issue and state a conclusion or opinion in favor of it, in violation of Section 1-45-116(1)(a)(I) and (b)(I), C.R.S. (1996). The second complaint charges that the Board expended public monies to retain Dain Bosworth to urge electors to vote in favor of the ballot issue, in violation of Section 1-45-116(1)(a)(I), C.R.S. (1996). The third complaint asserts that the Board expended public monies for ADK Architects to provide services to urge electors to vote in favor of the bond

issue, in violation of Section 1-45-116(1)(a)(I), C.R.S. (1996). These complaints were consolidated for the purpose of hearing.

### FINDINGS OF FACT

1. On September 9, 1996, the Board certified a bond issue ballot question to be submitted to the voters at the November 5, 1996 election. The bond issue involves a proposed increase in the debt of Weld County School District Re-3(J) ("District") to finance capital construction projects in the amount of \$11,500,000 for the construction or improvement of three elementary schools (Keenesburg Elementary, Hudson Elementary, Lochbuie Elementary) and additions to and renovations of Weld Central Junior/Senior High School.

2. The Board's decision to place this bond issue on the ballot was the culmination of ongoing discussions over the years regarding its facilities. In 1992 or 1993 the Board commissioned a facilities analysis, which revealed many facility problems. In 1995 the Board intended to ask voters to approve a bond issue but at the last minute decided against this course due to perceived lack of support.

3. As demonstrated by its certification of the bond question, the Board supports the bond issue.

### **Involvement of Dain Bosworth**

4. Typically school boards do not have the expertise needed to compute mill levies and determine the dollar amount which it will ask voters to approve. They commonly obtain these services through an investment banking firm.

5. As a part of its preparations for an expected bond issue on the November 5, 1996 ballot, the Board selected an investment banking firm. It did so by issuing a request for proposals to a number of investment firms, four of which responded with proposals.

6. At its April 3, 1996 regular meeting, the Board "accepted" Dain Bosworth, a investment banking and securities firm, as the investment banker for the November 1996 bond election.

7. Steven Bell, a managing director in Dain Bosworth, serves as the team leader or "point guy" for Dain Bosworth in dealing with the District on this bond issue. Bell serves as an underwriter in Dain Bosworth's public finance department to structure, originate and provide for tax exempt and municipal bonds and other securities.

8. The Dain Bosworth proposal was designed to inform the Board of the types of services Dain Bosworth offers to issuers of tax-exempt bonds. This proposal clearly provides that Dain Bosworth will undertake an active role in promoting the bond issue, as reflected in the following provisions of the proposal:

a. Dain Bosworth states that its focus is to provide "a full and complete range of services through the election process, the bond sale and delivery of proceeds."

b. Dain Bosworth agrees to provide campaign election services, including developing a campaign plan, researching voter attitudes, researching voter identification, and developing a communication strategy. It proposes a benchmark survey of the community and its taxpayers to determine "support" for the proposed projects and bond issue and to develop a campaign message and theme. It further agrees to help the campaign committee "maximize its resources in reaching, persuading and delivering ['yes' and 'undecided'] voters to the polls or, in increasing numbers, to get them to vote as absentee or early voters."

c. The proposal indicates that the survey research supplied by Dain Bosworth will "allow the campaign to target its likely positive and undecided voters, determine the best and most cost-effective approach to communicating with these voters, and design the most effective campaign themes for different audiences."

d. Dain Bosworth offers to help the campaign committee with a media campaign and to provide design services for campaign material.

9. The Dain Bosworth proposal provides differing means of compensating Dain Bosworth. If the sale of the bonds is done on a negotiated bond sale basis, Dain Bosworth is compensated by the underwriter's discount for "structuring the bond issue, coordinating all aspects of the election, financing and committing to purchase the bonds from the District at a fixed interest rate." The proposal includes a different compensation formula for a competitive sale. While it does not specifically indicate the services being compensated in the event of a competitive sale, it provides a formula for Dain Bosworth's total compensation and thus presumably includes the same services. Thus if these bonds are actually sold and Dain Bosworth underwrites this sale, Dain Bosworth will receive compensation for, *inter alia* "coordinating all aspects of the election."

10. Dain Bosworth's coordination of all aspects of the bond issue involves helping the Board coordinate the election to insure that it was conducted properly, that deadlines were met, and that the bonds were properly issued obligations. In order to underwrite a bond issue, an investment banking firm must insure that the procedure followed complies with applicable requirements.

11. The process for selection of Dain Bosworth follows the customary industry practice for the selection of an investment banker. This practice is as follows. The entity wishing to issue bonds distributes a request for proposals. Investment banking firms respond by submitting proposals. The entity then chooses an investment firm, which volunteers its time to advise the entity on the bond election process and the promotion of the bonds. The investment firm is willing to volunteer its time in the hope that it will be chosen to provide underwriting services. The investment firm provides these services pursuant to a somewhat loose arrangement not involving any contract, in which it is generally considered to be a volunteer advisor. If the voters approve the bond issuance, the entity may choose to contract for the issuance of the bonds with either this same investment banking firm or a different one. In practice, entities have on occasion discontinued their relationship with the current investment banking firm and chosen a new one at this stage. In such a case, the entity has no financial obligation to the initial investment firm selected, and the two part company without any exchange of compensation. If the entity decides to continue its relationship with the investment firm, the two parties develop a contract. No contract to underwrite bonds can be made until the bonds are available for purchase and sale. The contract provides for the sale by the entity of its bonds, the purchase by the investment banker, and the terms and conditions for the sale of the bonds. The investment firm is not obligated to abide by the fees for service quoted in the proposal, although it may be not be in the firm's best interests to decline to do so.

