STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

In the Matter of the Contest of the special election held on November 3, 2015, for the purpose of the passage of a ballot question for South Washington County Schools, Independent School District No. 833, Washington County, Minnesota, Canvass Completed November 25, 2015 Susan Richardson, Andrea Mayer-Bruestle, and Leilani Holmstadt, Contestants, v. South Washington Schools, Independent School District No. 833, Contestee.	Court File No. 82-cv-15-5639 **MEMORANDUM OF LAW IN SUPPORT OF SCHOOL DISTRICT'S MOTION TO DISMISS, FOR JUDGMENT ON THE PLEADINGS, AND/OR FOR SUMMARY JUDGMENT AND FOR ADDITIONAL SURETY BOND**

FACTS

Independent School District No. 833, South Washington County Schools, Minnesota ("School District"), held a special election in conjunction with its general election on November 3, 2015. (Notice of Election Contest ("Notice") ¶ 12.) For the special election, three questions appeared on the ballot. The only question at issue in this case is ballot Question 2, which requested voter approval to issue general obligation school building bonds in an amount not to exceed $96,000,000, to provide funds for the acquisition of land for and the construction and equipping of a new middle school facility; the repair, renovation,

remodeling, upgrading, equipping and repurposing of the existing Oltman Middle School site and facility for use as an elementary school and the construction of additions and improvements to three (3) other existing middle school sites and facilities. (*Id.*)

Following the election, the ballots were canvassed returning 6839 "yes" votes and 6820 "no" votes for Question 2. (Notice ¶ 13.) Consequently, Question 2 passed by a margin of 19 votes.

After receiving a valid recount petition, a recount of Question 2 was held on November 20, 2015. The results of the recount were two additional "no" votes and one additional "yes" vote, bringing the vote totals to 6840 "yes" votes and 6822 "no" votes, a margin of 18 votes. (*Id.*) Additionally there were 19 challenged ballots all of which were initially designated as non-votes or defective ballots. (Notice ¶ 16.)

In accordance with Minnesota Statutes Section 205A.10, subdivision 5, a School District Canvassing Board was created to canvass the recount. The members of the canvassing board were Katie Schwartz, Clerk of the School Board; Ron Kath, Chair of the School Board; Kim Blaeser, Woodbury City Clerk who was designated by the Mayor of the City of Woodbury; Annette Fritz, Washington County Court Administrator; and Kevin Corbid, Washington County Auditor-Treasurer.[1] (Notice ¶ 17.) The School District Canvassing Board convened on November 25, 2015 for the purpose of canvassing the recount.

During the canvassing meeting, Carol Peterson ("Peterson"), Washington County Elections Supervisor, who the School Board designated as the recount official, presented

[1] School District Canvassing Board members Kim Blaeser, Annette Fritz and Kevin Corbid do not reside within the School District and, therefore, the special election did not impact any of them. (Notice, Ex. B, 55:25-58:47.)

each challenged ballot one-by-one. Peterson announced the ballot number and showed the original ballot to each member of the School District Canvassing Board, to Erick Kaardal ("Kaardal"), representing the opposition group and Alan Weinblatt ("Weinblatt"), representing the proponent group. Kaardal and Weinblatt each were afforded one minute to explain their position relative to whether or how the ballot should be counted.[2] After hearing from both representatives, the School District Canvassing Board members discussed the ballot and voted as to whether the ballot should be counted and if so, how it should be counted. (Notice, Exs. B and C.)

Kaardal withdrew the challenge to Challenged Ballot ("CB") 1 which was accepted by the School District Canvassing Board. (Notice Ex. C.) The School District Canvassing Board made the following decisions on the challenged ballots at issue in this election contest as follows:

CB #	Determination	Vote
2	Non-vote, not counted	3-2
9	Non-vote, not counted	3-2
11	Non-vote, not counted	5-0
16	Non-vote, not counted	3-2
18	Non-vote, not counted	4-1

After consideration of all CBs the School District Canvassing Board adopted a Resolution Canvassing The Recounted Returns Of Votes Of School District Special Election ("Canvassing Resolution"). (*Id.*) The Canvassing Resolution provided that ballot Question 2 passed with 6840 "yes" votes and 6835 "no" votes.

