



TOWN OF APPLE VALLEY

TOWN COUNCIL STAFF REPORT

To: Honorable Mayor and Town Council **Date:** July 26, 2016
From: Town Attorney's Office **Item No:** 8
Subject: REPORT ON INITIATIVE MEASURE PROPOSING THAT THE
ISSUANCE OF PUBLIC DEBT IN EXCESS OF \$10 MILLION BE
SUBJECTED TO VOTER APPROVAL

T.M. Approval: _____ **Budgeted Item:** Yes No N/A

RECOMMENDED ACTION:

Staff recommends that the Town Council takes the following action:

- A. Receive and File the Report on the Initiative Measure Proposing that the Issuance of Public Debt in Excess of \$10 Million be subjected to Voter Approval

SUMMARY:

Staff recommends that the Town Council receive and file the attached report.

BACKGROUND:

On December 21, 2015, the Town received a Notice of Intent to circulate an initiative petition to amend the Apple Valley Municipal Code to require voter approval before the Town can issue public debt of more than \$10,000,000 in connection with the acquisition, construction, improvement, or financing of an enterprise (as that term is defined in state law) when the debt is to be repaid by fees collected by the Town and not from the Town's taxpayer revenues (the "Measure")

In accordance with the Elections Code, the Town Attorney's office prepared a ballot title and summary, which was received by the proponents on January 6, 2016. On January 15, 2016, the proponents published the Notice of Intent along with the ballot title and summary in the Apple Valley News. The proponents then had six (6) months to gather

enough signatures to qualify the Measure for the ballot. On May 10, 2016, the proponents submitted a signed petition to the Town Clerk's Office. The petition contained 5,348 raw signatures.

On June 21, 2016, the Town Clerk's Office, with assistance from the Elections Office of the Registrar of Voters for San Bernardino County, verified that the petition contained 3,873 valid signatures to qualify the Measure for the ballot. Under the Elections Code, 3,172 valid signatures were required.

On June 28, 2016, the Town Council received, filed, and accepted the Certificate of Sufficiency of Initiative Petition issued by the Town Clerk. The Town Council directed staff to prepare an impartial and informational report analyzing the impact of the Measure on the Town's finances, its ability to provide public services, and the like ("Report").

The Report, prepared by the Town Attorney's Office, is attached hereto as Exhibit A.

PROPOSED ACTION:

Town staff recommends the Town Council receive and file the attached Report.

FISCAL IMPACT:

The receipt and filing of the Report will have no fiscal impact.

Attachment:

Elections Code Section 9212 Report

**ELECTIONS CODE 9212 REPORT ON INITIATIVE PROPOSING THAT THE
ISSUANCE OF PUBLIC DEBT IN EXCESS OF \$10 MILLION BE SUBJECTED TO
VOTER APPROVAL**

EXECUTIVE SUMMARY

The proposed initiative, if adopted, will require the Town to seek voter approval before it may issue over \$10 million in public debt to provide funds for the acquisition, construction, improving, or financing of an enterprise, such as water, storm water, sewer, electricity, or waste disposal. By its own terms, the initiative is designed to impede the Town's current efforts to acquire the water system owned and operated by Liberty Utilities (Apple Valley Ranchos Water) Corp. ("Apple Valley Water System"). If adopted, the Town would need to obtain voter approval before it could finance the acquisition of the Apple Valley Water System. This will extend the time it takes to acquire the Apple Valley Water System and force the Town to incur more costs in the process. In addition, in the long term, the initiative will generally make it more difficult for the Town to take on large public works and infrastructure projects which are related to enterprises. Furthermore, there are several legal and practical issues with the initiative which raise questions about its enforceability.

REPORT

I. Background

The initiative proponents filed the Notice of Intent to Circulate an Initiative Petition ("Notice of Intent") with the Town Clerk's Office on December 21, 2015. On January 6, 2016, the proponents received a copy of the ballot title and summary for the petition. On January 15, 2016, the proponents published the Notice of Intent along with the ballot title and summary in the Apple Valley News, triggering a six-month window in which they were required to gather 3,172 valid signatures to qualify the proposed measure for the ballot.

On May 10, 2016, the proponents submitted a signed petition to the Town Clerk's Office containing 5,348 raw signatures. On June 21, 2016, the Town Clerk's Office, with assistance from the Elections Office of the Registrar of Voters for San Bernardino County, verified that the petition contained 3,873 valid signatures to qualify the initiative for the ballot. On June 28, 2016, the Town Council received, filed, and accepted the Certificate of Sufficiency of Initiative Petition issued by the Town Clerk.

