

Proposition 2 ½ - Part II

Contingent Appropriations

We are often asked questions concerning G.L. c.59, §21C, Proposition 2 ½, so called, overrides, debt exclusions, and capital outlay expenditure exclusions, and in particular, how to address contingent appropriations in towns. In this second part of our review of the practical requirements of Proposition 2 ½, we outline the basic issues to be aware of, and provide examples that may be useful in developing appropriate warrant articles and motions.

1. Contingent Appropriations – Availability and Timing

General Laws c.59, §21C(m) specifically authorizes towns, under particular circumstances, to make appropriations contingent upon approval of an override, debt exclusion, or capital outlay exclusion ballot question. The contingent appropriation will not take effect unless: (1) the purpose of the appropriation and the description in the ballot question are substantially similar; and (2) the question is approved within 90 days following dissolution of a special town meeting or by September 15 following a spring annual town meeting.

Be aware that the Department of Revenue has indicated that as a general rule no appropriation may be made on a contingent basis unless there is statutory authorization therefor. Thus, if an appropriation is voted with a non-statutory contingency, any conditions imposed must be clear and include a particular date by which the contingency must be met or measured. It is possible that such an appropriation could become an issue in the tax rate setting process, even requiring a special town meeting to resolve.

2. Form of Contingent Appropriations

As indicated in Part 1 of this eUpdate, Proposition 2 ½ does not impose a particular form for the warrant article or motion making the contingent appropriation. For debt exclusion and capital exclusion items, however, it is typically the case that they are voted separately (even if grouped together in a capital budget).

Although the law does not require that contingency language appear in the warrant article, such language must be approved as part of the motion. The Department of Revenue has indicated it is within the scope of an article for a contingency to be inserted in a motion regardless of whether the language appeared in the article, or for such language to be omitted from motion when such language did appear in the article.

A. Contingency Language – Debt Exclusion and Capital Outlay Exclusion

For a debt exclusion, contingency language can be as simple as adding the following to the end of any motion appropriating and authorizing a borrowing, “provided, however, that the vote taken hereunder shall be expressly contingent upon approval by the voters of a Proposition 2 ½ debt exclusion question in accordance with the provisions of G.L. c.59, §21C(k)”. The contingency language can be more descriptive, at the discretion of the motion drafter, such as, “provided, however, that the vote taken hereunder shall be expressly contingent upon

approval by the voters of the Town of a ballot question to exclude from the limitation on total taxes imposed by G.L. c.59, 21C (Proposition 2½) the amounts required to pay the principal of and interest on the borrowing authorized by this vote.”

Similarly, contingency language in the context of a capital outlay exclusion can range from relatively simple (“provided, however, that the vote taken hereunder shall be expressly contingent upon approval by the voters of a Proposition 2 ½ capital outlay exclusion question in accordance with the provisions of G.L. c.59, §21C(i½)”), to more complex.

B. Contingency Language - Override

The question of how to address a contingent appropriation in the context of an override is slightly more complicated depending on whether the override will be presented in the context of the operating budget article, or through a separate article or articles. How to present a proposed override is a policy question.

In the context of an override associated with the operating budget, there are several options.

Option 1. Single Article - Entire budget subject to override (no differentiation between which items would be “reduced” if the override failed). Care needs to be taken to ensure that the related ballot question is considered at an election scheduled with sufficient time to return to a special town meeting prior to June 30.

Pros: No need to determine which particular departments or services require “supplemental” funding. Stated differently, departments are not explicitly competing with each other for additional funding – the budget is approved or rejected as a whole.

Cons: If the override fails, the whole budget fails. A special town meeting would need to be called and held in short order to vote the budget, with the budget overall reduced to an amount that falls within the levy.

Form of Warrant Article (with optional contingency language in italics):

To see if the Town will vote to fix the annual salary and compensation of all elected officers, and raise and appropriate or transfer from available funds, a sum or sums of money for schools, highways, and all other Town expenses and departments for Fiscal Year 2019 [*provided, however that a portion of the appropriation made hereunder shall be expressly contingent upon approval of the voters of a Proposition 2 ½ override question in accordance with G.L. c.59, §21C(g)*], or take any other action relative thereto.

Option 2. Single Article - Entire budget presented in two columns, base budget and supplemental budget, and supplemental budget subject to an override. In the sample below, there are brackets in which reference may be made to a budget document if that document is available at the time the warrant is printed. If the budget will not then be available, the brackets may be removed. However, the motion will need to include a “base” budget column, as well as a “supplemental” budget column.

Pros: The base budget will be in place at the time the town meeting dissolves. If the override fails, such failure does not impact the base budget. The board of selectmen can decide to call for another special town meeting or election, or not, at its discretion, to address the override amounts. If budget as a whole has support, it may be “easier” to get support at town meeting for approval of the override budget.