[2] Kaardal attached to the Notice his "Kaardal Letter" which he sent to each member of the canvassing board on November 24, 2015. This ex-parte communication was neither requested, nor allowed by any rule or statute and was highly inappropriate as the proponent group did not receive an equal opportunity to provide its positions on the ballots by written communication to the School District Canvassing Board prior to the meeting.

ARGUMENT

I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE THE SCHOOL DISTRICT IS NOT THE PROPER CONTESTEE.

Courts have no common law jurisdiction over election contests. Since both the right to contest an election and authority of courts to hear and determine election contests are purely statutory, absent compliance with statutory requirements, courts are powerless to entertain such proceedings. *Phillips v. Ericson*, 248 Minn. 452, 80 N.W.2d 513, 517 (Minn. 1957).

In the present action, the School District was named as the Contestee, however, Minnesota Statutes Section 209.021, subdivision 3, specifically provides that the "clerk of the school district" is the contestee where the election contest involves a school district ballot question, as follows:

> If a contest relates to a question voted on within only one . . . school district, . . . a copy of the notice of contest must be served on the . . . clerk of the school district, . . . respectively, *who is the contestee*.

Minn. Stat. § 209.021, subd. 3 (emphasis added). Consequently, the School District moves to dismiss the election contest under Minnesota Rules of Civil Procedure 12.02(a).

The clerk of the school district, Katie Schwartz, was served with the Notice of Election Contest but she was not named as the Contestee. This is clear from the face of the Notice of Contest pleading. Consequently, the statutorily required party does not appear on the face of the Notice of Election Contest. This is fatal to Contestants' action. *See Disbrow v. Creamer Package Mfg. Co.*, 104 Minn. 17, 19-20, 115 N.W. 751 (Minn. 1908).

Where the contestants fail to precisely follow the requirements contained in Minnesota Statutes Section 209.021, jurisdiction will fail and the matter must be dismissed.

See, e.g. Stransky v. Indep. Sch. Dist. No. 761, 439 N.W.2d 408 (Minn. App. 1989) (service of process by contestant violated prohibition of party to action effecting personal service thus improper and jurisdiction fails).

In other civil actions involving a statutorily created cause of action, Minnesota Courts have declined to expand their role beyond the constraints imposed by the statutory language. *See Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc*., 355 N.W.2d 138, 141 (Minn. 1984) ("[b]ecause the right to maintain an action is created by statute and is in derogation of the common law, the requirements of the statute generally have been strictly construed.") Thus, Minnesota Courts have held that when a civil cause of action is created by statute, the Court will limit its scope of interpretation to a strict application of the statute. "No right of action exists save that expressly given by statute, and the remedy prescribed cannot be enlarged except by further legislative enactment." *Beck v. Groe*, 245 Minn. 28, 44, 70 N.W.2d 866, 897 (Minn. 1955).

Contestants' pleading is defective and it cannot now be amended since the time for initiating the election contest proceeding has expired. *See Schmitt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979). As a result, this Court does not have subject matter jurisdiction over this action and Contestants' election contest must be dismissed in its entirety.

II. MINNESOTA STATUTES SECTION 204C.39 DOES NOT APPLY TO SCHOOL DISTRICT ELECTIONS.

To the extent that Contestants' action rests upon a failure to comply with Minnesota Statutes Section 204C.39, Contestants fail to state a claim upon which relief can be granted. Minnesota Rules of Civil Procedure 12.02(e) supports the dismissal of this claim.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim as stated. The trial court must examine the claim as stated by the party asserting it. On a motion to dismiss for failure to state a claim upon which relief can be granted, courts consider only those facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences if favor of the non-moving party. *See Krueger v. Zeman Const. Co*., 781 N.W.2d 858 (Minn. 2010).

Contestants claim that Minnesota Statutes Section 204C.39 applies to the School District merely because Minnesota Statutes Section 205A.02 provides "[e]xcept as provided by law, the Minnesota Election Law applies to school district elections." Minn. Stat. § 205A.02.[3] In making this claim, however, Contestants ignore the preface to the statute "except as provided by law." A plain reading of the statute clearly limits the application of this statute to a "county canvassing board" with respect to "votes for an office."

Minnesota Statutes Section 204C.39 provides, in relevant part, as follows:

> A county canvassing board may determine by majority vote that the election judges have made an obvious error in counting or recording the votes *for an office*. The county canvassing board shall then promptly notify all candidates *for that office* of the determination including a description of the error. . . .

