STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL January 17, 2024	No. I24-001 (R23-020) Re: Whether Proposition 413 is subject to an automatic recount under A.R.S. § 16-661.

To: Adrian Fontes
Secretary of State
1700 West Washington, 7th Floor
Phoenix, Arizona 85007

Questions Presented

Whether the City of Tucson is required to recount its November 7, 2023 election on Proposition 413 under A.R.S. § 16-661, the state's automatic recount statute, because of the narrow margin of votes by which Proposition 413 passed.

Summary Answer

A.R.S. § 16-661's reference to automatic recounts of "referred measures" only encompasses statewide ballot measures and does not include municipal measures like Proposition 413. As such, no recount is required.

Background

On November 7, 2023, the City of Tucson held a special election on Proposition 413, a ballot measure referred to Tucson voters by the Mayor and City Council to amend the city charter to increase the Mayor's and councilmembers' salaries.

City voters approved Proposition 413 by a margin of 289 votes out of 94,014 total votes cast. That margin represents less than half of one percent of all votes cast.

On November 21, 2023, the City of Tucson approved the canvass of Proposition 413. *See* City of Tucson Resolution No. 23697. Because of the narrow margin, the City also approved a motion directing the City Clerk and City Attorney to notify the Secretary of State and Attorney General of the Proposition 413 vote margin and canvass and to seek advice regarding the applicability of the automatic recount statute to the Proposition 413 election. The motion also authorized the City Attorney to file a legal action if necessary to confirm whether a recount is required under Arizona law for Proposition 413.

Analysis

Title 16, Chapter 4, Article 12 governs recounts of Arizona elections. *See* A.R.S. §§ 16-661-67. Specifically, A.R.S. § 16-661(A) provides:

> A recount of the vote is required when the canvass of returns in a primary or general election shows that the margin between the two candidates receiving the greatest number of votes for a particular office, or between the number of votes cast for and against initiated or referred measures or proposals to amend the Constitution of Arizona, is less than or equal to one-half of one percent of the number of votes cast for both such candidates or on such measures or proposals.

Subsection B excludes certain elections from an automatic recount, namely, "elections for precinct committeemen, school district governing boards, community college district governing boards, fire district boards or fire district chiefs or secretary-treasurers or boards of other special districts." A.R.S. § 16-661(B).

To determine whether the recount statutes apply to a municipal measure such as Proposition 413, we examine the meaning of "referred measures" in § 16-661(A) and assign the statutory text its ordinary meaning. *State v. Luviano*, 255 Ariz. 225, 530 P.3d 388, 391 ¶ 10 (2023). Viewed in isolation, "referred measures" would appear to encompass all potential referred ballot measures, including statewide, county, and municipal referred measures, because there is no indication in § 16-661(A) itself that "referred measures" should be limited to certain levels of government. Under that view, § 16-661(A) would apply to a municipal referred measure such as Proposition 413.[1]

However, the meaning of statutory text must be assessed "in view of the entire text, considering the context and related statutes on the same subject" and text should not be read in isolation. *See Molera v. Hobbs*, 250 Ariz. 13, 24 ¶ 34 (2020) (citation omitted). The statutes that follow § 16-661 make clear that the term "initiated or referred measures" in the recount statutes refer only to *statewide* initiatives or measures. Put another way, the statutes do not contemplate recounts of local initiatives or referred measures.

First, A.R.S. § 16-662 governs which official should certify the facts requiring a recount and in which court that certification should be filed. "[I]n the case of an office to be filled by electors of the entire state, a congressional district, a legislative district or a subdivision of the state greater than a county, initiated or referred measures or proposals to amend the constitution," the secretary of state shall certify the facts requiring a recount, and he shall do so in Maricopa County

[1] Proposition 413 was sent to voters in a special election. Section 16-661(A) states that it only applies to primary and general elections; however, because A.R.S. § 16-537 clarifies that "[t]he powers and duties conferred or imposed by law upon any public officer with respect to regular elections are conferred and imposed upon such officers with respect to special elections," § 16-661(A) also applies to special elections. *See also* Tucson City Charter XIV § 18 (providing that special elections be conducted in the same manner as general elections).

Superior Court. A.R.S. § 16-662. By contrast, "[i]n the case of an office to be filled by the electors of a county or subdivision of a county or precinct," the county board of supervisors shall certify the facts, and they shall do so in "the superior court in the county in which the canvass was conducted." *Id.* Similarly, "in the case of an office to be filled by the electors of a city or town, the city or town council of that city or town shall certify the facts requiring a recount," and they shall do it in the superior court in the county in which the canvass was conducted. *Id.* In other words, initiated or referred measures are included in § 16-662 only where the secretary of state is the filing officer; all other filing officers certify facts for a recount only for candidates.

This statute thus breaks elections down into two categories: (1) elections at greater than the county level, and (2) elections at the county level or lower. In the former category, the secretary of state is the initiating officer for a recount, and the recount action is filed in Maricopa County Superior Court. In the latter category, local officials are the initiating officers, and the recount action is filed in the county in which the election was conducted and canvassed.

Relevant here, § 16-662 places "referred measures" in the former category, of elections at greater than the county level. Whenever there is a recount for a referred measure, it must be initiated by the secretary of state in Maricopa County, just like elections for statewide office. That would make little sense if "referred measures" included measures voted on only by the voters of a single county, city, or town. It indicates that, in this statutory context, "referred measures" means statewide measures, not local ones.

