



City of Santa Fe, New Mexico

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CITY ATTORNEY'S OFFICE

To: Members of the Public
From: Erin K. McSherry, City Attorney *EM*
Re: Legality and Form of Proposed 2023 Ballot Questions

MEMO PURPOSE AND SCOPE

The City of Santa Fe's Charter requires me as City Attorney to review the legality and form of any proposed charter amendment and render and publish a public opinion before those amendments are submitted to the voters. *See* Santa Fe City Charter, Section 10.02. On August 22, 2023, the City's Governing Body voted to place five ballot questions on the November 7, 2023, Regular Local Election ballot. Four of the questions ask voters to consider charter amendments and one asks them whether to support affordable housing by imposing an excise tax on the transfer of high-end residential property. This memo begins with my opinion regarding the legality of the proposed excise tax and then I turn to the proposed charter amendments. The memo ends with my opinion regarding the form of the five questions.

BACKGROUND

The City of Santa Fe (City) is a "home-rule" municipality, governing pursuant to its City Charter and constitutional constraints, unless the State otherwise further expressly restricts it. The New Mexico Constitution states that the purpose of providing for home rule municipalities "is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities." N.M. Const., Art. 10, Section 6 (E). The New Mexico Supreme Court has stated that being a home-rule municipality means that a city does not need "to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act. . . . To adopt any other interpretation in New Mexico would make the home rule amendment [to the New Mexico Constitution] meaningless." *Apodaca v. Wilson*, 1974 -NMSC- 071, ¶ 14.

ANALYSIS

A. Excise Tax on Certain Transfers of Residential Property

1. The Ballot Question

The ballot question on this topic is as follows:

PERMANENT FUNDING FOR AFFORDABLE HOUSING THROUGH
EXCISE TAX ON RESIDENTIAL PROPERTY PURCHASES OVER ONE
MILLION DOLLARS

Should the City of Santa Fe create a new dedicated funding source for the City's Affordable Housing Trust Fund for affordable housing by imposing a three percent (3%) excise tax on the transfer of high-end residential property, imposed on the portion of the purchase price exceeding one million dollars (\$1,000,000), with the amount above which the tax is imposed increased annually by an amount corresponding to the previous year's increase, if any, in the consumer price index for the western region for urban workers?

Prior to adopting the above ballot question language, Santa Fe's Governing Body adopted an ordinance describing the applicability of the tax. That ordinance is effective upon approval of the above ballot question and would apply to transactions beginning six months after approval of the ballot question, to allow for implementation of the administration of the new tax.

2. Legal Analysis

The City's Charter contemplates imposition of a tax through an ordinance ratified by its voters and requires that the City "disseminate in a timely manner the purposes of proposed expenditures for any tax increase or bond measure that requires ratification by the voters." *See* Section 4.08. Therefore, the City may act with its home rule authority to impose a transfer tax pursuant to ordinance and ballot question if no other law prohibits such tax.

Rather than prohibiting excise taxes, state statute expressly authorizes municipalities to impose excise taxes, other than on "incidents" related to tobacco, liquor, motor fuels, and motor vehicles, if the municipality adopts an ordinance that names the product or service being taxed and the ordinance is approved by the majority of voters. *See* NMSA 1978, § 3-18-2 (D). The New Mexico constitution does not govern excise taxes, and the State imposes excise taxes on tobacco transfers on a per cigarette basis in NMSA 1978, Sections 7-12-1 to -19; on liquor purchases pursuant to Sections 7-17-1 to -12; on gasoline on a per gallon basis pursuant to Section 7-13-3 (1995); and on the transfer of ownership of motor vehicles based on the price paid for the vehicle, pursuant to Section 7-14-4 (2019).

Recently, an officer of the Santa Fe Association of Realtors opined that, "In New Mexico, a local option real estate property transfer tax is prohibited." He went on to say that "the state does not

give local governments, such as the city of Santa Fe, the authority to impose any tax on property measured on an ad valorem, per unit or other basis.” These statements are misleading and false for the following reasons: (1) they suggest the City of Santa Fe requires the State to provide authority to impose an excise tax, whereas, as described above, the New Mexico Supreme Court and State Legislature have otherwise opined and legislated in relation to the power of home rule municipalities to impose excise taxes; (2) the statements confuse a limitation on imposing property taxes with a limit on an excise tax; and (3) the statements cite no source for their conclusions.