12. The wording of the Dain Bosworth proposal itself does not clearly set forth the volunteer nature of the activities undertaken in support of the bond issue's passage. The Board asserts that Dain Bosworth's volunteer status is reflected in the following language of the proposal:

a. The Dain Bosworth proposal indicates that there is "no charge for on-going services and advice." Common industry practice includes an investment firm's provision of certain services and advice to its clients or potential clients on an ongoing basis. To be effective, investment firms must maintain a professional relationship with clients even when a specific bond transaction is not underway. This involves keeping clients advised of rulings which might affect them, interest rate trends, and new developments in the public financing arena.

b. The Dain Bosworth proposal contains the following statement: "If the campaign committee feels that they would prefer a larger volunteer role in all aspects of the election, we can also help the committee craft survey questions for a more informal survey and assist in the analysis of the responses."

13. The language regarding a "volunteer role," as cited in paragraph 12b above, does not clearly define whose volunteer role is being referenced, *i.e.*, the campaign committee's or Dain Bosworth's. In addition, while the proposal clearly states that there is no charge for "on-going services and advice," as referenced in

paragraph 12a, it is not clear what constitutes services and advice, *i.e.*, whether this refers to the client relation activities undertaken even when no bond issue is being considered or whether it refers to Dain Bosworth's bond campaign services at issue here.

14. In spite of any lack of clarity in the proposal, both Dain Bosworth and the Board consider that Dain Bosworth's services in promoting the bond issue have been rendered on a voluntary basis.

15. The District thus has not paid any compensation to Dain Bosworth or Bell in relation to any services provided in connection with the bond issue and is under no legal obligation to do so.

16. If the District does select Dain Bosworth to provide underwriting and investment banking services in connection with a bond issue, it will not at that point in time compensate Dain Bosworth for the work performed on the bond election campaign. Dain Bosworth's compensation under such a contract would be in the form of an underwriter's fee, which does not vary depending on the amount or existence of work performed on the bond election campaign. In fact, if the District had asked Dain Bosworth to underwrite a refinancing of bonds, which involves no election, the fee would not differ.

17. In his capacity with Dain Bosworth, Bell has attended approximately 12 meetings of the Bond Campaign Leadership Committee and its predecessor, Communities Supporting the Schools. The last such meeting he attended was on October 4 or 5, 1996. The Bond Campaign Leadership Committee is a group of volunteer community members, students, and staff which is seeking passage of the bond issue.

18. Bell describes his role with the Bond Campaign Leadership Committee as one of assisting it in a role to be determined by the Committee.

19. At the Board meetings on June 5 and July 2, 1996, Bell was listed on the agenda to report on the Bond Campaign Leadership Committee and in fact did so.

20. As outlined above, Dain Bosworth and Bell have engaged in activities to urge electors to vote in favor of the November 5, 1996 bond issue certified by the Board.

21. The passage or defeat of the bond issue will not affect Bell's compensation or standing within Dain Bosworth. The amount of time devoted by Bell to pre-election activities in support of the bond issue does not affect his salary from Dain Bosworth.

22. If the bond issue passes and Dain Bosworth underwrites the bonds, it will received between approximately \$51,415 and \$67,800.

23. The deadline for submitting a ballot resolution to the county clerk's office this year was September 10, 1996.

#### **Involvement of ADK Architects**

24. A school district contemplating a bond issue needs to determine how much additional revenue it needs and thus how much additional debt to ask voters to approve. It also needs to determine how the bond revenues will be spent. In relation to a capital construction project, an architect is an appropriate person to evaluate that information; to evaluate construction needs; and to develop plans, specifications and a budget to meet those needs.

25. On April 25, 1995, the Board entered into a contract, known as a Standard Form of Agreement Between Owner and Architect, with ADK Architects in relation to additions and renovations of the present and proposed facilities as described in the November 1996 bond issue, including providing a master plan of current and future needs.

26. By retaining ADK Architects, the District sought to obtain an independent review of its facilities. The prior facilities analysis, prepared for the District in 1993, had been subject to criticism, and the District sought a fresh approach.

27. A. Daryl Klone is self-employed through ADK Architects and has provided the architectural services pursuant to the contract.

28. The contract between the Board and ADK Architects is a standard American Institute of Architects ("AIA") form. In addition to the preprinted portions of the contract, the parties added provisions, including the following:

a. For a lump sum fee, ADK Architects agrees to provide master planning, programming, rough cost estimates and an analysis of existing buildings.

b. ADK Architects agrees to prepare a floor plan, site plan and one exterior elevation of each new facility and addition/renovation of present facilities. It further agrees to provide an estimated cost of construction and furnishings. The compensation for such services is a percentage of the estimated construction cost.

c. ADK Architects agrees that the District can use the services and resulting products described in paragraphs 28a and b in promoting its bond issue.

d. ADK Architects agrees to meet with the Board, staff and various groups in the District involved with the bond issue process.

