

## County Attorney's Role in Borrowing Money

### Speaker's Outline

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#### 1. You're not expected to be an expert in local government finance,

- a. But you are the expert in your client's concerns, affairs and procedures
- b. And there are important tasks you can undertake to help the process go well
- c. Most of these principles apply whether or not you have a separate bond counsel, just a matter of degree

#### 2. Here's the most important thing you can do:

- a. If you don't understand something, **ask**; because if you don't understand it, chances are the client doesn't, either. If something strikes you as odd, it may well be odd. **"See something, hear something, say something."**
- b. Don't let anyone put you off with "the way we always do it" or "market requirements," without at least some further inquiry.
  - i. (For example semiannual payments on a bond deal v. types of prepayment requirements).

#### 3. Help your client understand what it's getting into

- a. **Who are the players?** See the chart at the end of the document. Staff doesn't always understand the relationship between the County and other participants. This is especially true in vendor financings, which often bubble up through departments other than finance. If separate bond counsel, you can ask them to discuss. Also, encourage the Lead Staff to get written fee commitments from all parties at the beginning of the process, and ask LGC and Financial Advisor to review.

- b. What do the documents say?** Someone from the County needs to be reading documents with a critical eye. If that's not going to be you, you need to make sure that matches the client's expectation – because people think you are reading the documents. You're not there to proofread the bond counsel's documents, but bond counsel doesn't know everything you know about how your County operates, and can't be the expert on the County's business matters. There's also the matter of "translation"
  - c. What is the County committing to now?** What's the formally pledged security? What's the actual source of green dollars to pay the loan – and how are the two related? Does the final payment schedule match the County's expectation? – for example the timing and amount of the first payment. What's the procedure for actually drawing money when the loan is closed?
  - d. What are the County's on-going requirements or limitations?** Prepayment rules. Rules for additional debt on the same security. Releasing property or granting easements. Continuing disclosure or reporting to the lender. Rules for keeping records of how the money is spent. Who's going to keep a permanent file of the financing documents?
- 4. Biggest issue(s)**
- a. Insurance issues; Contractors' bonds; Insurance policies**
    - i. Getting coverages that match the financing agreements' requirements, including noting the lender as a dual obligee on construction bonds.**
      - 1.** These continue to be glossed over in closing process and cause problems post-closing. Much easier to change pre-closing than post-closing. See the last two pages for examples of provisions that might be in the draft financing contract you get from either the lender or even from your own counsel.

**5. Help along the local process**

- a. This is where County Attorney may have specific responsibilities, and where a failure to carry them out could cause a significant problem or delay in closing.
- b. Be proactive in telling people how you want things done. Things like agenda deadlines, newspaper deadlines, resolution certifications vary from place to place and can change over time. Folks shouldn't make assumptions, but help out where you can.

**6. Get a schedule set, and help everyone stick to it.**

- a. When do we need the money?
- b. When does that mean we need LGC approval?
- c. When does that mean the Board need to act?
- d. When does that mean we need documents for the agenda package?
- e. When do we need to have a title insurance commitment?
- f. County Attorney isn't going to write that schedule, but you can help be sure you get one, and then hold folks accountable to stay on schedule.
- g. Attorneys can be deadline-focused, and if the closing date is the only deadline, everything else falls out of line.
- h. **Agenda deadlines** – these vary widely from County to County, and from time to time they change. But once folks know the deadlines, there's no reason you should accept a failure to meet them.
- i. **Publication deadlines** – if a notice needs to be in the paper on the 20<sup>th</sup>, when do you need that text, and in what format? Some places that's the 19<sup>th</sup>, and in others it might be the 12<sup>th</sup>. Some folks want a camera-ready pdf, others want a Word® text that they'll plug in. Are you going to send the notices to the paper, or is someone else? If the notice is for a meeting or a hearing, who is double-checking the date, time and place?
- j. **Resolution formats** – if there's a certain way your Board or the Clerk wants resolutions, or their certifications, to look, no reason others can't accommodate that.
- k. **Open meetings/conduct of hearings/special meetings and notices** - often bond counsel isn't there and there's no one else to

make sure the hearing is opened and folks are given an opportunity to speak.