Minn. Stat. § 204C.39, subd. 1 (emphasis added).

Beyond this, the Legislature has adopted a specific procedure for School District elections in Minnesota Statutes Section 205A.10. More specifically, this statute details the make-up of the school district canvassing board for the purpose of a recount of a special election related to school district general obligation bonds under Minnesota Statutes

[3] Consistent with this, Minnesota Statutes Section 200.015 provides, "[t]he Minnesota Election Law applies to all elections held in this state unless otherwise specifically provided by law." Minn. Stat. § 200.015.

Section 475.59. *See* Minn. Stat. § 205A.10, subd. 5. Additionally, the Secretary of State has adopted rules for the conduct of recounts. *See* Minn. R. 8235.0200 – 8235.1200. According to those rules, the recount official presents the summary statement of the recount and any challenged ballots to the canvassing board which "shall rule on the challenged ballots and incorporate the results into the summary statement." *See* Minn. R. 8235.1100. Thus, the School District Canvassing Board has been specifically authorized by the Legislature to canvass and rule on challenged ballots with regard to recounts of school district ballot question elections.

The cannons of construction also favor the application of specific provisions over the general provisions. *Beck*, 245 Minn. at 41, 70 N.W.2d at 895 ("[t]he principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise provide controlling is well settled"). Even assuming, for the sake of argument, that Section 204C.39 was considered to be a general election law applicable to school district elections, the Legislature adopted specific recount provisions for school district special elections. Consequently, those specific provisions which provide the recount process apply. Therefore, the School District Canvassing Board was properly created in accordance with Section 205A.10 and Minnesota Statutes Section 204C.39 which is specific to a county canvassing board has no application under the facts herein.[4]

[4] Contrary to Contestants' claim that "the School District did not dispute this proposition" (that the school district canvassing board may correct obvious errors under Minn. Stat. § 204C.39), the School District's attorney in fact did discuss the statute's application at the beginning of the canvassing meeting and concluded that it did not apply for the same reasons stated above. (Notice, Ex. B at 4:38–6:36)

III. ATTEMPTED ERASURES IN THE VOTER INTENT LAW DOES NOT APPLY TO BOND QUESTION BALLOTS AND, THEREFORE, JUDGMENT ON THE PLEADINGS IS PROPER.

A motion for judgment on the pleadings under Minnesota Rules of Civil Procedure 12.03 permits a party to have the court determine the sufficiency of a legal claim. In the present case, Contestants solely rely on a claimed attempted erasure to conclude that CB 11 should be ruled a "no" vote. (Notice ¶¶ 70-79 , Ex. A p. 7). This claim, however, assumes that Section 204C.22, subdivision 11 applies to school district ballot question elections. Subdivision 11, however, refers only to "candidates" and makes no reference to a school district "question." The plain language of subdivision 11 coupled with legislative history regarding Section 204C.22 leads to the unmistakable conclusion that "attempted erasures" are not a valid consideration for determining voter intent with respect to school district ballot questions. Since subdivision 11 does not apply, Contestants' claim that CB 11 is a "no" vote must be rejected. As a result, CB 11 was properly not counted and even without considering the remaining challenged ballots, the ballot question passes.[5]

Until 1987, the Minnesota election law did not apply to school district elections. *See* Minn. Stat. § 200.015 (1986) ("[t]his chapter and chapters . . . do not apply to school district elections unless otherwise specifically provided by law."). (Affidavit of Michelle Kenney ("Kenney Aff."), Ex. A.) During the 1987 legislative session, the Legislature made the Minnesota election law applicable to school district elections. *See* Minn. Stat. § 200.015 (1987) ("[t]he Minnesota election law applies to all elections held in this state unless otherwise specifically provided by law.") (Kenney Aff., Ex. B.)

[5] The result of the recount canvass was the passage of Question 2 by five (5) votes. There are five (5) challenged ballots. Therefore, unless Contestants establish that all five (5) ballots should have been determined to be "no" votes, Question 2 passes.

Subdivision 11 relating to "attempted erasures" was included in Section 204C.22 prior to 1987 when the statute did not apply to school district elections. At that time, subdivision 11 addressed "attempted erasures" as follows:

> If the names of two candidates have been marked, and an attempt has been made to erase or obliterate one of the marks, a vote shall be counted for the remaining marked candidate. If an attempt has been made to obliterate a write-in name a vote shall be counted for the remaining write-in name or marked candidate.