29. Pursuant to the standard terms of AIA contract, all drawings and specifications prepared by the architect remain the property of the architect. It is standard practice that the architect retains ownership and copyright protection of all documents produced by him. Thus even the owner cannot use the documents unless the architect agrees.

30. Klone drafted the language referenced in paragraph 28c above as an exception to the standard AIA contract language regarding his ownership of all documents. He did so to allow the District to use those documents to promote the bond issue.

31. Klone added the language of paragraph 28d above to the standard printed AIA contract such that he would be required to meet with the Board, staff and various groups involved in the bond issue process. Klone believes that to be effective in contributing to a master plan, analyzing existing buildings, developing a program of needs, and developing a design, an architect must elicit community input. In addition, when Klone was hired, the Superintendent and Board stressed to him that he must insure community input, work with community groups such as the accountability committee, and make his work available to the community. The record does not reflect the make-up or function of the accountability committee.

32. Klone prepared a 15-page draft Building and Site Analysis of Existing Weld County Re-3J School Facilities in which he detailed deficient conditions at Keenesburg Elementary School, Prospect Valley Elementary School, Weld Central Junior/Senior High School, and Hudson Elementary.

33. Based on this analysis, Klone then prepared a document reflecting scenarios for the elementary and junior/senior high schools. This document is the result of many meetings with the District accountability committee, District staff, the Superintendent and the Board. It represents the options suggested by Klone based on his analysis and master planning work. It also provides a budget for the scenarios listed.

34. The consensus of the accountability committee, District staff, Board, and Klone was that one particular scenario was the best.

35. After he developed his work product, Klone also attended various meetings, including at least one meeting of the Bond Campaign Leadership Committee. Klone characterized his role in relation to the Bond Campaign Leadership Committee as a resource person. He answered questions about the information he had produced. He did not, however, develop new information or scenarios at the request of this Committee. The record does not establish how Klone's attendance at that meeting was arranged.

36. Klone's services for master planning, program of needs and analysis, including his meetings with Board, staff, and various community groups or members, is compensated by the lump sum payment described in paragraph 28a above.

37. Klone has made his work product available to all, proponents and opponents alike. In addition, he has cooperated with Coan and answered Coan's questions. Coan opposes the bond issue. Klone has not refused to meet with anyone who requested it.

38. At the February 7, 1996 Board meeting, Coan requested that both Klone and Bell prepare information to address his specific requests and that the District compensate these consultants for this additional work. The Board denied this request but indicated that Coan could have access to all information currently available on the issues he raised.

39. Klone has not urged voters to vote for or against the bond question. He has not worked with the bond issue campaign in any aspect. The Board has not compensated Klone for any bond issue campaign work, nor is it obligated to do so. When he met with the Board, staff, and members of the community, he did not take a position on the contemplated bond issue.

40. Klone and ADK Architects will receive significant income if the bond issue passes and it thus undertakes the additional work contemplated pursuant to the contract. To date, ADK Architects has billed, and the District has paid, approximately \$8,000-\$8,500. This represents work completed, including approximately 75% of the master planning and program of needs, the preliminary design, site plans at Weld Central and Hudson Elementary, floor plans, and preliminary budgets of construction costs.

#### **Fact Sheets**

41. On June 12, 1996, the District mailed a one-page document called "Fact Sheet 1," attached to this Initial Decision as Attachment 1, to all District residences. Fact Sheet 1 begins with statements under a heading of "DID YOU KNOW. . . ." These statements indicate that District schools are at capacity and in need of major renovation, expansion or replacement; that the school property tax rate is one of the lowest in the state; that the District's last successful bond election was in 1962; that the District has been debt-free since 1983; that current space designed for 1,185 students serves 1,372 students; and that this space cannot meet student instructional needs.

42. The second half of Fact Sheet 1 details the five-year planning effort, completed in 1996, to develop a master plan to review existing school facilities and examine growth.

43. Fact Sheet 1 ends with the following: "Weld County School District Re-3(J); Hudson, Keenesburg, Lochbuie, Prospect Valley, Roggen; Five Communities Working in an Educational Partnership." The Committee intended this phrase as an indication of unity to reflect support for the bond and representation of all communities involved. Coan views this as a campaign slogan.

44. On June 13, 1996, the District paid the \$192.91 postage cost for mailing Fact Sheet 1. As a part of its routine approval of expenditures, the Board later approved this expenditure.

45. On June 26, 1996, the District mailed a one-page document called "Fact Sheet 2," attached to this Initial Decision as Attachment 2, to residents of the District. This fact sheet, entitled "WHERE WE ARE . . .," contains a list of inadequacies of four district schools. By school, it details their overcrowding, inadequate space, continued use of temporary buildings, need for replacement of current buildings, structural problems, lack of handicap accessibility, fire and safety problems, and lack of adequate ventilation. It further identifies Lochbuie as lacking a neighborhood elementary school to meet its population.

