Date: July 31, 2015
To: ULCT membership and other public entities in Utah
From: Cameron Diehl and the ULCT legal team
RE: Public entity and public official involvement during a ballot proposition election

INTRODUCTION

(Note: ULCT urges city officials to consult with your city attorney and to consider any relevant municipal ordinances in your jurisdiction)

Three acts govern public entity involvement in ballot propositions. First, the legislature enacted the Transparency of Ballot Propositions Act (TBPA) in 2014 that only applies to the entity that imposes the tax. In this case, the imposing entity is the county. Second, the county is also responsible for arguments in the voter information pamphlet. Third, the Political Activities of Public Entities Act (PAPEA) applies to all public entities, regardless of who imposes the tax. The PAPEA allows public entities to offer a brief statement of support and provide factual information so long as opponents have equal access. PAPEA also prohibits public entities from using public funds to influence the ballot proposition election.

Once your county governing body votes to place the local option on the ballot for the November election, then the county triggers both the official ballot proposition and the governing statutes. This memo examines the TBPA, PAPEA, and the voter information pamphlet requirements, and encourages election consolidation between counties and municipalities.

I) TRANSPARENCY OF BALLOT PROPOSITIONS ACT AND VOTER INFORMATION PAMPHLET

A) MANDATORY AND EXCLUSIVE COUNTY ACTION TO PUBLICIZE SUPPORT AND OPPOSITION

The Transparency of Ballot Propositions Act defines the procedure for a governing body to propose a ballot proposition to their voters. A taxing entity must comply with the Act to submit a ballot proposition. In the case of the HB 362 local option, the governing body is the county governing body.

Once a county governing body submits the local option to voters, the county must then follow TBPA guidelines to provide public statements of support, offer an opportunity for the opposition to respond, and hold a public meeting in October on the local option. The county must also provide a local voter information pamphlet which has a different calendar and argument requirements than the TBPA.

First per TBPA, the county governing body must submit to the county clerk an argument in favor of a ballot proposition. In reply, any eligible voter may submit to the county clerk an argument against the ballot proposition.[1] Both arguments must not exceed 500 words in length and be submitted no later than 60 days before Election Day.[2] In 2015, the 60 day deadline is Friday, September 4.

Second, both the county governing body and the opponent may provide a rebuttal argument to each other that does not exceed 250 words and is submitted at least 40 days before Election Day. In 2015, the 40 day deadline is Thursday, September 24. If multiple opponents submit arguments and rebuttals against the county position, then the county clerk designates one of the opponents to provide the official counter argument and rebuttal.[3]

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[1] Utah Code Ann. § 59-1-1604(1)
[2] Utah Code Ann. § 59-1-1602, 1604(2)
[3] Utah Code Ann. § 59-1-1604(1)(b)(ii)

Third, the county governing body must then post the arguments and rebuttals on the Statewide Electronic Voter Information Website and the county website for 30 consecutive days before the election. In 2015, the 30 day window begins on Sunday, October 4.[4] The county governing body would also have to post the arguments and rebuttals in the next scheduled newsletter (if the county has a newsletter) published before Election Day.[5]

Fourth, the county governing body must hold a public meeting between four and 14 days before Election Day, which would be between Tuesday, October 20, and Friday, October 30.[6] The county governing body must allow equal time for a presentation of the arguments both in favor of the ballot proposition and against the ballot proposition.[7] The public meeting must begin at or after 6 pm.[8] The county governing body must then provide a digital audio recording of the public meeting no later than three days after the meeting on the county website or, in the case of counties without websites, at the primary government building.[9]

B) CERTIFIED BALLOT AND VOTER INFORMATION PAMPHLET

Meanwhile separate from TBLA, the county governing body must submit the certified ballot title of the ballot proposition to the county clerk 65 days prior to the election[10] which is Sunday, August 30. Additionally, the county clerk must also prepare a voter information pamphlet and receive petitions from supporters and opponents to prepare arguments for and against the ballot proposition by August 30. If more than one person files a request to prepare arguments for or against the ballot proposition in the local voter information pamphlet, then the governing body must make the final designation[11] and give priority to sponsors or members of the local governing body. The voter information pamphlet arguments may not exceed 500 words in length and not list more than five names as sponsors.[12] The authors of the 500 word arguments for the voter information pamphlet must submit their arguments to the county clerk[13] by 50 days before Election Day which is September 14.

C) TBPA APPLICATION TO OTHER PUBLIC ENTITIES

Cities and towns and other public entities are not officially responsible for any of the aforementioned requirements because only counties can impose the HB 362 local option. However, the Transparency in Ballot Propositions Act provides a framework for other public entities that could fit within the broad parameters of the Political Activities of Public Entities Act.