Second, § 16-665 categorizes elections in a distinct but related way that similarly indicates that referred measures, in this context, means statewide measures. That section requires that the result of a recount be presented to a court, which announces the result and issues an order. A.R.S. § 16-665(A). Then, the certified copy of that order shall be delivered as follows:

> 1. To the governor with respect to an initiative or referendum measure, or proposal to amend the Constitution of Arizona. The governor shall forthwith issue a proclamation reciting the total number of votes cast for or against the initiative or referendum measure, or amendment to the constitution, as certified by the court, and declaring such measure or amendment as approved by a majority voting thereon, as certified by the court, to be the law.
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> 2. To the secretary of state with respect to offices to be filled by electors of the entire state, a congressional district, a legislative district or a subdivision of the state greater than a county. The secretary of state shall forthwith deliver to the candidate entitled thereto, as certified by the court, the certificate of election.
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> 3. To the clerk of the board of supervisors with respect to offices to be filled by electors of the county or a subdivision of a county, or a precinct, or in the case of an office to be filled by the electors of a city or town, to the city or town clerk. The clerk of the board of supervisors or the city or town clerk shall forthwith deliver to the candidate entitled thereto, as certified by the court, the certificate of election.

A.R.S. § 16-665(B). This statute groups measures referred to the people with other changes made by the people to state law (initiatives and constitutional amendments), all of which are certified and announced by the governor. By contrast, the only elections for which local officials receive the certificate are elections for local offices; referred measures are not included in this category of elections for which certification is a local matter. This too indicates that the term "referred measures" in § 16-661 refers to statewide measures, not local ones.

Third, A.R.S. § 16-666 allocates the expenses of recounts in a manner that, once again, indicates that referred measures in the recount statutes are statewide affairs. The statute provides:

> The expenses of the recount of the votes as provided in this article, if for an office to be filled by state electors, or if upon an initiative or referendum measure, or proposal to amend the constitution, shall be a state charge, and if for an office to be filled by the electors of a county or a subdivision of a county, or precinct, shall be a county charge. In the case of an office to be filled by the electors of a city or town, the expenses of the recount shall be a city or town charge.

A.R.S. § 16-666. If there's a recount of a "referendum measure," the State pays the cost. By contrast, a county or city is responsible for the cost of a recount only for elections for offices of a county or city, respectively. *Id.* Again, it would make little sense for the State to be responsible for

the cost of recounts for local referenda or initiatives, but not for the cost of recounts for local offices.

Legislative history also provides some helpful context. In 2004, the Legislature passed S.B. 1244, amending the recount statutes to clarify that they applied to municipal *candidate* elections after a dispute about whether the then-operative version of the statute requiring recounts for county officer elections also encompassed city and town officer elections. *See* A.R.S. § 16-661(6) (2004). As explained in the Senate Fact Sheet:

> In 2003, the margin between two candidates for a council election in Youngtown was two votes. Maricopa County election officials determined the current statute did not apply to municipalities. Although county officials performed the recount in that instance, they informed Youngtown that the County did not believe it was responsible for administering the recount. Prior to that incident, Maricopa County had automatically conducted recounts for city and town elections where the difference in votes was equal to or less than one-tenth of one percent or ten or less votes. S.B. 1244 specifies that the recount statute also applies to municipal elections.

See S.B. 1244 Senate Fact Sheet as Enacted, (May 10, 2004), https://www.azleg.gov/legtext/46leg/2r/summary/s.1244jud_finalamended.doc.htm.

S.B. 1244 amended § 16-661(6) to explicitly confirm that city and town *officer* elections were subject to recount if there was a ten-vote margin. A.R.S. § 16-661(6) (2004). S.B. 1244 made similar conforming changes to the surrounding recount statutes. *See* A.R.S. § 16-662 (2004) (clarifying that municipal recounts in officer elections should be presented to the court in which the canvass was conducted); § 16-665(3) (2004) (clarifying that the city or town clerk shall deliver certificate of election after municipal recounts in officer elections); § 16-666 (2004) (clarifying that the city or town shall bear cost of municipal officer election recounts). These amendments all were made with respect only to elections to "an office"—the type of election underlying the dispute which prompted the amendment.

Although the Legislature could have also amended the recount provisions (in 2004 or at any other time) to clarify that the statutes apply to all municipal elections, it did not do so. In light of this legislative silence, and the way referred measures are treated in sections 16-662, -665, and -666, applying § 16-661 to municipal ballot measures would inappropriately "read into a statute something which is not within the manifest intention of the [L]egislature as indicated by the statute itself." *Mussi v. Hobbs*, 255 Ariz. 395, 532 P.3d 1131, 1138 ¶ 34 (2023) (citation omitted); *see also State v. Fink in & for Cnty. of Santa Cruz*, __ Ariz. __, 539 P.3d 543, 546 ¶ 9 (Ariz. Ct. App. Nov. 7, 2023) (citation omitted) (The "mere fact a statute is silent as to a particular scenario neither makes it ambiguous nor permits [a court] to read provisions into it.").

Finally, we note that the Legislature's decision to not explicitly list municipal ballot measures in § 16-661(B) as a type of election not subject to the recount provisions does not counsel a different result. The fact that subsection (B) specifically excludes certain officer elections that would otherwise be subject to recount under subsection (A) sheds no light on whether the Legislature intended municipal ballot measures to be subject to recount. Furthermore, because the rest of the recount article indicates that municipal ballot measures are not included under § 16-661(A), there is no reason to exclude them under § 16-661(B).

Conclusion

Read in the context of the recount article, the term "referred measures" in § 16-661 encompasses only statewide referred measures, not municipal measures. If the legislature had intended to expand the recount article to encompass municipal elections more broadly, as opposed

to just municipal officer elections, it could have said so. It did not. Therefore, the City of Tucson is not required to recount the election for Proposition 413.

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