46. The second half of Fact Sheet 2 lists solutions and costs. This section essentially outlines the construction and renovation projects determined by the Board to be the best approach to solving the myriad of District facility problems. These projects eventually became part of the Board's certification of the bond question to the electors. It does not outline alternative solutions or options. The fact sheet then breaks down by school the costs associated with this one solution.

47. Fact Sheet 2 contains a statement that the Board "will ask the voters of the district on November 5th, 1996 to approve a bond issue not to exceed \$11.5 million to fund these projects." (Emphasis in the original) It concludes with the same identification of the District reflected in paragraph 43.

48. On June 28, 1996, the District paid the \$192.91 postage cost for mailing Fact Sheet 2. As a part of its routine approval of expenditures, the Board later approved this expenditure.

49. All the statements in Fact Sheet 1 and Fact Sheet 2 are factually accurate, with the possible exception of the unconditional assertion that the Board will submit the bond question on the November 1996 ballot, since a final determination of this matter had not yet occurred. The District includes the five communities of Hudson, Keenesburg, Lochbuie, Prospect Valley, and Roggen.

50. The Bond Campaign Leadership Committee developed the Fact Sheets. Based on the District's 1995 experience, when the Board changed its plan at the last minute and decided not to refer a bond question, and on a survey conducted afterwards, the Bond Campaign Leadership Committee determined that the voters

were inadequately informed about facility problems in the District. The Bond Campaign Leadership Committee intended Fact Sheet 1 to present historical background to show why the District had reached the decision that it needed to issue bonds.

51. Bond Campaign Leadership Committee members worked with the District administration, Klone, and Bell to compile specifics for the Fact Sheets.

52. Bell advised the District regarding the development of the Fact Sheets and whether their distribution complied with the Campaign Reform Act. He indicated that the Fact Sheets must be totally accurate, must contain only factual information and could not advocate a particular position. He further advised that because the bond question was not before the voters, the Board could provide this information.

53. The Bond Campaign Leadership Committee further insured that all information in the Fact Sheets had previously been made known to the public. It relied heavily on the facilities analysis and scenarios documents prepared by Klone. The Committee also used student population statistics received from the District administration.

54. Dr. Dennis Disario, Superintendent of the District, and Bell reviewed the language of Fact Sheets 1 and 2. Two or three drafts were circulated before the final wording was reached.

55. The Board did not review the language of the Fact Sheets. It had no involvement with the preparation or distribution of the Fact Sheets except to pay for the cost of postage. The record does not reveal who paid the costs of printing.

56. The clear thrust of Facts Sheets 1 and 2 is that a serious problem with District facilities exists, the current burden on District taxpayers is low, a thorough process was undertaken to address the problem, the only solution to current problems is the particular combination of projects proposed, and voters should approve the bond issue.

57. The Fact Sheets do not contain arguments against the bond issue or alternative solutions to the District facility problems. The only possible information included within the Fact Sheets which might be interpreted as reflecting negatively on the bond issue is the statement of costs. Because the drafters of the Fact Sheets intended to make them neutral, however, they did not include this or any other information with the intent that it represent arguments against the bond issue.

58. The Board intended to use the Fact Sheets and in fact did use them to gauge support for the bond question. The Bond Campaign Leadership Committee conducted a telephone survey after the Fact Sheets were distributed to determine voter reaction to the bond election (*i.e.*, yes, no, or undecided). If the response to the

Fact Sheets had been negative, the Board would likely have decided not to proceed with the bond election.

59. At the Board's July 2, 1996 meeting, Coan requested that the Board distribute two additional fact sheets reflecting views in opposition to the bond election, but the Board declined to do so.

60. Before September 7, 1996, although it had not taken formal action, the Board had a clear intent to put the bond question on the November 1996 ballot, absent a lack of public support indicating the bond question would be unsuccessful. This intent is reflected on Fact Sheet 1 (which indicates that the Board will submit a bond question on the November 1996 ballot); Fact Sheet 2 (which states that the Board will ask the voters on November 5, 1996, to approve a bond issue not to exceed \$11.5 million to fund identified construction and renovation projects); and the July 2, 1996 minutes, which indicate, in the context of a request by Coan for distribution of opposing information, that the Board has approved the proposal contained in the Fact Sheets for a November bond election. The Board's intent is further supported by the testimony at hearing.

### DISCUSSION

Coan alleges three separate violations of the Campaign Reform Act of 1974 ("Act"). The Board has further raised a number of legal arguments in its hearing brief. After citing the applicable law, the Administrative Law Judge will address each of the alleged violations separately and in doing so will rule upon the legal arguments asserted by the Board.

**Campaign Reform Act Provisions and Applicability.** The relevant portions of the Act, Sections 1-45-116(1)(a)(I) and (b)(I), C.R.S. (1996), are as follows:

(a)(I) No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution or contribution in kind in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys from any source, or make any contributions in kind, to urge electors to vote in favor of or against any:

...

(C) Referred measure, as defined in section 1-1-104(34.5).

...