See Minn. Stat.§ 204C.22, subd. 11 (1986) (Kenney Aff., Ex. C).

During the 1990 legislative session the Legislature made a number of changes to the election law that explicitly addressed school district ballot question elections. *See* 1990 Minn. Laws, Ch. 453 ("[a]n act relating to election; making various changes in laws applicable to school district elections. . .") (Kenney Aff., Ex. D). More specifically, the legislation added one new subdivision and amended three other subdivisions of Section 204C.22.

The new subdivision added was Subdivision 3a which provides as follows:

> Subd. 3a. **VOTES YES AND NO**. If a voter votes both yes and no on a question, no vote may be counted for that question, but the rest of the ballot must be counted if possible.

1990 Minn. Laws, ch. 453, s. 7. (*Id.*)

Three subdivisions were amended to specifically apply to school district ballot questions, as follows:

> Subd. 9. **VOTES FOR ONLY SOME OFFICES OR QUESTIONS DETERMINED**. If the voter's choice for only some of the offices or questions can be determined from a ballot, the ballot shall be counted for those offices or questions only.

1990 Minn. Laws, ch. 453, s. 8. (*Id.*)

> Subd. 10. **DIFFERENT MARKS**. If a voter uniformly uses a mark other than (X) which clearly indicates an intent to mark a name or to mark yes or no on a question, and the voter does not use (X) anywhere else on the ballot, a vote shall be counted for each candidate or ~~position~~ response to a question marked. If a voter uses two or more distinct marks, such as (X) and some other mark, a vote shall be counted for each candidate or ~~position~~ response to a question marked, unless the ballot is marked by distinguishing characteristics that make the entire ballot defective as provided in subdivision 13.

1990 Minn. Laws, ch. 453, s. 9. (*Id.*)

> Subd. 15. **BLANK BALLOT FOR ONE OR MORE OFFICES VALID**. If no name or ~~position~~ response to a question is marked and no name is written in, the ballot is blank with respect to that office of question. A ballot that is blank with respect to one or more offices or questions is not defective.

1990 Minn. Laws, ch. 453, s. 10. (*Id.*)

A review of the new subdivision 3a and amendments to subdivisions 9, 10 and 15 reveal a legislative intent that only those voter intent rules previously applicable to candidate elections also apply to school district ballot questions. Importantly, subdivision 11 related to attempted erasures, which clearly only applies to candidate elections,[6] was not and has not been amended consistently with subdivisions 9, 10 and 15. This conclusion is further supported when subdivisions 3a and 15 are considered together. In this respect the legislature made it clear that voting both yes and no or leaving the ballot is blank with respect to a question, results in the ballot not being counted. The legislature's intent that subdivision 11 applies only to a candidate election is clear. Courts must enforce statutory language and arguments for change are best addressed to the legislature. *See Education Minn.–Osseo v. Indep. Sch. Dist. No. 279*, 742 N.W.2d 199, 202 (Minn. App. 2007). Consequently,

[6] Subdivision 11 provides, in relevant part, "[i]f the names of two candidates have been marked, and an attempt has been made to erase or obliterate one of the marks, a vote shall be counted for the remaining marked candidate. . . ." *See* Minn. Stat. § 204C.22, subd. 11.

subdivision 11 addressing attempted erasures is not applicable to and cannot be used to determine voter intent in school district ballot question elections.

In addition, interpreting subdivision 11 to apply to school district ballot questions not only ignores the clear and unambiguous language of subdivision 11, but would also, in effect, render subdivision 3a a nullity. Such an interpretation is counter to the cannons of statutory construction that "the legislature intends the entire statute to be effective and certain." Minn. Stat. § 645.17(2). Therefore, Contestants' challenge of CB 11 must be rejected, the election contest be dismissed and Question 2 be affirmed as passing.