Property taxes are imposed on *ownership*, annually, without consideration of the amount paid in the initial purchase and based on the value of the property. Real estate transfer excise taxes, on the other hand, are paid once, at the time of the transfer of ownership of the real estate. And, in the case of the City’s proposed transfer tax, the amount of the tax is not based on the value of the property but rather the amount paid in consideration of the transfer. The same New Mexico statute that recognizes municipalities’ right to impose excise taxes also recognizes that an excise tax is distinct from income taxes and property taxes: while expressly permitting excise taxes, it states that unless provided by law, municipalities may not impose income taxes and property taxes.

The United States Supreme Court and numerous federal courts of appeals have drawn the same distinction between excise and property taxes, recognizing “the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property’s value, and a tax levied upon the property itself. The former [excise tax] has historically been permitted even where the latter [property tax] has been constitutionally or statutorily forbidden.” *U.S. v. Wells Fargo Bank*, 485 U.S. 351, 355 (1988); *see also Delaware County, Penn. v. Federal Housing Finance Agency*, 747 F.3d 215, 224 (3rd. Cir. 2017) (concluding a “real estate transfer tax is an excise tax because it is not a tax on the real estate itself ... [but a] tax [on] certain transactions pertaining to real estate.”) (internal quotations and citations omitted); *DeKalb County v. Federal Housing Finance Agency*, 741 F.3d 795, 801 (7th Cir. 2013) (concluding Milwaukee County was incorrect when it sought to equate its real estate transfer tax with a property tax: “A deed is not real estate, any more than a car title is a car.”); *Bd. Of County Com’rs of Kay Co., OK v. Fed. Housing Financing Agency*, 754 F.3d 1025, 1030 (D.C. Cir. 2016) (“Here, Oklahoma’s statutory taxation scheme confirms that the Transfer Tax is an excise tax: the state imposes an entirely separate ad valorem tax on real property. The Oklahoma Transfer Tax is triggered by conveyance and paid by the seller, who, at the point of payment, no longer has any right in the property conveyed. Appellant’s attempt to convert the Transfer Tax into a property tax fails.”) (internal citations omitted); *Bd. of Commissioners of Montgomery Co. v. Federal Housing Finance Agency*, 758 F.3d 706, 711 (6th Cir. 2014) (“[W]e conclude that the real property transfer tax at issue is an excise tax upon the grantor of real property for the privilege of transferring real property rather than a real property tax levied directly against the property.”)

3. Conclusion

Because the City adopted an ordinance, describing the proposed excise tax on the transfer of certain real estate in particularity, as contemplated in NMSA 1978, Section 3-18-2 (D), and because no other law otherwise restricts the tax, the proposed tax is legal.

B. Charter Amendment Regarding the City's Charter Review Commission

1. The Ballot Question

The ballot question on this topic is as follows:

GUIDELINES FOR CHARTER REVIEW COMMISSION

Should the Santa Fe Municipal Charter Article X, Section 10.01, be amended to require that the City's Charter Review Commission:

- (1) Consist of nine members, each appointed by a member of the governing body;
- (2) Elect its own leadership;
- (3) Serve for one-year;
- (4) Have a budget and staff adequate for its functions;
- (5) Be advertised and receive public submissions on a dedicated web page;
- (6) Hold at least two meetings in each city council district to receive public input; and
- (7) Recommend proposals that the mayor and city councilors must consider as proposed ballot questions?

2. Legal Analysis

There are seven elements to the ballot question. Without opining on the applicability of the Municipal Charter Act (Act), NMSA 1978, Sections 3-15-1 to -16, it is worth noting that the proposal is consistent with that Act. In fact, the Act contemplates commissions with at least seven members and commissions selecting their own leadership. *See* NMSA 1978, § 3-15-5.