(b)(I) Nothing in this subsection (1) shall be construed as prohibiting an agency, department, board, division, bureau, commission, or council of

the state or any political subdivision thereof from expending public moneys or making contributions in kind to dispense a factual summary, which shall include arguments both for and against the proposal, on any issue of official concern before the electorate in the jurisdiction. Such summary shall not contain a conclusion or opinion in favor of or against any particular issue. As used herein, an issue of official concern shall be limited to issues that will appear on an election ballot in the jurisdiction.

The definition of "referred measure" referenced in the Act is found in Section 1-1-104(34.5), C.R.S. (1996):

"Referred measure" includes any ballot question or ballot issue submitted by the general assembly or the governing body of any political subdivision to the eligible electors of the state or political subdivision pursuant to article 40 or 41 of this title.

It is undisputed that the Board is the governing body of the District [Section 22-32-104, C.R.S.]; the District is a political subdivision covered by the Act [See *Bagby v. School District No. 1*, 528 P.2d 1299 (Colo. 1974) (school districts are political subdivisions of the state)]; the bond issue is a referred measure based on the statutory definition (See "Fact Sheets" discussion below); and thus the Act generally applies to the Board's activities in relation to the bond issue.

**Involvement of Dain Bosworth.** In order to establish that the Board violated the Act, Coan must prove that the Board expended public monies to urge voters to vote in favor of the ballot issue. Based on the activities offered in the Dain Bosworth proposal and actually undertaken by Bell, there is no question that Dain Bosworth has urged electors to vote in favor of the bond issue. The Act, however, only proscribes such activities supported by public expenditures. The determinative question, therefore, is whether the Board expended any public monies to obtain Dain Bosworth's services. The record here establishes that the Board had not expended such public monies and thus has not violated the Act.

The phrase "expend any public moneys" clearly does not encompass uncompensated services. Rather, an expenditure reasonably involves a payment of money, a contractual agreement to pay money, or a contribution in kind. See, for illustrative purposes, Section 1-45-103(7), C.R.S. (1996) (definition of "expenditure," not directly applicable here). The record is clear that the Board has paid no compensation whatsoever to Dain Bosworth as of the date of the hearing and has incurred no obligation to do so. There is further no claim of a contribution in kind. While outside of the investment banking industry it may seem unlikely that a firm such as Dain Bosworth would volunteer its time to the Board at this stage without compensation, that in fact is the customary industry practice, which was followed here.

It is appropriate, however, to scrutinize carefully the relationship between the Board and Dain Bosworth to determine whether compensation for Dain Bosworth's activities urging voters to vote in favor of the bond question is in some way disguised in a later fee, such that it would be appropriate to characterize it as compensation for such services. This does not appear to be the case. The Board has not incurred any contractual obligation whatsoever to Dain Bosworth to date, and it has no legal obligation to do so in the future. Further, even if the Board elects to contract with Dain Bosworth for underwriting services, should the bond issue pass, the Board would pay no greater fee to Dain Bosworth than it would have had no bond campaign services been provided. In fact, Dain Bosworth's underwriting fee would be the same, even had it underwritten a refinancing not involving an election. Under these circumstances, the total compensation which the Board would pay to Dain Bosworth upon execution of any contract cannot fairly be characterized as containing compensation for its activities urging voters to favor the bond issue.

Coan in this matter urges that the acceptance of the Dain Bosworth proposal constitutes a contract and that Bell's services are in fact being compensated. Since the Dain Bosworth proposal contains a range of fees for services provided, Coan asserts that it represents a contractual obligation for the District to pay these fees. The fact that the District may elect not to contract with Dain Bosworth at all, however, negates any characterization of its proposal as a contract.

Further, Coan contends that the fact that the proposal provides for compensation for Dain Bosworth's coordination of all aspects of the election process, if a contract is eventually negotiated, means that Dain Bosworth will be compensated for its activities advocating passage of the bond issue. In fact, however, the actual fee which would be charged by Dain Bosworth for underwriting the bonds is not dependent on or reflective of such services.

Coan also asserts that Dain Bosworth's activities are not volunteer, because Bell is being paid by Dain Bosworth during the time he is advocating the passage of the bond issue. While this is true, it is not relevant. The Act does not proscribe Dain Bosworth's expenditure of funds to urge electors to vote in favor of a bond issue. Rather, it imposes limits on a public entity's expenditure of public funds for such purpose. The Board expended no such public funds to compensate Bell or Dain Bosworth, and thus Bell is a volunteer vis-a-vis the Board.

**Involvement of ADK Architects.** The Board has expended public monies of approximately \$8,000 to \$8,500 for the services rendered by Klone on behalf of ADK Architects. The question then becomes whether Klone's activities constitute his urging electors to vote in favor of or against the bond issue. Coan contends that by making Klone available to answer questions to community members or groups which both support and oppose the bond issue, it has violated the Act by expending public monies at times to urge electors to vote in favor of the bond issue and at times

against. This argument is illogical and unsupported by either the facts or a reasonable interpretation of the Act.

The mere act of expending public funds to retain an architect does not violate the Act and is further a reasonable action, based on the need to analyze current District facilities, design a plan to remediate deficiencies, and project the cost of such a plan. Such an action cannot reasonably be considered either to favor or oppose any bond election question which may result.