IV. THE SCHOOL DISTRICT CANVASSING BOARD CORRECTLY DECIDED THE FIVE CHALLENGED BALLOTS AT ISSUE.

A. Introduction

Where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is proper under the Minnesota Rules of Civil Procedure 56. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). To defeat a motion for summary judgment, the non-moving party must demonstrate the existence of specific facts that create a genuine issue for trial. *See Gorath v. Rockwell Int'l, Inc.*, 441 N.W.2d 128, 131 (Minn. App. 1989), *review denied* (Minn. July 27, 1989). A party cannot rely upon bare allegations or denials to oppose a summary judgment motion. *See Russ*, 566 N.W.2d at 71, *Mickelson v. Travelers Ins. Co.*, 491 N.W.2d 303, 306 (Minn. App. 1992) (party opposing summary judgment may not rely on general statements of fact or conclusory allegations, but must demonstrate the existence of specific facts that create an issue of material fact).

The School District Canvassing Board found and certified that Question 2 at the November 4, 2015 special election received 6,840 "yes" votes and 6,835 "no" votes and declared the Question passed. (Kenney Aff., E.) This established prima facie evidence that Question 2 passed and placed upon Contestants the burden to prove that it did not. *See Berg v. Veit*, 136 Minn. 443, 445, 162 N.W. 522, 522 (1917).

Contestants challenge the School District Canvassing Board's decisions to not count five (5) ballots. The intent of the voter is an important consideration that must be ascertained from the ballot itself without speculating or making efforts to determine intent in a manner other than provided by statute. Minn. Stat. § 204C.22, subd. 2; *Prenevost v. Delorme*, 129 Minn. 359, 363, 152 N.W. 758, 759 (1915). When determining a voter's intent, the court may look at the whole ballot rather than merely the portion related to the present contest. (*Id*.)

None of the five (5) ballots were rejected for a technical error that made it impossible to determine the voter's intent. Therefore, to determine intent, the principles applicable to school district ballot questions contained in Section 204C.22 are used. Minn. Stat. § 204C.22, subd. 1. Intent shall be ascertained only from the face of the ballot. Minn. Stat. § 204C.22, subd. 2.

B. CB 11.

Looking at CB 11 as a whole, the voter filled in ovals for school board members and all three ballot questions. For Questions 1 and 2, however, the voter filled in both the "yes" and "no" ovals and appears to have placed an "X" through the "yes" oval. (Notice Ex. A, Ex. 11.)

The Recount Official ruled this ballot was a "non-vote" and it was not counted. (Notice, Ex. B at 1:18:20-1:22:07.) The ballot question proponent group challenged the ballot stating it should be considered as a "Yes" vote. (*Id.*) Contestants argued to the School District Canvassing Board that it should be judged a "No" vote. (Id. 1:12:15-1:13:01.) The School District Canvassing Board determined unanimously that with respect to Question 2 it was a "non-vote" and not counted. (Notice, Ex. C.)

First and foremost, the voter completely filled-in both "yes" and "no" ovals for Question 2. The voter intent statute cannot be any clearer on these facts. "Where a voter votes both yes and no on a question no vote may be counted for that question, but the rest of the ballot must be counted if possible." Minn. Stat. § 204C.22, subd. 3a. Thus CB 11 was properly determined to be a "non-vote" and not counted.

Notwithstanding the clear language in Subdivision 3a, Contestants claim that CB 11 was incorrectly not counted. More specifically, Contestants allege that the "X" through the "yes" oval was an attempted erasure or obliteration. (Notice ¶ 70-72.) As discussed above, Subdivision 11's attempted erasure or obliteration provision does not apply to school district ballot questions. Therefore, Contestants' challenge must be rejected and the ballot not be counted.

Even if the "X" through the "yes" oval is given any weight as an attempted obliteration, it can be argued with equal force that the voter was trying to vote "Yes." The "X" mark was, prior to electronic balloting, used to mark a name or to mark "yes" or "no". *See generally* Minn. Stat. § 204C.22, subds. 3, 4, 6, 7, 10. Consequently, it is just as likely that the voter was attempting to indicate his/her intent to vote "yes" by including the "X" mark.

Under any scenario, CB 11 cannot be counted. It is not counted because it is marked both "yes" and "no." It is also not counted because the "X" is as much a vote for "yes" as it is an attempted erasure to vote "no," and, at best, the voter's intent is ambiguous and the ballot is not counted. *See Ganske v. Indep. Sch. Dist. No. 84*, 271 Minn. 531, 533, 136 N.W.2d 405, 407 (Minn. 1965).