II. What the Initiative Would Do

A. Full Text of the Initiative

If adopted, the initiative would add a new Chapter 3.35 to Title 3 of the Apple Valley Municipal Code. The new Chapter 3.35 would read as follows:

3.35 VOTER APPROVAL PRIOR TO ISSUANCE OF PUBLIC DEBT SECURED BY FEES OR CHARGES ON SERVICES

(a) *No ordinance or resolution authorizing the issuance of bonds or other forms of public debt in an amount exceeding ten million dollars (\$10,000,000) to provide funds for the acquisition, construction, improving, or financing of an enterprise, secured by revenues derived from the operation of the enterprise, shall become effective unless approved by the voters, as provided herein.*

(b) *For purposes of this section:*

(1) *The terms “bonds,” “enterprise,” “charges,” and “revenues” shall have the same meaning as provided for the in the Revenue Bond Law of 1941 (Chapter 6 of Division 2 (commencing with section 54300) of the Government Code);*

(2) *The term “public debt” includes, but is not limited to, certificates of participation, or public leaseback, secured by revenues derived from the operation of the enterprise, or lease payments made by or to advance the purpose of the enterprise.*

(c) *The election required shall comply with the provisions of Article 3 of Chapter 6 of Division 2 (commencing with section 54380) of the Government Code.*

(d) *No ordinance or resolution that authorized the issuance of bonds or public debt that would have been subject to the voter approval requirement of this section, enacted by the council after the date the notice of intent to circulate petitions was filed by the proponents proposing enactment of this section, but before its adoption by the voters, shall be implemented or enforced unless and until the voters approve that ordinance or resolution pursuant to this section.*

(e) *If any provision of this section, or any part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end, the provisions of this section are severable.*

B. Explanation of Provisions

General Rule

Subdivision (a) of the proposed initiative sets forth the general rule that the Town will be required to seek voter approval before it may issue over \$10 million in public debt to provide funds for the acquisition, construction, improving, or financing of an enterprise where the debt is secured by revenues derived from the operation of the enterprise.

Definition of “Enterprise”

Subdivision (b) of the proposed initiative provides definitions for a number of important terms, including the term “enterprise.” The term “enterprise” is defined as having the same meaning as provided for the in the Revenue Bond Law of 1941. Under that Law, enterprise is comprehensively defined as any “revenue-producing improvement, building, system, plant, works, facilities, or undertaking used for or useful for any of the following purposes:

(a) The obtaining, conserving, treating and supplying of water for domestic use, irrigation, sanitation, industrial use, fire protection, recreation, or any other public or private uses.

(b) The collection, treatment or disposal of garbage or refuse matter.

(c) The collection, treatment or disposal of sewage, waste or storm water, including drainage.

(d) The providing of public parking lots, garages, or other automotive or vehicular parking facilities, including any and all public offstreet vehicular parking facilities.

(e) The providing of public transportation by means of a ferry or ferry system.

(f) The providing of public airports and facilities appurtenant thereto.

(g) The providing of harbors, including without limitation public small boat harbors, and facilities and improvements in connection therewith.

(h) The providing of hospitals and facilities appurtenant thereto.

(i) The providing of public golf courses, and facilities and improvements in connection therewith.

(j) The generation, production, or transmission of electric energy for lighting, heating, and power for public or private uses.”

(Gov. Code, § 54309.) The Revenue Bond Law of 1941 expands the definition of enterprise to specifically include:

“(a) Lands, easements, rights in land, water rights, contract rights, and franchises;

(b) Approaches, dams, reservoirs, trunk, connecting, and other water mains, filtration works, pumping stations, water supply, storage, and distribution facilities and equipment;

(c) Garbage trucks, equipment, dumps, garbage disposal plants, and incinerators or other disposal facilities, including facilities to sort and prepare components of solid waste for sale and facilities to convert solid waste to energy and reusable materials;

(d) Sewage treatment plants, sewage disposal plants, intercepting and collecting sewers, outfall sewers, trunk, connecting, and other sewer mains;

(e) The franchises or licenses to operate a ferry or ferry system, all boats and vessels, all land and interest in land, all slips, wharves, piers, landing places, approaches, and all facilities and equipment used in the maintenance and operation of a ferry or ferry system, or harbor, including small boat harbors, marinas, aquatic playgrounds, and similar recreational facilities;

(f) Ambulances, both inpatient and outpatient facilities, laboratories, pharmacies, surgical instruments, and equipment of such nature as may be reasonably necessary for the treatment of patients; and

(g) All buildings, structures, improvements, equipment, ditches, canals, and facilities whatsoever appurtenant or relating to the enterprise.”

(Gov. Code, § 54309.1.)

The definition of “enterprise” does exclude the “distribution of electric energy for lighting, heating, and power for public or private uses” and the “generation, production, transmission, and distribution of gas for public or private uses.” (Gov. Code, § 54310.)

Definition of “Public Debt”

The initiative defines public debt very broadly. For example, it covers certificates of participation, public leasebacks, lease payments, and also bonds.