Further, the Board's direction to Klone to provide information to interested persons and groups does not violate the Act. The provision of information equally to all parties, including those opposing and favoring the ballot issue, does not constitute urging the voters to vote in a particular way. In this case and by definition, the Board has referred the bond question because it favors the passage of that issue. It is unreasonable to interpret the Board's provision of information to Coan, an opponent of the bond measure, for example, as urging him to vote against it.

If Klone had developed information specifically for opponents or proponents of the bond issue and the Board had paid for such work, a different issue would be raised. In the instant case, however, Klone has not advocated voting for or against the bond issue in his meetings with community members and groups. He has simply explained the work that he has performed and answered questions in relation to it. The Act does not prohibit such publicly-funded activities.

Coan apparently contends that a violation of the Act occurs because ADK Architects stands to profit from the passage of the bond issue, since it will receive substantial additional revenue from the additional work which will be entailed. The mere fact that ADK Architects may benefit financially from the passage of the bond issue does not, however, establish that it had urged voters to voter in favor of that bond issue.

Coan also contends that Klone should not have met with any groups or individuals but that persons who wished information should have funneled their requests through the Board, which would contact Klone to obtain the information and then respond to the request. While this approach may seem preferable to Coan, it is not mandated by the provisions of the Act.

**Fact Sheets.** Coan contends that the Fact Sheets, mailed at Board expense, urge electors to vote in favor of the bond issue, as proscribed by Section 1-45-116(1)(a)(I), C.R.S.; do not constitute a factual summary with arguments both for and against the bond issue, as permitted by Section 1-45-116(1)(b)(I), C.R.S.; and further contain a conclusion or opinion in favor of the bond issue, as proscribed by Section 1-45-116(1)(b)(I), C.R.S. The only expenditure at issue in relation to the Fact Sheets is the cost of mailing, *i.e.*, approximately \$386.

Before reaching these contentions, the Administrative Law Judge must consider the Board's contention that the Act does not apply to the Board's postage costs in relation to the Fact Sheets because no ballot issue was before the electorate when these expenditures were incurred. The reference to "before the electorate" is included in Section 1-45-116(1)(b)(I), which clarifies that the Act does not prohibit a board of education from using public moneys to dispense certain factual summaries on issues of official concern "before the electorate." The Board contends that the bond issue was only before the electorate and only became a referred measure on September 7, 1996, when the Board certified this matter. In fixing this point in time, the Board relies on the definition of a referred measure and contends that no referred measure can be before the electorate until the Board takes official action to refer it. Since the Board paid mailing expenses in connection with the Fact Sheets in June, 1996, and certified the bond issue in September, 1996, the Act would not apply to the Fact Sheet expenditures under Board's interpretation. After reviewing the applicable law, the Administrative Law Judge concurs that the Act does not apply to the June 1996 expenditures by the Board in connection with the Fact Sheets.

The definition of a referred measure is critical in determining when a public expenditure can be said to urge electors to vote for or against a referred measure and when that referred measure is before the electorate. As cited above, a referred measure is a ballot question or ballot issue *submitted* by the governing body of any political subdivision to its eligible electors pursuant to Articles 40 or 41 of Title 1, C.R.S. Section 1-1-104(34.5), C.R.S. (1996), as cited above. A ballot issue is defined in Sections 1-1-104(2.3) as a local government matter arising under Section 20 of Article X of the Colorado Constitution [the TABOR Amendment] and as defined by Section 1-41-103(4). Section 1-41-103(4)(a) and (b) define "local government matters arising under section 20 of article X" of the Colorado Constitution to include the approval of a new tax, tax rate increase, or mill levy above that for the prior year and approval of the creation of multiple-fiscal year debt without adequate present cash reserves. The bond issue in this matter meets this definition, as the election calls for a mill levy increase and creates a multi-year debt without adequate present cash reserves.

By its very terms, a referred measure is one which has actually been submitted by the governing body of a political subdivision to the eligible voters of that political subdivision. No measure can reasonably be considered to have been referred when the governing body has not yet taken action to refer it. In this case, while the Board clearly had the intent to refer the bond issue to the voters sometime before the Fact Sheets were mailed, it did not actually carry through with that intention until September 7, 1996. Thus, pursuant to Sections 1-45-116(1)(a)(I) and (b)(I), the Act does not prohibit public expenditures urging a particular vote in relation to a particular issue until such time as the matter has actually been referred.

The definition of "referred measure" makes it absolutely clear that only the governing body of a political subdivision has authority to refer a ballot question or

issue. The Board is the governing body of the school district [Section 22-32-104, C.R.S.], with powers and duties set forth in the Colorado Constitution [Colo. Const. art. IX, sec. 15] and statutes [e.g., Sections 22-32-103(1) and 109, C.R.S.].