Looking at the face of the ballot and using the voter intent law the ballot was properly not counted by the School District Canvassing Board. This Court must reach the same result and conclude that CB 11 not be counted.

C. CB 18.

CB 18 originated from a St. Paul Park precinct and, as a result, only the three ballot questions appear on side one of the ballot. City offices and School District offices appeared on the other side of the ballot. (Kenney Aff., Ex. F.) With respect to the School District ballot questions, the voter did not fill in any of the ovals for either "yes" or "no." (*Id.*) The voter only made what appears to be scribble or scratch marks covering most of the word "no" for each of the three ballot questions. The School District Canvassing Board by a 4–1 vote, found that the ballot was a "non-vote" and it was not counted. (Notice, Ex. C.)

Contestants claim that the voter intended to vote "no." In support of this position, they rely upon subdivision 6 which provides "[i]f a mark (X) is made out of its proper place, but so near a name or space as to indicate clearly the voter's intent, the vote shall be counted." Minn. Stat. § 204C.22, subd. 6.

Looking at the ballot, however, it is equally arguable that the intent of the voter's mark was to cast a "yes" vote. Virtually identical facts are found in *Ganske*, where the ballots "contained an X mark across the word 'NO' with no other mark, either in the adjacent box or

elsewhere to indicate the voter's intention." *Ganske* at 271 Minn. 533, 136 N.W.2d 407. The contestant in *Ganske* focused on the same rule as Contestant herein, arguing that the "X" mark on the word "no" "should be treated as a 'NO' vote." *Id*. The Supreme Court, however, recognized that "it could be argued with equal force" that the voter intended to cross out the word "no" to indicate his intent to cast a "yes" vote. *Id*. The Supreme Court held "that the intention of the voter is ambiguous at best and that the ballot should not have been counted either for or against the question." *Id*.

Ganske supports the decision of the Canvassing Board to not count CB 18. This Court should similarly conclude that CB 18 not be counted.

D. CBs 9 and 16.

CBs 9 and 16 are similarly marked. With respect to the three ballot questions, the voter of each ballot filled in the "no" oval for Questions 1 and 3, but filled in the letter "O" in the word "no," and not the oval, on Question 2.

Contestants claim that the voters' intent is exhibited by the filling-in of the letter "O" in the word "no" because it is so near to the word "no" that it indicates "clearly" the intent to vote "no." Minn. Stat. § 204C.22, subd. 6. Thus, Contestants argue that both ballots should have been found to be "no" votes.

However, on CB 9, the voter demonstrated that she/he understood the Instructions to Voters by filling in the ovals for three school board members and by filling in the "no" oval for Questions 1 and 3. For whatever reason, the voter then filled in the letter "O" of the word "no" for Question 2.

Similarly, on CB 16, the voter demonstrated that she/he understood the Instructions to Voters by filling in the "no" oval for Questions 1 and 3. Unexplainably, the voter filled in the letter "O" of the word "no" for Question 2.

The voters' conduct of filling in the letter "O" of the word "no" for Question 2 differs from every other mark on the ballots. While misplaced marks may be counted, subdivision 6 specifically requires that the mark be "so near a name or space as to *indicate clearly* the voter's intent." Minn. Stat. § 204C.22, subd. 6. Taking into consideration the ballots as a whole, it is conceivable that the voters did not intend to cast a vote for Question 2, which certainly was their prerogative. Consequently, since there is nothing to suggest that the voters in fact intended to vote "no" on Question 2, the School District Canvassing Board correctly found the ballots were ambiguous and determined that the ballots not be counted.

E. CB 2.

The final ballot challenged by Contestants is CB 2. The voter of CB 2 followed the instructions to fill in the ovals for School Board Members, however, filled in only the letter "O" in "no" for all three ballot questions. The Canvassing Board decided to not count the ballot. Contestants again rely on subdivision 6 to support their position that a mark out of place should be counted as a "no" vote.

Like CBs 9 and 16, the question is whether the voters' intent can be clearly ascertained from the face of the ballot. Looking at each challenged ballot as a whole, it is conceivable that the voter did not intend to vote at all for Question 2, which certainly was their prerogative. Consequently, since there is nothing to suggest that the voters in fact intended to vote for Question 2, the School District Canvassing Board correctly found the ballots was ambiguous and should not be counted.

