

Public Funds Influencing Election

**David G. Stoker,
Cohl, Stoker & Toskey, PC**

Historical General Rules Regarding Use of Public Funds Influencing Election

- Public funds cannot be expended to influence the outcome of an election. OAG 1987-88 No. 6423, p. 33 (February 24, 1987).
- “[I]t was never contemplated under the Constitution and Statutes of this State that our commissions ... should function as propaganda bureaus.” *Mosier v Wayne County Commission of Auditors*, 295 Mich. 27, 31 (1940).

Factual Information

- It has been recognized, however, that public funds may be used to inform electors of the facts surrounding a millage proposal. OAG 1987-88 No. 6531, p. 367 (August 8, 1988).

Section 57/Campaign Finance Act

- After a number of Attorney General Opinions had addressed the use of public funds in relation to millage proposals; Section 57 was added to the Campaign Finance Act (MCL 169.257) in 1997 to provide as follows:
A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under Section 4(3)(a).
- Section 57 of the Campaign Finance Act thus prohibits a public body, and any official, employee, or other person acting on behalf of a public body, from using funds, personnel, office space, property, stationery, postage, vehicles, equipment, supplies, or other public resources to influence the outcome of an election.
- The term “public body” is very broadly defined in MCL 169.211(6) and would include any public agency including the City or Village Council and other public commissions or boards.

- Section 57 does, however, establish six “**safe harbors**,” i.e., activities which do not violate the Campaign Finance Act. The six “safe harbors” are as follows:
 - The expression of views by an elected or appointed public official who has policy making responsibilities.
 - The production or dissemination of factual information concerning issues relevant to the function of the public body.
 - The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication.
 - The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.
 - The use of a public facility owned or leased by, or on behalf of, a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event.
 - An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

Pamphlets/Written Materials

- Under Section 57 of the Campaign Finance Act, a public body may expend funds for the **“production or dissemination of factual information”** regarding millage proposals. MCL 169.257(1)(b)).
- The Secretary of State interprets this to mean that as long as the information is factual, the public body is not required to “balance” the information or to propound both sides of an issue.
- Secretary of State adopted the federal "***express advocacy***" test in judging election under §57 [Secretary of State Interpretive Statement, Letter to David E. Murley, October 31, 2005]
- “Express advocacy” means, in the opinion of the Supreme Court, the use of express words of election or defeat, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject,” or similar words urging or exhorting a vote for or against.

Examples of Factual Information

- Rate and term of millage.
- The amount of additional taxes paid by a homeowner living in a house with a specified taxable value.
- The amount of additional revenue that will be generated for the municipality by the millage.
- Factual information on current municipal operations such as budget, hours of operation, staffing, etc.
- Other factual information.

Express Advocacy is Prohibited

- In contrast, a public body may not expend funds for the preparation, printing, and distribution of pamphlets or other materials which advocate a vote in favor of a millage proposal. In considering Section 57 of the Campaign Finance Act, the Secretary of State has adopted an “express advocacy” test in interpretive statements and declaratory rulings under the Act

Examples of Advocacy

- Pamphlet urging "Vote Yes" on millage.
- Pamphlet otherwise seeking to influence the voters containing other than factual information. Avoid typical campaign slogans such as "Vote for Your City," "Your City Needs Your Vote," etc.
- Avoid communications containing express words of advocacy of election or defeat, such as "vote for", "elect", "support", "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," or similar words of urging or exhorting a vote for or against.
- Even a statement such as "the millage will allow us to provide better city services" is generally prohibited because it is viewed more as a promotional message than a factual statement.
- Avoid the use of slogans and "targeted" or mailings just to persons who might be expected to favor a ballot proposal.

Employees/Officials/Commission Members

- Staff/employees may not engage in campaign activities when the employee is being compensated for the performance of duties as a public employee. OAG 1987-88 No. 6423, p. 33 (February 24, 1987).
- Staff/employees may, however, be involved in the preparation of factual materials or meetings designed to disseminate factual information on the millage proposal.
- On off-hours (i.e., when employees are not being compensated for performance of public duties), staff/employees may engage in political activities including support or opposition to a ballot proposition. MCL 15.404. Section 57 of the Campaign Finance Act provides that elected officials, appointed officials, and staff/employees, when acting on their own personal time and not acting for a public body, may express their own personal views, expend their own personal funds, or provide their own personal volunteer services. MCL 169.257(1)(f).
- Employees without policy making authority are prohibited from expressing views on behalf of the public body. Further, they are prohibited from expressing their own personal views and distributing information during working hours.
- Employees and staff should not use any of the Public Agency's materials or promote the election while "on the clock" at the Agency. For those employees without policy making authority who are salaried, they should refrain from promoting the millage election during hours when they are scheduled to work.