The exclusive authority of the Board to refer the bond issue is consistent with Section 22-42-102(2)(a), C.R.S., which requires a board of education to submit to eligible electors any question of contracting a bonded indebtedness for constructing, erecting, enlarging, improving, remodeling, repairing, equipping or furnishing school buildings. See *Hebel v. School District R-1*, 131 Colo. 105, 279 P.2d 673, 675 (1955) (board of education determines amount of bonded indebtedness and maximum rate of interest before submitting question of authorization to the electors). It is also consistent with the principle that boards of education must themselves exercise legislative-type powers involving judgment and discretion and can only delegate ministerial or administrative functions. *Big Sandy School District No. 100-J v. Carroll*, 164 Colo. 173, 433 P.2d 325, 328 (1967), *Fremont Re-1 School District v. Jacobs*, 737 P.2d 816, 819 (Colo. 1987). In determining when the bond issue became a referred measure, one must thus examine only the actions of the Board, not District officials or employees.

The Board may act only at public meetings by means of a roll-call vote. If a board of education attempts to take action not conforming to these requirements, it is a nullity. Section 22-32-108(6), C.R.S.; *Robb v. School District No. Re50(J)*, 28 Colo. App. 453, 475 P.2d 30, 33 (1970). In determining when the Board referred this the bond issue to the electorate, one can only consider formal action taken by the Board at a public meeting by roll-call vote. In any case, the record does not establish any purported action by the Board to refer the bond issue to the voters other than the September 7, 1996 vote. The Board thus referred the matter on September 7, 1996, and not before. Although Coan accurately references the Board's prior intent to refer, such an intent does not constitute the actual referral.

The factual circumstances of this matter also support an interpretation that the Board did not refer the bond issue to the electorate until September 7, 1996. Although the Board obviously intended to take this action and was preparing to do so, it had made no final decision and likely would not have made the referral if it judged that the bond issue had insufficient public support. In the Board's case, this possibility was more than theoretical, as in 1995 it had exercised the option to abort the bond issue process and not refer the bond issue.

The Administrative Law Judge recognizes that the result of this interpretation is that a board of education could expend significant sums of money to urge voters to vote in favor of a bond issue, so long as the board of education deferred formal action on a referral until after such expenditures. A board of education could even delay the referral decision until the last minute to prolong the period of unrestricted expenditures. In the case at hand, the Board actually referred the bond issue only three days before the deadline.

As Coan contends, this result is inconsistent with the stated legislative purposes of the Act, found in Section 1-45-102, C.R.S. (1980):

The general assembly hereby finds and declares that the interests of the people of this state can be better served through a more informed public; that the trust of the people is essential to representative government; and that public disclosure and regulation of certain campaign practices will serve to increase the people's confidence in their elected officials. Therefore, it is the purpose of this article to promote public confidence in government through a more informed electorate.

In construing the Act, the primary task is to ascertain and give effect to the underlying legislative intent. *Colorado Common Cause v. Meyer*, 758 P.2d 153 (Colo. 1988); *Englebrecht v. Hartford Accident and Indemnity Co.*, 680 P.2d 231 (Colo. 1984). Nonetheless, the legislative declaration of the Act can only be used as a guide to interpretation of the specific provisions found elsewhere in the Act and does not itself proscribe all conduct which would, for instance, counter the goals of an informed public, public trust, and public disclosure and regulation of certain campaign practices.

If the Act were to be read to regulate public expenditures by the Board before referral of the bond issue to the voters, it would also be impossible to determine the period of time covered by the Act. At what point in time would the matter be deemed submitted to the voters and before the electorate? Would it be when the Board first considered a bond issue for the November 5, 1996 election? Would it be when the Board's intent to refer gained some level of informal Board support? The ambiguities inherent in designation of some different date would hinder boards of education in understanding the proscriptions of the Act and seeking to conform their conduct to the Act. The Act suggests no reasonable alternative to the interpretation that it applies only after the Board formally acts to refer the ballot measure. The interpretation suggested by Coan leads to an unreasonable result and cannot feasibly be executed. Section 2-4-201, C.R.S. (1980). In addition, had the legislature intended that an earlier applicability date attach, it could clearly have provided for such.

Further, if the Act were read to impose an earlier applicability date, as Coan contends, it would also create the untenable circumstance that a Board could be held liable for a violation of the Act when it in fact never referred a measure. This circumstance could result when, for example, a board of education intended to refer a measure, expended public funds to urge electors to vote in favor of the intended measure, but then determined for some reason not to refer the measure to the voters.

Because the Administrative Law Judge has determined that the Act does not apply to the postage expenditures of the Board in connection with the Fact Sheets,

she need not and does not address the issue of whether those Fact Sheets comply with the provisions of the Act.

### CONCLUSIONS OF LAW

1. The Secretary of State has jurisdiction over the Weld County Re-3(J) School Board and the subject matter of the three complaints filed in this matter.

2. The Weld County Re-3(J) School Board did not violate the Campaign Reform Act of 1974 [Section 1-45-116(1)(a)(I), C.R.S. (1996)] by choosing Dain Bosworth as its investment banker and accepting the uncompensated services of Dain Bosworth and Steven Bell to promote the bond issue.

3. The Weld County Re-3(J) School Board did not violate the Campaign Reform Act of 1974 [Section 1-45-116(1)(a)(I), C.R.S. (1996)] by contracting with and compensating ADK Architects and A. Daryl Klone for architectural services in connection with the bond issue.