## 7. Help with the real estate matters

- a. If a financing has a real estate component, you will either be handling the real estate matters or identifying another lawyer who will. If it's going to be someone else, try to identify that person to the rest of the group as soon as you know you'll have real estate issues.
- b. If you're doing it yourself –
  - i. Identify the timeline for providing a title insurance commitment, and then meet that deadline
  - ii. Identify issues that may be of concern to the lender, especially those you might know from the start –
    - 1. Presence of future interests and other encumbrances – Oh, is it a problem that the property is subject to a reversion clause? Or a brownfields agreement?
    - 2. Subdivision issues, if County wants to mortgage only a part of a larger parcel
    - 3. Is lender going to require a new survey, or will a general exception for matters of survey be OK? Especially as these rules change . . . [put in the financing RFP you're not getting a new survey]
    - 4. What's the timeline for recording? Often there will be a specific day for the recording, and the parties will want it to be done as early as possible.

## 8. Help with the closing-day process

- a. Once again you shouldn't have to be the closing-day logistics manager, but you can certainly be of help and you can encourage folks to get these set early on
- b. Who needs to sign things when? If the process is set early, you can make sure the signing folks won't be on vacation or at out-of-town training.
- c. Don't have documents signed with blanks. Don't sign naked signature pages. Don't allow the lender to wait until closing day to provide the final payment schedule. Don't have people sign for things that are

outside the scope of their responsibility or expertise (for example, the clerk isn't the best person to certify that there's no pending litigation, or that there's been no material adverse change in the County's financial condition). Hold folks' feet to the fire so you don't have a rag-tag closing.

- i. When you've been working on a financing for four months, you simply shouldn't accept documents showing up late or incomplete, or getting an email on the morning of closing telling you to "make seven copies of the attached 15 documents plus that other one I sent last week, get them all signed and then fax them all to me by 9:45." Whether it's the lender or your bond counsel or whoever, you are entitled to an orderly closing process.

## 9. Two other points

- a. Reimbursement rules
- b. Joint committee filings ("45-day letters") -- N.C. Gen. Stat. Section 120-157.2

## 10. Delivering a legal opinion at closing

- a. *Why does the lender even want my opinion anyway?*
  - i. **Opinions are part of the due-diligence process** for the lender and the other lawyers. Everyone cares if the resolutions are properly adopted and if there's no related litigation. Asking you to put that in writing causes focus on the issue and helps us know it's true. If you need to modify the info to reflect facts, then usually can work with it; and if so bad we can't work with it, well need to know that too. Keep in mind that even when you have a bond attorney, your opinion may be part of the bond attorney's due diligence, and therefore the County Attorney and the Bond Attorney will have differing interests in the composition of those opinions.
  - ii. **But no legal opinion is a guarantee** – not yours, not mine. Legal opinions are a statement of professional judgment, subject to a negligence standard.

- iii. You are held to this negligence standard when you prepare an opinion for 3rd party evaluation regardless of who your client is, whether or not you have liability insurance and whether you are part time or full time. See Rule 2.3, Evaluation for Use by Third Persons. Also really doesn't matter if it's called an "opinion" or a "certificate," or if it's on your letterhead or not.

## 11. Two types of opinions you'll run into

### a. **The LGC's preliminary opinion from local counsel on a 160A-20 installment financing**

- i. The LGC now accepts this opinion from bond counsel, and it seems to me most bond attorneys are happy to do it. We talk to County Attorney to see if they want us to do it or do it on their own
- ii. LGC form is in the package, along with our own suggested alternate form. Not too much different. We did a blog post – biggest issues with LGC form is that LGC wants this turned in before some of the statements will be true. The LGC is OK with getting a draft that you sign and send in once all the conditions on the opinion are met

### b. **An opinion on closing –**

- i. We have two pages in the materials with standard language that you will see in many of the forms that you'll be presented as a form for you to follow. What you see in the package are statements that I think you, as the County Attorney, should feel are within your zone of responsibility and knowledge that you can deliver.
- ii. If there are specific reasons why you think a particular conclusion is either not fair to ask, or not true, talk to the person requesting the opinion – that's how the opinion serves its due diligence function.
- iii. Things I don't think you should say –
  - 1. If you have a bond counsel involved, I don't think you should deliver any opinions as to whether a contract is "enforceable" against the County. That's really one of the

two main legal areas the bond counsel should be covering (along with tax)

