

MEMORANDUM

TO: Supervisor Pool and Members of the Town Board
of the Town of New Castle

FROM: Keane & Beane, P.C.

RE: Conducting a Non-Binding Advisory Referendum
Or Informal Survey / Poll on the Form-Based Code

DATE: October 30, 2020

Summary

Our office previously advised that the proposed Form-Based Code for the Chappaqua hamlet could not be adopted subject to a permissive referendum. We understand that you have received a follow-up public comment asking whether the Town can conduct an advisory (non-binding) referendum of the electorate with respect to the proposed Form-Based Code. By this Memorandum, we answer that question in the negative.

As a rule, a municipality may not conduct a referendum, advisory or otherwise, in the absence of constitutional or statutory authority. Here, there is no such authority that would enable the Town to conduct an advisory referendum regarding the proposed local law. In such situations, the New York State Comptroller's Office has opined that the use of taxpayer monies to conduct an advisory referendum is impermissible. We also believe that irrespective of whether public funds are expended, conducting or relying upon an informal survey or poll in connection with the proposed Form-Based Code would be impermissible and inadvisable.

Discussion

In other contexts, it may be permissible for a municipality to expend public funds to undertake an informal survey or poll regarding a contemplated action or policy. *See Woodburn v. Village of Owego*, 151 A.D.3d 1216, 57 N.Y.S.3d 537 (3d Dep't 2017) (holding that a Village Board was authorized to appropriate public funds to conduct an opinion poll regarding the future of the Village's police department). However, we believe that taking such action is inadvisable and impermissible when done in connection with the adoption of legislation and/or an ongoing environmental review being conducted pursuant to the New York State Environmental Quality Review Act ("SEQRA").

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When adopting legislation, municipal officials have limited authority to delegate decision-making powers back to the electorate. “Direct legislation ... must always rest on some constitutional or statutory grant of power.” *Burke v. Kern*, 287 N.Y. 203, 211 (1941) (quoting *Matter of McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926)). “[I]n the absence of express statutory authority, an advisory referendum ... is not authorized.” *Meredith v. Monahan*, 60 Misc. 2d 1081, 1084, 304 N.Y.S.2d 638, 642 (Sup. Ct. 1969) (citing *Mills v. Sweeney*, 219 N.Y. 213, 221 (1916)). The prohibition against calling a referendum without statutory authorization is based on the principle that “[g]overnment by representation is still the rule” and “[d]irect action by the people is the exception.” *Matter of McCabe*, 243 N.Y. at 413.

A further constraint is presented by the New York State Constitution, N.Y. Const. Art. VIII, § 1, which generally requires that a municipality expend funds only to meet its lawful obligations as a result of the performance of its governmental functions.

Based upon these immutable principles, the New York State Comptroller’s Office has opined on multiple occasions that advisory referendums that are neither permitted nor required by statute are improper, and public funds may not be expended for such purposes. *See* NYCPTR Opn. No. 88–70 (“It has been consistently held in this State that a municipality may not submit a proposition to a referendum in the absence of express statutory authority ... In the absence of express statutory authority, a city may not conduct an advisory referendum on whether to fluoridate city water or whether to improve the city water or sewer systems”); NYCPTR Opn. 81-344 (“A town board, which must vote on whether to permit a village to annex uninhabited territory, may not submit the question to the residents of the town by way of a non-binding advisory referendum held at the annual town election in November”); NYCPTR Opn. 91-58 (“In the absence of express statutory authority, a city may not conduct an advisory referendum on the question whether to grant site plan approval and whether a proposed facility is consistent with the local waterfront revitalization program”); NYCPTR Opn. 96-18 (“There is no State statute which authorizes a village to conduct an advisory referendum on the question of whether to seek to become a city”).

In the instant matter, even if no public funds were expended to undertake a survey or opinion poll concerning the proposed Form-Based Code, we believe that the endeavor would constitute an impermissible advisory referendum on proposed legislation within the meaning of cases such as *Burke* and *Matter of McCabe*.

We also believe that the use of an opinion poll in this context would potentially undermine the integrity of the Town Board’s ongoing SEQRA review. The opportunity for public participation and engagement is the backbone of the SEQRA process, and SEQRA prescribes a set of procedural mechanisms as to which “strict,

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not substantial compliance is required.” *King v. Saratoga County Board of Supervisors*, 89 N.Y.2d 341, 347 (1996). A lead agency’s reliance upon generalized community opposition to a proposed action in the form of an informal survey or poll – rather than the empirical data and analysis generated during the EIS process – would contravene SEQRA’s requirements.

Here, the level of public engagement and comment with respect to the Form-Based Code has been robust, and we believe that the Town Board’s reliance upon an informal survey or poll would create significant uncertainties with respect to compliance with SEQRA’s requirements.

We further note that the question of whether a Form-Based Code should be implemented for the Chappaqua hamlet is not binary. The proposed legislation is relatively complex and nonfinal. We understand from the Town Board’s public statements that the Board is likely to make changes to the legislation based upon the input it has already received from residents and stakeholders. We believe that any informal survey or poll attempting to gauge public support for the Form-Based Code (apart from being legally impermissible) would inevitably oversimplify or misstate the questions that are being analyzed by the Town Board in its capacity as Lead Agency under SEQRA.

Conclusion

Since there is no constitutional or statutory authority that enables the Town Board to conduct an advisory referendum on whether to adopt the Form-Based Code, the Town is prohibited from undertaking one or otherwise spending public monies for this purpose. Conducting or relying upon an informal survey or poll to gauge public support for the proposed legislation would likewise be impermissible.