4. The Weld County Re-3(J) School Board did not violate the Campaign Reform Act of 1974 [Sections 1-45-116(1)(a)(I) and (b)(I), C.R.S. (1996)] by paying for the mailing of Fact Sheet 1 and Fact Sheet 2, because the bond issue had not yet been referred to the electorate and the Act thus does not apply to the time period when the Board expended public monies to mail these Fact Sheets.

### INITIAL DECISION

It is therefore the Initial Decision of the Administrative Law Judge that all charges in the three complaints filed in this matter are dismissed.

**DONE AND SIGNED**

October 24, 1996

  
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NANCY CONNICK  
Administrative Law Judge

os9606.id/k

# DID YOU KNOW . . .

## Fact Sheet 1

- Weld School District Re-3(J) schools currently are either at capacity, in need of major renovation/expansion, or replacement. Our average growth rate since 1992 has been 3.39% and our communities continue to grow.
- Weld School District Re-3(J) school property tax rates are one of the lowest in the state. Our current mill levy is at 34.862 mils, which is below the state average.
- Weld School District Re-3(J) held its last successful bond election in 1962. The district has been debt-free since 1983.
- Weld School District Re-3(J) served 1,372 students during the 1995-96 school year with facilities designed for 1,185 students. Current space does not meet instructional needs.

From 1992 through 1995, the Board of Education developed a Master Plan to review existing school facilities and examine growth.

**Phase I** (1992-1993): The Board selected a consulting firm to fully evaluate all district facilities.

**Phase II** (1993-1994): The Board directed the District School Accountability Committee (D-SAC) to review and analyze the results of the evaluation and identify current and future needs of the district. The D-SAC was open to all patrons of the school district and represented patrons, parents, students, teachers, staff and administrators from throughout the district. Building-level Accountability Committees, along with faculty and staff, were responsible for making recommendations for each school site.

**Phase III** (1994-1995): An extensive community survey was conducted by a professional consulting firm in July of 1995 to evaluate the recommended Master Plan.

**Follow-up** (1995-1996): As a result of the evaluation process, a new architect was contracted to review all previous work and develop recommendations for a new Master Plan in cooperation with D-SAC and the Board of Education.

The Board of Education reviewed the revised Master Plan in early 1996 and sent it back to D-SAC for final analysis.

The Board of Education approved the recommended Master Plan in Spring of 1996 and will submit a bond question on the November 1996 ballot.

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WELD COUNTY SCHOOL DISTRICT RE-3(J)  
HUDSON KEENESBURG LOCHBUIE PROSPECT VALLEY ROGGEN  
Five Communities Working in an Educational Partnership

# WHERE WE ARE . . .

# Fact Sheet 2

## Hudson Elementary

- Main building, originally built in 1963 with additions in 1969 and 1988, is overcrowded.
- Library and Cafeteria space is inadequate for current student population.
- Temporary metal building, added in 1973, still houses three classes.
- Gymnasium and Music building, part of the original Hudson 1-12 school, are in need of replacement.

## Keenesburg Elementary

- The 1927 main building is overcrowded, has small and inadequate classroom and support services space.
- Gymnasium is located in center of building, surrounded by classrooms, hindering both classroom and physical education teaching.
- Cafeteria/music room has structural problems and needs to be replaced

## Lochbuie

- Currently lacks a neighborhood elementary school to meet its present and growing population.
- Elementary students are bused to Hudson, resulting in overcrowded conditions and increased transportation costs.

## Prospect Valley Elementary (includes Roggen)

- This building, built in approximately 1903, has major structural concerns and is not handicapped accessible.
- There are serious fire exiting and safety problems, inadequate classroom space, and the gymnasium is in poor condition.
- The detached cafeteria metal building needs replacement.

## Weld Central Jr/Sr High School

- Originally built in 1963, this school has inadequate library/technology, cafeteria, classroom and support services space.
- Central-area classrooms lack adequate ventilation.
- The current gymnasium space does not provide for coed junior/senior high physical education activities.

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## What are the solutions . . .

- Construct new elementary school in Keenesburg, to serve Keenesburg, Prospect, and Roggen elementary students.
- Construct elementary school at Lochbuie.
- Renovate Hudson Elementary to add music room, cafeteria, counseling and speech areas. Add library/media center and multi-purpose gym.
- Renovate Weld Central to upgrade current classroom, kitchen/cafeteria, and counseling space. Add twelve additional classrooms and library/technology space. Replace small metal gym with full-size gymnasium and physical education multi-purpose area. Improve ventilation in central-area classrooms and support services areas.

## What are the Costs . . .

Keenesburg Elementary Construction	\$3,440,000
Hudson Elementary Additions/Improvements	880,000
Lochbuie Elementary Construction	3,400,000
Weld Central Additions/Improvements	<u>3,780,000</u>

TOTAL (BOND PROPOSAL WILL NOT EXCEED) \$11,500,000

Although the District Master Plan addresses only current needs and limited growth, building plans allow for future expansion as necessary.

The Board of Education will ask the voters of the district on November 5th, 1996 to approve a bond issue not to exceed \$11.5 million to fund these projects.

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### WELD COUNTY SCHOOL DISTRICT RE-3(J)

HUDSON KEENESBURG LOCHBUIE PROSPECT VALLEY ROGGEN  
Five Communities Working in an Educational Partnership