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[4] Utah Code Ann. § 59-1-1604(5)
[5] Utah Code Ann. § 59-1-1604(6)
[6] Utah Code Ann. § 59-1-1605(1)
[7] Utah Code Ann. § 59-1-1605(2)
[8] Utah Code Ann. § 59-1-1605(3)(b)
[9] Utah Code Ann. § 59-1-1605(4)
[10] Utah Code Ann. § 20A-6-106
[11] Utah Code Ann. §20A-7-402(2)(a)(ii)
[12] Utah Code Ann. §20A-7-402(2)(a)(v)
[13] Utah Code Ann. § 20A-7-402(2)(a)(vi)

II) POLITICAL ACTIVITIES OF PUBLIC ENTITIES ACT (PAPEA, 20A-11-1201)

A) WHAT ALL PUBLIC ENTITIES CANNOT DO

A public entity such as the state, county, municipality, or governmental inter-local cooperative may NOT make an expenditure from public funds for political purposes or to influence a ballot proposition.[14] Violating this section of state law is a class B misdemeanor.[15] As "political purposes" refers to the elections of candidates and judges, this analysis will focus only on the ballot proposition restriction.[16]

A "public entity" includes the state, county, municipality, governmental interlocal cooperation agency, local district, and each administrative subunit therein.[17] As such, the Utah Department of Transportation, all counties, all cities and towns, the Utah League of Cities and Towns, associations of governments and the Utah Transit Authority and other transit agencies are considered "public entities."

State law defines an "expenditure" as a "payment, donation, gift of money, or anything of value" for any recipient.[18] State law further defines "expenditure" when the recipient is a political issues committee as "goods or services provided for political purposes at less than fair market value."[19] State law also defines "public funds" as any money received by a public entity from appropriations, grants, taxes, fees, interest, or returns on investment.[20]

State law defines "influence" as "campaign or advocate for or against a ballot proposition" with one key exception. "Influence" does **not** mean "providing a brief statement about a public entity's position on a ballot proposition and the reason for that position."[21] This exception is critical because it allows the public entity to explain why the ballot proposition would be beneficial and allows for the activities that the TBPA requires of counties.

In short, a county, city, town, or other public entity may not spend taxpayer dollars to campaign or advocate for or against a ballot proposition with the notable exception of providing a "brief statement" and/or "factual information" with "equal access" (analysis below) about the public entity's position.

B) WHAT ALL PUBLIC ENTITIES CAN DO

Per PAPEA, the public entity may provide a "brief statement" about the public entity's position and the reason for that position.[22] A public entity (both those that impose the tax and those who do not impose like a city or town) may also provide "factual information" about the ballot proposition to the public, so long as the entity grants "equal access" to both the opponents and proponents of the ballot proposition.[23] The public entity may also neutrally encourage voters to vote.[24]

Even though the county is the governing body that submits the ballot proposition to voters and thus **must** comply with the aforementioned Transparency of Ballot Propositions Act, any public entity like a city or town **may** provide a "brief statement" and "factual information" with "equal access" to explain the entity's position without violating the PAPEA restriction on influencing the election.

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[14] Utah Code Ann. § 20A-11-1203(1)
[15] Utah Code Ann. § 20A-11-1204
[16] Utah Code Ann. § 20A-11-1202(9)
[17] Utah Code Ann. § 20A-11-1202(10)
[18] Utah Code Ann. § 20A-11-1202(4)(a)
[19] Utah Code Ann. § 20A-11-1202(4)(e)
[20] Utah Code Ann. § 20A-11-1202(11)(a), (b)
[21] Utah Code Ann. § 20A-11-1202(6)(a)
[22] Utah Code Ann. § 20A-11-1206(6)(b)
[23] Utah Code Ann. § 20A-11-1206(2)
[24] Utah Code Ann. § 20A-11-1206(3)

III) ULCT RECOMMENDATION: WHAT CITIES, TOWNS, & PUBLIC ENTITIES MAY DO PER BOTH ACTS

PAPEA allows for a "brief statement" and "factual information" so long as the public entity provides "equal access." Even though TBPA does not apply to cities, towns, and other public entities in this context because counties will impose the tax, the TBPA does provide a parallel framework for public entities (like cities and towns) to provide the PAPEA-allowed "factual information" with "equal access."

A) BRIEF STATEMENT

A public entity may provide a "brief statement" explaining their position on the ballot proposition and the reason for that position. PAPEA and case law are silent as to what a "brief statement" is. For example, ULCT believes that cities and towns (and public officials) can reference the resolutions that they passed that demonstrate the official municipal position on the local option.