Elected/Appointed Officials

- Elected or appointed public officials with policy-making responsibilities may express their personal views under Section 57.
- Under Section 57 of the Campaign Finance Act, Public Agency Board members and public officials with policy making authority are treated differently than other staff members. These officials are permitted to express their views on the ballot question as long as the activity complies with other provisions of the Michigan Campaign Finance Act. For example, Board members still may not use Public Agency stationery, phones, computers or other public materials to disseminate their personal opinions.
- Public officials member may make "occasional, incidental use of public resources," such as telephone, mailing, room, or stationery to communicate with a constituent, the media, or business and community leaders, etc., to expressly advocate for or against a ballot proposal.
- A board can adopt a resolution supporting or opposing a ballot proposal related to operation of the public agency. The resolution must be distributed or publicized by the regular provision of factual information regarding actions taken by the board.

Recommendations

- When speaking to community groups for the purpose of campaigning (rather than providing factual information), the official should make clear that they are expressing their personal views and not as representatives of the public body and they must not use any local City or governmental resources to prepare for or give the presentation (e.g., do not use City computers, equipment, paper, etc. and do not use employees on City time to assist with the preparation or making of the presentation).
- For example, Secretary of State has concluded that an elected or public official with policy-making responsibilities may express their own personal views but may not use a public body's resources to send a mass e-mail expressing those views on a ballot proposal.
- A public official or board member may not use public facilities to send a mass e-mail or mailing that expressly advocates support or opposition for or against a ballot proposal.

Public Buildings/Facilities/Equipment

- Public facilities and equipment may be used in connection with the preparation and dissemination of factual information on a millage proposal.
- Do not allow commission members, employees, or others to use any City or local government resources (computers, e-mail, printer, paper, pens, cell phones, or any other equipment) for advocacy or campaign purposes.
- The Secretary of State has concluded that a public body may not maintain links to websites that expressly support or oppose ballot questions if the public body does so for the purpose of influencing the outcome of an election, such as by linking only to sites advocating one side of a proposal.
- Section 57 of the Campaign Finance Act also now allows the use of a public facility if any candidate or committee has an equal opportunity to use the public facility. MCL 169.257(1)(d).
- This does not mean just the opposition to a proposal in a particular election. It means any candidate or committee in any future election. In other words, that public facility becomes an open forum.

Remedies for Unlawful Expenditures/Activities

- **Civil**

- Taxpayers may bring a civil action to enjoin the unlawful expenditure of public funds for political purposes.
- A public body may also commence an action against public officials to recover unlawfully expended funds.
- In addition to criminal penalties for violations of the Campaign Finance Act, the Act also allows for civil fines up to \$1,000 for each violation. MCL 169.215(8). Although there is no private right of action under the Act, any person may file a complaint with the Secretary of State who must then investigate the allegations. MCL 169.215(7); 169.215(5). The Secretary of State may refer the matter to the Attorney General for criminal prosecution or may pursue an action for a civil fine. The Secretary of State also uses conciliation agreements in connection with civil fines.

- **Criminal**

- A violation of Section 57 of the Campaign Finance Act is a misdemeanor punishable by a fine of not more than \$1,000 or imprisonment not more than one year, or both, for individuals. If the violator is not an individual, a violation is punishable by a fine of not more than \$20,000 or the amount of the improper contribution or expenditure, whichever is greater.

If a public officer were to draw or issue any warrant, order, or certificate for the payment of public funds to private persons or organizations to influence the electorate to support a millage proposal, if done willfully or corruptly, the officer would violate MCL 750.490 which states:

Any officer who shall willfully or corruptly draw or issue any warrant, order or certificate for the payment of money in excess of the amount authorized by law, or for a purpose not authorized by law, shall be guilty of a misdemeanor, punishable as provided in this section.

- The violation, punishable as a misdemeanor, may be prosecuted by the county prosecutor.

Legal Considerations

- Use of public funds, employees, and facilities is permitted under the rules discussed above, questions and objections can be and often are raised by millage opponents, the media, or both. In light of the potential for civil or criminal penalties under the Campaign Finance Act, extreme caution is advised. Consulting an attorney before undertaking any activity related to a millage vote to avoid a violation of the Campaign Finance Act in an important step in this process.
- **Ballot Question Committees** Because Public Agencies are restricted with respect to their conduct during an election campaign; the alternative for promoting election would be for citizens to form a ***Ballot Question Committee***. Any information that is subjective or arguably subjective may be disseminated and paid for by a Ballot Question Committee. The Ballot Question Committee may tell voters to "Vote Yes!" Ballot Question Committees are formed by members of the community who desire to promote the election and spend more than \$500.00 in any calendar year doing so. The requirements for such a committee are contained in the Michigan Campaign Finance Act, MCL 169.201 et seq. There is also information available on the Internet on the Michigan Secretary of State's website. Although there are organizational and reporting requirements, the Ballot Question Committee is not limited by the requirements of Section 57 of the Campaign Finance Act above that apply to Public Agencies. **A Ballot Question Committee can freely explain the advantages of the millage and encourage voters to approve the millage.**