The requirement that the Charter review commission have a budget and staff "adequate" for its functions does not specify a particular budget or staff as adequate. Similarly, the requirement that the Charter review commission recommend proposals that the mayor and city councilors must consider as proposed ballot questions does not specify what "consideration" means. As such, those provisions are flexible in application, such that they can be applied consistently with other potentially applicable laws. *See* NMSA 1978, § 12-2A-18(A)(3) (1997) ("A statute or rule is construed ... [to] avoid an unconstitutional ... result."); *Wells v. Cty. of Valencia*, 1982-NMSC-048, ¶ 11 ("[T]he Legislature is presumed to have enacted the statute within the bounds of the constitution, and, to that end, we must so construe the statute."). *El Castillo Ret. Residences v. Martinez*, 2017-NMSC-026, ¶ 25.

The requirements for a web page and at least two meetings in each city council district to receive public input are essentially minimum public notice requirements. While the requirements are more prescriptive than most other Charter provisions, other laws do not disallow these types of notice.

3. Conclusion

The proposed Charter Commission amendments are legal.

C. Charter Amendments Regarding Initiative, Referenda, and Recall

1. The Ballot Questions

The proposed ballot questions regarding this topic are as follows:

DETERMINING PERCENTAGES OF VOTERS FOR REFERENDA, INITIATIVES, AND RECALL PETITIONS

Should the Santa Fe Municipal Charter be amended to specify that the voters who voted in the most recent election that included the election of the office of the mayor, rather than the number of voters who voted for mayor, is the population used to determine the required number of signatures for petitions for referenda, initiative, and recall?

SIGNATURE REQUIREMENT FOR REFERENDA

Should the Santa Fe Municipal Charter be amended to reduce the number of signatures required to place referenda on the ballot from thirty-three and one third percent (33.3%) to fifteen percent (15%) and make technical changes consistent with the Local Election Act?

REDUCING SIGNATURE REQUIREMENT FOR INITIATIVES

Should the Santa Fe Municipal Charter be amended to reduce the number of signatures required on a petition to place initiatives on the ballot from thirty-three and one third percent (33.3%) to fifteen percent (15%) and to make technical changes consistent with the Local Election Act?

2. Analysis

Voting yes on the first question would change the number used to calculate the percentage of voters who have signed a petition for referendum, initiative, and recall. Currently the number is the number of votes *for mayor* in the last mayoral election. The new language would use the number of city voters who voted *on any matter* in the last mayoral election. The effect would be a larger denominator for calculating percentages, requiring more signatures to reach the required threshold, if the percentages of signatures required remained the same.

Voting yes on the second and third questions would reduce the numbers of voters' signatures needed to place a referendum or petition on the ballot from thirty-three and a third to fifteen percent.

None of these proposals is inconsistent with law. Therefore, the proposed ballot language is allowable. Of note, the City of Albuquerque requires twenty percent of voters to sign petitions and the City of Las Cruces requires fifteen percent of voters to sign for referenda.

3. Conclusion

The proposed changes to the Charter regarding calculating percentages and minimum percentages are legal.

D. Form of the Ballot Questions

According to the New Mexico administrative rules governing ballot questions, a ballot question must be stated as a question that seeks permission of the voters to accomplish an act with a legal consequence; contain such information necessary to give a reasonably prudent voter notice of the act proposed; and be answerable with a “Yes” or “No,” unless state law requires otherwise. An affirmative answer to the question must indicate approval and a negative answer must indicate rejection. By contrast, the full text of the act, resolution, charter amendment, or ordinance itself should not be part of the form of the ballot question and are not permitted to be printed on the ballot. *See* NMAC 1.10.16.8.

All the City’s ballot questions, if approved, would result in legal consequences. They each contain reasonable notice regarding the proposed change, and they can be answered yes or no to either indicate approval or rejection, respectively. The full text of the ordinances and resolutions that resulted in the questions is not included in the ballot.

For the above reasons, the form of the City’s ballot questions conforms with law.

CONCLUSION

In conclusion, each of the ballot questions is legal and the form of the questions conforms with law.