2. If there isn't a bond counsel involved, you may receive more pressure to provide an enforceability opinion. I still think a bank should be able to live without it, but you'll have to have that discussion.
3. Anything about the tax-exempt status of interest
4. That a deed of trust or a UCC provides a "first lien"

## 12. Addressees, assumptions and limitations

- a. **Addressees** – it's appropriate for anyone who is relying on the opinion to be an addressee of the opinion. If you won't address to the lender, for example – or provide a separate "reliance" letter to the lender – then that should be a red flag to the lender that you are unwilling to stand behind the opinions. Personally I'm in the camp of "in for a dime, in for a dollar" – will address to anyone, they'll still need to show reliance.
- b. **Assumptions and limitations** – You can never state all of them. But if there are some that are of particular importance to you, put them in; again, that's part of the opinion as a due diligence instrument
  - i. Licensed only in North Carolina
  - ii. As to litigation, only as to "matters on record in local superior court or for which County has been served with a summons"
  - iii. "I didn't really read anything, including the rest of this opinion, so this is pretty much a guess"
  - iv. *What I put in for my clients to sign* – "I make the representations in this certificate based on my own actual knowledge, including information provided to me by County officers and other County representatives, but I have not undertaken any special investigation for the specific purposes of this certificate."

**13. Links to some of our blog posts on topics covered in the presentation**

- a. On the general topic of local counsel's role (including a link to a good short article from another source) ---
  - i. <http://www.sanfordholshouserlaw.com/nc-public-finance/2014/03/20/our-use-of-signature-pages-has-got-to-change>
- b. About our “better form” of a preliminary opinion to the LGC –
  - i. <http://www.sanfordholshouserlaw.com/nc-public-finance/2014/10/15/the-attorneys-preliminary-opinion-to-the-lgc-on-an-installment-financing-a-better-form>
- c. On the use of signature pages –
  - i. <http://www.sanfordholshouserlaw.com/nc-public-finance/2014/03/20/our-use-of-signature-pages-has-got-to-change>
- d. On the IRS reimbursement rules –
  - i. <http://www.sanfordholshouserlaw.com/nc-public-finance/2013/09/04/dont-get-caught-by-the-irs-rules-on-reimbursement>
- e. About “45-day” letters –
  - i. <http://www.sanfordholshouserlaw.com/nc-public-finance/2013/08/14/45-day-letters-to-the-legislative-joint-committee>

## County Attorney Closing Opinions

### Provisions that I think are reasonable and appropriate

1. The County is a political subdivision of State of North Carolina duly organized and existing under the constitution and laws of the State of North Carolina. The County has the full legal right, power and authority to execute and deliver the Financing Documents and to perform all of its obligations under and as contemplated by the Financing Documents.

2. The Board has properly adopted the Resolution. The Resolution authorizes County officials to execute and deliver the Financing Documents on the County's behalf. The Financing Documents have been executed by appropriate County officials.

3. No further approval, consent or withholding of objections is required from any federal, state or local government authority with respect to the County's entering into the Financing Documents, the County's performing its obligations under the Financing Documents or the transactions contemplated by the Financing Documents, except that we express no opinion as to any federal or state regulatory requirements of the Underwriter or any action required under federal or state securities or "Blue Sky" laws in connection with the Underwriter's offering and sale of the Bonds. The County has complied with all required public-bidding procedures regarding the Mortgaged Property (as defined in the Financing Documents) and the transactions contemplated by the Financing Documents.

4. To the best of my knowledge after reasonable investigation, neither (a) the adoption of the Resolution, nor (b) the execution and delivery of the Financing Documents or the consummation of the transactions contemplated by the Financing Documents, nor (c) the fulfillment of or compliance with the terms and conditions of the Financing Documents, breaches or violates any provision of any contract, lease, instrument or other agreement or any judgment, order or decree of any court or other governmental authority to which the County is a party or by which the County is bound. No event or condition has happened or existed, or is happening or existing, under the provisions of any such instrument which, at this time, constitutes a default or which, with notice or lapse of time or both, would constitute an event of default under any such

contract, lease, instrument or other agreement or any such judgment, order or decree.