B) FACTUAL INFORMATION AND EQUAL ACCESS

PAPEA allows but does not require a public entity to provide "factual information" to the public about the ballot proposition so long as the public entity provides "equal access" to opponents. PAPEA does not provide guidance for "factual information" and "equal access." However, TBPA allows an imposing public entity (in this case counties) up to a 500 word public argument and 250 word rebuttal to express support for the ballot proposition. TBPA also outlines how the public entity should provide equal access to opponents by providing an opportunity to a registered voter in the county to submit counter arguments that would be publicly shared in the same manner as the public entity argument.[25]

Since PAPEA does not require a city, town, or other public entities to provide "factual information," then a city, town, and other public entities need not provide "factual information." If a city or town decides not to provide "factual information," then the city or town need not provide "equal access" to opponents to respond. The city or town could still offer a "brief statement" though the line separating a "brief statement" and "factual information" with "equal access" is unclear.

If a city or town elects, however, to provide "factual information" to demonstrate support of the local option, then ULCT recommends that the city or town follow the same framework in the TBPA: 500 word argument and counter argument, 250 word rebuttal and counter rebuttal, and post all arguments on the municipal website. Since PAPEA is silent about how to provide "equal access" to opponents, ULCT recommends that the city or town could use the same counter argument and counter rebuttal that the county clerk has designated for the county per TBPA. The city or town may choose to have an open meeting to discuss the local option as TBPA requires of counties but that meeting is not mandatory to satisfy the "equal access" requirement.

In conclusion, if a city or town elects to provide "factual information" about the ballot proposition, the city or town should follow the TBPA "equal access," argument, and counter argument framework.

C) WHAT A PUBLIC OFFICIAL AND PUBLIC EMPLOYEE CANNOT DO—EMAIL

A "public official" has a different legal framework than a "public entity." A "public official" includes both elected and appointed government officials who have authority to make public policy. A "public official" also includes any person with "supervisory authority over the personnel and affairs of a public entity and approves the expenditures of funds." As such, a "public official" does not include public employees who do not have authority to make public policy nor does it include public employees who do not have supervisory authority over the public entity's personnel AND do not have the authority to approve expenditures.[26]

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[25] Utah Code Ann. § 59-1-1604; see section I(a) above

[26] Utah Code Ann. § 20A-11-1202(12)

Public officials may not use public funds to influence a ballot proposition. Specifically, the legislature in 2015 enacted a provision that now also restricts a person—public official, public employee, or anyone—from using the email of a public entity to send an email to advocate for or against a ballot proposition.[27] The county clerk may impose a civil fine of $250 for the first violation and then $1000 for each subsequent violation multiplied by the number of violations that the person commits.[28] The violation is the act of sending the email from the public account, regardless of the quantity of recipients.[29] Receiving an email on your public account, however, is not a violation. The law does provide for a safe harbor if the lieutenant governor determines that the email was inadvertently sent as a reply.[30]

Consequently, anyone—public official, public employee, etc.—with access to an email of a public entity may not send an email from the public account to advocate for or against the ballot proposition.

D) WHAT A PUBLIC OFFICIAL AND PUBLIC EMPLOYEE CAN DO

A public official may advocate for or against a ballot proposition and may speak, contribute personal money, or otherwise exercise his/her First Amendment rights independent of the public entity and without using public funds or resources.[31] For example, a public official may post on his/her personal Facebook page but he/she may not send an email from the email of a public entity or face a civil fine. Public officials and public employees may use their own personal email accounts and other modes of communication to exercise their First Amendment rights so long as they do not use public funds.

IV) ELECTION CONSOLIDATION

Previous ULCT analysis determined that state law encourages but does not require counties and municipalities to consolidate elections.[32] As of July 2015, many municipalities still intend to conduct their own election in November. If the county in which those municipalities reside puts the ballot proposition to voters, then the voters in that county could receive one ballot from the city/town with the city/town council candidates and another ballot from the county with the ballot proposition. Voters receiving two ballots may be confused about which ballot to submit and may result in low turnout. Consequently, ULCT recommends that counties and municipalities consider election consolidation.

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[27] Utah Code Ann. § 20A-11-1205(1) (note: though the word "influence" is not used in this statute, the definition herein is consistent with "influence" within PAPEA)
[28] Utah Code Ann. § 20A-11-1205(2)
[29] Utah Code Ann. § 20A-11-1205(5)
[30] Utah Code Ann. § 20A-11-1205(5)
[31] Utah Code Ann. § 20A-11-1206(1)
[32] Utah Code Ann. §20A-1-204(2)(a),(b)