F. Conclusion.

The Canvassing Board made correct determinations using the voter intent law as a guide on each of the five (5) ballots at issue. The decision that each of the five ballots not be counted is supported in the law. This Court should also conclude that the five (5) ballots at issue not be counted. However, even if this Court finds that only one of the five (5) ballots was correctly not counted, the School District's ballot Question 2 will pass. Therefore, the School District requests that the Canvassing Board's decision be affirmed.

V. CONTESTANTS SHOULD BE REQUIRED TO FILE AN ADDITIONAL SURETY BOND.

Minnesota Statutes Section 209.07, subdivision 4, requires a minimum surety bond in the amount of $5,000 "when an election approving the issuance of bonds by a school district is contested." Minn. Stat. § 209.07, subd. 4. The statute further provides that the bond amount may be "a greater amount determined necessary by the court to provide security for costs of the contest to the school district, including any additional costs that may be incurred by the school district if the bond issue is delayed." *Id.* Should the sale of bonds be delayed because of the present action, the School District and its taxpayers will be subject to additional costs and damages and the requirement of an additional surety bond should be ordered for their protection.

In light of the current market, the School District's financial consultant, Ehlers, Inc. is recommending to most school districts that passed bond questions in the November election to sell their bonds in mid-January to early February of 2016 because interest rates are traditionally lower at that time of the year. *See* Affidavit of Joel Sutter ("Sutter Aff.") ¶ 3.) At a meeting of the School District Finance Committee on December 7, 2015, District

officials and Ehlers discussed February 4, 2016 as the tentative date for the School District's bond sale. (*Id.*)

In the event that this election contest action is still pending on February 4, 2016, the School District will not be able to move forward with selling the bonds. In order for the bonds to be marketable in accordance with customary standards in the municipal bond marketplace, the School District's bond counsel must be able to issue an opinion that is "unqualified" in the sense that the matters covered in the opinion must not be subject to dispute. As a prerequisite to delivering the bond approving opinion, the School District is required to make various certifications to bond counsel, including a certification that there is no pending or threatened litigation questioning the School District's right and power to execute and deliver said bonds or otherwise questioning the validity of said bonds or the levy of any tax to pay the principal thereof and interest thereon. (Affidavit of Thomas Deans ("Deans Aff.") ¶ 4.) Underwriters and prospective purchasers of bonds will not purchase them while an action to invalidate the authorizing election is pending, leaving said bonds unmarketable. (Affidavit of Joel Sutter ("Sutter Aff.") ¶ 5; Deans Aff. ¶ 5.) The present action will prevent bond counsel from delivering its unqualified opinion to prospective purchasers of bonds, thereby making the bonds unmarketable. (Deans Aff. ¶ 6.)

Consequently, pendency of the present action effectively forestalls all actions that rely upon the approved referendum. In this respect, should this action remain pending on February 4, 2016, the scheduled sale will not be able to occur because of the School District's inability to deliver the certificate of non-litigation, thereby precluding bond council's opinion as to the validity of the bonds. In particular, the School District's inability to issue bonds on schedule will affect the School District's ability to move forward with

design development, construction documents, project bidding and contract awards over the next several months in anticipation of contracts being awarded in or about July 2016. Thus, it is clear that the Court has authority to require Contestant to post an additional surety bond to protect the School District and its taxpayers from additional costs and damages caused or occasioned by delay in the sale of the bonds resulting from the continuing pendency of this action, including any appeal thereof.

Although the current proceeding may be concluded prior to mid-January, appeals could result in a sale not occurring in mid-January and a delay of up to approximately six months. The construction schedule for the new middle school building provides for design development to begin December 1, 2015 and the development of construction documents in January 2016 in preparation for bidding and contract awards to occur in July 2016. (*See* Affidavit of Paul Youngquist ("Youngquist Aff.") ¶ 7.) Construction is scheduled to begin in August 2016. (*Id.*) Should the School District be delayed until mid-April 2016, the critical components of the construction schedule will not be achieved. (Youngquist Aff. ¶ 8.) In addition to affecting the construction schedule, a delay of three (3) to six (6) months will have an adverse effect upon construction costs. (Youngquist Aff. ¶ 9.) In this regard, the School District could realistically see a three percent (3%) inflationary increase in construction costs. (*Id.*) Further support for this conclusion is found in the Mortenson Construction Cost Index for Minneapolis-St. Paul for the 2nd Quarter of 2015 which advised building owners that because "it appears that strong growth in the Twin Cities construction costs will sustain through 2015" coupled with "many subcontractors and suppliers at capacity and continuing to exercise caution in their pursuit of new work" that building owners should "plan for cost increases of 5% over the next year." (Youngquist Aff. ¶ 10.) Using a three