5. There is no litigation or any proceeding before any governmental agency pending or, to the best of my knowledge after reasonable investigation, threatened against the County (or any official thereof in an official capacity) with respect to (a) the County's organization or existence, (b) the County's authority to execute and deliver the Financing Documents, to adopt the Resolution or to comply with the terms thereof, (c) the transactions contemplated by the Financing Documents and the Resolution, (d) the title to office of any County governing board member or any other County officer, or (e) any authority or proceedings relating to the County's execution or delivery of any of the Financing Documents.

6. The Deed of Trust is in proper form for recording. The Deed of Trust has been properly recorded with the County Registrar of Deeds.

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In addition, I advise you that I have participated in the preparation of the Official Statement and that nothing has come to my attention that would lead me to believe that the Official Statement contains any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading (except that we express no view about the information concerning the validity or tax status of the Bonds, The Depository Trust Company and the book-entry system for the Bonds, or about the financial and statistical data contained in the Official Statement); however, I have not independently verified the accuracy, completeness or fairness of any information provided to us by the County or any other person or the genuineness of any document provided to us by the County or any other person in connection with our participation in the preparation of the Official Statement.

## Parties in the local government financing transaction

Who/What	Relationship to County	Must you talk to?
Lead County staff	County's representative for carrying out the work	Yes; this will likely be your primary interaction
County Commissioners	Must provide basic formal approvals	[no comment]
County's Financial Advisor	Hired by and paid for by the County. Often serves very valuable functions in creating best overall deals for clients. Has a fiduciary relationship to the County, but does not have same rules or understanding of confidentiality or privilege as attorneys have. Will generally not vet fees of other participants unless asked specifically, and won't want to be the "fee police."	No

<b>Bond counsel</b>	Fiduciary relationship to the County as an organizational client, but doesn't know as much about County's interests and practices as County Attorney or Lead County staff	Yes; this will be your secondary interaction
<b>Lender/underwriter, or the vendor in a vendor financing</b>	May be selected by the County, but ADVERSE to the County in every meaningful way. Not that they're crooks or trying to sneak anything past you – just different interests in the transaction	No (unless you have no bond counsel and there's no separate lender's counsel)
<b>Lender's/underwriter's counsel</b>	May be selected by the County, but ADVERSE to the County in every meaningful way.	At least a little; if you have no bond counsel, then perhaps quite a bit
<b>Local Government Commission</b>	It's a regulator, not a financial advisor. It will coach the County through the LGC's process, but will not vet financing documents or consultant fees except on direct questioning (and even then will be highly reluctant to interfere). Looks out for County's interests only in the most general way. Sees its duty as following its own protocols and protecting the broader interests of State and NC local government finance, rather than helping any one government develop and carry out its financing	Usually not

	plans, and will sometimes tell you it knows what's best for you. *	
<b>Trustee for bondholders, and its counsel</b>	Hired by and paid by the County, but fiduciary relationship to the bondholders	No
<b>Nonprofit conduit financing corporation, and its counsel</b>	Created on behalf of the County to carry out specific tasks in certain transactions; formally adverse to the County but non-adversarial in practice	Yes
<b>County's separate counsel for real estate matters</b>	Hired by and paid for by the County to carry out a specific role. Fiduciary relationship to the County.	Yes

\* Let me concede that not all LGC staffers would agree with all aspects of this characterization.

## **Examples of financing agreement provisions for insurance from the County, and for contractors' bonds and insurance policies**

**4.17. County's Insurance.** (a) From and after substantial completion of each principal portion of the Facilities, the County shall, at its own expense, acquire, carry and maintain broad-form extended coverage property damage insurance with respect to all improvements in or on the Site or otherwise related to the Facilities in an amount equal to the estimated replacement cost of such improvements. Such property damage insurance shall include standard mortgagee coverage in favor of the Bank. The County shall provide evidence of such coverage to the Bank promptly upon such substantial completion. Any Net Proceeds of the insurance required by this subsection (a) shall be payable as provided in Section 6.10.