Election Requirements

The initiative requires voter approval to be obtained through an election held in compliance with the Revenue Bond Law of 1941, in particular Government Code Section 54380 et seq., which addresses elections for the approval of revenue bonds, despite the fact that the initiative applies to public debt other than bonds. How the

election provisions of the Revenue Bond Law of 1941 would apply to public debt other than bonds is unclear and the initiative offers no guidance on this matter.

Retroactivity

The initiative purports to have retroactive effect to the date the Notice of Intent was filed by the proponents (i.e. December 21, 2015). The Town has not issued debt in excess of \$10 million since that date and, at present, has no plans to do so before November 8, 2016. Therefore, this provision will have no impact on the Town. Nonetheless, although retroactivity provisions have been upheld by courts in limited circumstances, the Town Attorney's Office has reservations regarding the enforceability of this provision.

Severability

The initiative includes a provision to ensure the survival of the remainder of the initiative should a portion of it be found invalid or unconstitutional.

III. Implications for Future Projects

A. Acquisition of the Apple Valley Water System

The Town is in the process of acquiring the water system currently owned and operated by Liberty Utilities (Apple Valley Ranchos Water) Corp. ("Apple Valley Water System"). At a special meeting on November 17, 2015, the Town Council adopted two Resolutions of Necessity authorizing the acquisition, by eminent domain, of the Apple Valley Water System. At the same meeting, the Town Council certified a Final Environmental Impact Report (SCH #2015061078), which analyzes the environmental impacts associated with the Town's acquisition of the Apple Valley Water System. On January 8, 2016, the Town formally initiated a condemnation action to acquire the Apple Valley Water System.

The statement of reasons included with the Notice of Intent was directed almost entirely at the Town's planned acquisition of the Apple Valley Water System. If adopted, the initiative will almost certainly apply to this project. As a result, prior to issuing debt to finance the acquisition of the Apple Valley Water System, the Town Council will be required to submit a measure to the voters requesting authorization. This will likely have two noteworthy effects. First, it will increase the length of time it will take to acquire the Apple Valley Water System, which will likely result in additional costs for the project. Second, it will result in the Town incurring the cost of an election, possibly a special election, when the time comes to obtain financing for the acquisition.

B. Future Projects

Because the definition of public debt and the definition of enterprise are so broad, the future impact of the initiative could be significant. The initiative will require a vote of the people every time the Town Council decides to acquire, construct, improve, or finance an enterprise even though the debt is secured against the revenues. Projects of

this size are fairly rare in a city the size of Apple Valley. However, when such projects come along, they will almost certainly be of great importance to the Town.

By requiring the Town to submit the issuance of such debt to a vote of the people, the initiative will have two likely impacts on such projects: (1) it will likely result in project delays because the project will not be able to be financed until an election has been held; and (2) it will result in more costs because a measure will have to be drafted and an election will have to be paid for.

IV. Practical and Potential Legal Limitations

A. Practical Limitations

Application of Bond Law to Other Debt

As noted above, the initiative imposes the election rules of the Revenue Bond Law of 1941 on all elections required under the initiative. However, the provisions of the Revenue Bond Law of 1941 are specific to bonds and do not appear to have been intended to be used for other forms of debt. As a result, there is no guidance in the Revenue Bond Law of 1941 on how these rules are to be applied to other forms of public debt. Likewise, the initiative provides no guidance on the matter.

Application of \$10 Million Limit

The initiative states that no ordinance or resolution authorizing the issuance of more than \$10 million for enterprise purposes will be valid without a vote of the people. It does not, however, explain how and when the \$10 million limit applies. For example, if the Town were to adopt multiple resolutions on a single enterprise project with each one authorizing the issuance of \$9 million of debt, would that violate the initiative? If so, at what point are two projects which individually require the issuance of less than \$10 million in debt but collectively require more than \$10 million so similar that the initiative would apply to them? For example, if the Town were to pass an ordinance issuing \$6 million in debt to construct a new storm water system extension, could it pass a similar ordinance issuing \$5 million in debt to improve existing parts of the storm water system?

The initiative does not answer these questions.

B. Potential Legal Limitations

The placement of the initiative on the ballot may subject the Town to legal attack on the following grounds:

- As applied to the acquisition of the Apple Valley Water System, the initiative may be subject to challenge as an invalid administrative act because it seeks to impose procedural restrictions upon an otherwise authorized legislative policy in favor of acquisition;

- The initiative may be subject to challenge as it may be preempted by state law as there is an argument that the State has occupied the field of voter approval of financing or that the State has exclusively delegated the function of financing to the Town Council; and
- The initiative may also be subject to challenge as it arguably impermissibly impairs the “essential government functions” of a local government.

Although the Town Attorney’s Office is not offering a legal opinion on the merits of such potential legal challenges, we raise them in this Report because the Town could be subject to litigation concerning the measure, which would have a fiscal impact on the Town, including staff time and legal resources.