Cons: This approach requires that the particular amounts to be subject to the override be identified no later than the date of town meeting, possibly resulting in some tension amongst departments as policy decisions must be made as to what spending purposes are and are not essential. Debate at town meeting can linger on the particular override purposes and amounts, and can create risk with respect to approval of less controversial budget priorities.

Form of Warrant Article:

To see if the Town will vote to fix the annual salary and compensation of all elected officers, and raise and appropriate or transfer from available funds, a sum or sums of money for schools, highways, and all other Town expenses and departments for Fiscal Year 2019 [as set forth in the attached budget]; provided, however that the amounts presented in the budget under column labeled "Override Budget" shall be expressly contingent upon approval of the voters of a Proposition 2 ½ override question in accordance with G.L. c.59, §21C(g), or take any other action relative thereto.

Option 3. Two Articles - Base budget in one article, and the supplemental budget amounts, subject to an override, in a separate article.

Pros: Similar to Option 2, here the base budget would be in place at the time the town meeting dissolves. Therefore, if the override fails, the failure does not impact the base budget. Use of two articles can make it easier to present the override amounts. Moreover, it may make the debate and vote on the base budget "easier", in that the override, and the issues with respect thereto, are more properly debated under the override article.

Cons: Again, similar to Option 2, this approach requires that the particular amounts to be subject to the override be identified prior to town meeting. Depending on the moderator, it can be difficult to limit debate on the base budget to only base budget issues, which can lead to procedural challenges. Moreover, if the debate is consolidated anyway, then this option just adds another vote.

"Base" budget article: To see if the Town will vote to fix the annual salary and compensation of all elected officers, and raise and appropriate or transfer from available funds, a sum or sums of money for schools, highways, and all other Town expenses and departments for Fiscal Year 2019, or take any other action relative thereto.

"Supplemental" operating budget general article: To see if the Town will vote to raise and appropriate or transfer from available funds, a supplemental sum or sums of money for schools, highways, and all other Town expenses and departments for Fiscal Year 2019, provided, however that the amounts appropriated hereunder shall be expressly contingent upon approval of the voters of a Proposition 2 ½ override question in accordance with G.L. c.59, §21C(g), or take any other action relative thereto.

Option 4. Two or More Articles - Base budget in one article, and a specific purpose override in separate article, subject to an override.

Pros: See Options 2 and 3. In particular, if an override will be presented for a singular purpose, and that purpose is controversial, this approach properly focuses debate about that purpose under a separate article. Debate about the base budget is relatively insulated from the controversy.

Cons: This approach requires that the particular amounts to be subject to the override be identified well in advance of town meeting. This approach can result in some tension amongst departments as policy decisions are made regarding which spending purposes are essential (included in general budget article) and those that are not (included in separate articles). Moreover, prolonged discussion of the specific, likely more controversial override amounts, can make it less likely such amounts are approved.

“Base” budget article – see Option 3.

“Supplemental” budget specific purpose article: To see if the Town will vote to raise and appropriate or transfer from available funds, a supplemental sum or sums for *[insert particular budget purpose for which override will be sought]* for Fiscal Year 2019, provided, however that the amounts appropriated hereunder shall be expressly contingent upon approval of the voters of a Proposition 2 ½ override question in accordance with G.L. c.59, §21C(g), or take any other action relative thereto.

3. Stabilization Fund Contingency

General Laws c. 59, §21C(g) was amended recently to allow a municipality to provide funding for a special purpose stabilization fund contingent upon a Proposition 2 ½ override. Similar to any other override, approval is required both from town meeting and the voters of the town at an election. If the override passes, the new stabilization fund will thereafter exist in the town, and be funded each year through taxation in the amount specified in the town meeting appropriation vote, plus an amount of up to an additional 2½ percent of the amount previously appropriated. The statute provides that the board of selectmen is responsible for deciding how much, within the amount allowed by law, will be appropriated to the fund. Importantly, however, town meeting remains responsible for appropriating monies from such a stabilization account. The purpose of the fund can be changed only by the voters at an election.

A warrant article for this purpose may take a form similar to the following:

To see if the Town will vote pursuant to G.L. 40, §5B to create a special purpose stabilization fund for *[insert purpose of fund]*, and, as funding therefor, to raise and appropriate the sum of \$*[insert amount]*; provided, however that the vote taken hereunder shall be expressly contingent upon approval by the voters of a Proposition 2 ½, so called, override question in accordance with G.L. c.59, §21C(g), or take any other action relative thereto.

If you have any questions about Proposition 2½, please contact Attorneys Brian W. Riley (briley@k-plaw.com) or Lauren F. Goldberg (lgoldberg@k-plaw.com) at 617.556.0007.

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