(b) The County shall, at its own expense, acquire, carry and maintain comprehensive general liability insurance in an amount not less than \$2,000,000 for personal injury or death and \$2,000,000 for property damage, and must include the Bank as an additional insured with respect to occurrences related to the Facilities.

(c) The County shall also maintain workers' compensation insurance issued by a responsible carrier authorized under State law to insure the County against liability for compensation under applicable State law as in effect from time to time.

(d) All insurance shall be maintained with generally recognized responsible insurers and may carry reasonable deductible or risk-retention amounts. All such policies shall be deposited with the Bank, provided that in lieu of such policies there may be deposited with the Bank a certificate or certificates of the respective insurers attesting the fact that the insurance required by this Section is in full effect. Prior to the expiration of any such policy, the County shall furnish the Bank evidence satisfactory to the Bank that the policy has been renewed or replaced or is no longer required by this Agreement.

(e) No County agent or employee shall have the power to adjust or settle any property damage loss greater than \$50,000 with respect to the Mortgaged Property, whether or not covered by insurance, without the Bank's prior written consent.

(f) The Bank shall not be responsible for the sufficiency or adequacy of any required insurance and shall be fully protected in accepting payment on account of such insurance or any adjustment, compromise or settlement of any loss agreed to by the Bank.

(g) The County shall deliver to the Bank annually by June 30 of each year a certificate stating that the risk coverages required by this Agreement are in effect, and stating the carriers, policy numbers, coverage limits and deductible or risk-retention amounts for all such coverages.

**5.03. Contractors' Performance and Payment Bonds.** The County shall require each contractor entering into a Construction Agreement to furnish a performance bond and a separate labor and material payment bond as required by Article 3, Chapter 44A of the North Carolina General Statutes. The County shall provide copies of all such bonds to the Bank promptly upon the County's receipt of each such bond. Each such bond shall include the Bank as a dual obligee.

Upon any material default by a contractor under any Construction Agreement, or upon any material breach of warranty with respect to any materials, workmanship or performance, the County shall promptly proceed, either separately or in conjunction with others, to pursue diligently its remedies against such contractor or against the surety of any bond securing the performance of such Construction Agreement.

**5.04. Contractors' General Public Liability and Property Damage Insurance.** The County shall require each contractor entering into a Construction Agreement to procure and maintain standard form (a) comprehensive general public liability and property damage insurance, at such contractor's own cost and expense, during the duration of such contractor's construction contract, in the amount of at least \$2,000,000, and (b) comprehensive automobile liability insurance on owned, hired and non-owned vehicles for not less than \$2,000,000. Such policies shall include the Bank as an additional named insured. The County shall provide to the Bank a certificate of insurance in a form acceptable to the Bank with respect to each contractor. Such insurance shall provide protection from all claims for bodily injury, including death, property damage and contractual liability, products/completed operations, broad form property damage and XCU (explosive, collapse and underground damage), where applicable.

**5.05. Contractors' Builder's Risk Completed Value Insurance.** The County shall require each contractor entering into a Construction Agreement to purchase and maintain property insurance (builder's risk) upon all construction, acquisition, installation and equipping of the Facilities (excluding contractor's tools and equipment) at the site thereof at the full insurable value thereof. This insurance shall include a lender's loss payable endorsement in favor of the Bank, and shall insure against "all risk" subject to standard policy conditions and exclusions. The contractor shall purchase and maintain similar property insurance for portions of the work stored off the Site or in transit when such portions of the work are to be included in an application for payment. The contractor shall be responsible for the payment of any deductible amounts associated with this insurance.

**5.06. Contractors' Workers' Compensation Insurance.** The County shall require each contractor entering into a Construction Agreement to procure and maintain workers' compensation insurance during the term of such Construction Agreement, covering his or her employees working thereunder. A certificate of insurance evidencing such coverage, in form acceptable to the Bank, shall be provided to the County with respect to each contractor entering into a Construction Agreement. Each Construction Agreement shall also provide that each subcontractor of any contractor who is a party to such Construction Agreement shall be required to furnish similar workers' compensation insurance.