percent (3%) inflationary factor, the total cost of construction would increase by approximately $2,938,349, rendering the amount of funds provided by the bond issue insufficient for the Project as currently envisioned. (Youngquist Aff. ¶ 11.) As a result, the Project would need to be reduced in scope or certain items deleted in order to keep the Project costs within the authorized bond amount resulting in harm to the School District, its students and taxpayers. (Youngquist Aff. ¶ 12.)

In addition to increased construction costs, there is a strong likelihood that a delay in the bond sale will result in higher interest rates paid by the School District. The School District's financial consultant has projected that based upon current interest rates a bond sale on February 4, 2016 will result in a True Interest Cost of approximately 3.25 percent, resulting in total payments over the entire term of the issue of approximately $142.2 million. (Sutter Aff. ¶ 4.) Should the School District's bond sale be delayed by three months, until May 2016, interest rates could be approximately 0.50 higher. (Sutter Aff. ¶ 7.) A True Interest Cost of approximately 3.75 percent would result in total payments over the entire term of the issue of approximately $148.6 million, approximately $6.4 million more than if the sale occurred on February 4, 2016. (*Id.*) There is even the risk that these costs could be higher as there have been three times since 2008 during which average interest rates on municipal bonds have increased by more than 1% in less than four months. (Sutter Aff. ¶ 8.)

Further support for the damages the School District could incur from delay was recently observed in a 2014 bond referendum election contest action involving Independent School District No. 2310, Sibley East ("Sibley East"). The School District received voter approval to issue general obligation bonds in the amount of $43,045,000 for the acquisition and betterment of school sites. An election contest was filed based on alleged procedural

irregularities. (Sutter Aff. ¶ 9.) The School District prevailed at trial. Contestant appealed to both the Court of Appeals and the Supreme Court. Even though the case was expedited in the Court of Appeals, final judgment was not entered until June 1, 2015. Sibley East sold their bonds on June 10, 2015 and they closed on July 7, 2015. During the appeal process interest rates increased resulting in the additional principal and interest costs to the taxpayers estimated at $2.9 million dollars. (Sutter Aff. ¶ 9.) The School District's bond referendum was more than twice the amount of the Sibley East bond referendum. Consequently, the impact of delay to the School District and its taxpayers is real and can be significant. Therefore, ample support exists for this Court to require Contestants to file an additional surety bond for the protection of the School District and its taxpayers in the amount of $9,300,000.

CONCLUSION

Contestants failed to name the proper Contestee for this election contest. Because the statutory procedure must be strictly followed and the time for filing the contest has expired, the School District's motion to dismiss for lack of subject matter jurisdiction should be granted.

If not dismissed for lack of subject matter jurisdiction, Contestants' election contest fails to state a claim upon which relief can be granted with respect to Section 204C.39. In this regard, the section applies only to county canvassing boards which are not applicable to the School District recount. Additionally, the School District Canvassing Board properly conformed to Section 205A.10, which specifically applied under the facts. Therefore, to the extent that Contestants' action rests upon Section 204C.39, it should be dismissed for the failure to state a claim.

Section 204C.22, subdivision 11 relating to attempted erasures does not apply to school district question elections. When revising Section 204C.22 in 1990 to apply to school district ballot question elections, the legislature did not similarly amend Subdivision 11. Consequently, it is clear that the legislature did not intend for Subdivision 11 to apply in school district question elections which leads to the unmistakable conclusion that CB 11 was properly not counted.

The School District Canvassing Board correctly determined that the five (5) challenged ballots should not be counted. If only one challenged ballot is affirmed the election contest must be dismissed and Question 2 be affirmed as passing.

If the present action delays the sale of the voter approved bonds, the School District and its taxpayers will be subject to increased construction costs as well as additional interest costs. Consequently, the Court should require Contestants to file an additional surety bond in the amount of $9,300,000 for the protection of the School District and its taxpayers.

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