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Attorney for Town of Payson

9
10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF GILA**

12 TRANSPARENT PAYSON, a political
committee registered pursuant to Arizona
13 Revised Statutes Section 16-905, JEFFREY
AAL, individually as a citizen of the Town
14 of Payson, and in his capacity as Chairman
of Transparent Payson; KIMBERLY ANN
15 NICHOLS, individually,

16 Plaintiffs,

17 v.

18 TOWN OF PAYSON, ARIZONA, a public
entity, and TRACIE BAILEY, in her official
19 capacity as Payson Town Clerk,

20 Defendants.

21 TOWN OF PAYSON, an Arizona
municipal corporation,

22 Defendant/Counterclaimant,

23 v.

24 TRANSPARENT PAYSON, a political
committee registered pursuant to Arizona
25 Revised Statutes Section 16-905,
JEFFREY AAL, in his capacity as
26 Chairman of Transparent Payson,
KIMBERLY ANN NICHOLS, individually,

27 Plaintiffs/Counter-Defendants.
28

Case No. S0400CV202300118

**VERIFIED ANSWER AND
VERIFIED COUNTERCLAIM**

(Assigned to the Honorable Michael
Latham)

1 Defendants Town of Payson, Arizona (“Payson”) and Tracie Bailey (“Ms. Bailey”
2 collectively “Payson”), by and through counsel undersigned, hereby answer the
3 corresponding paragraphs of Plaintiffs’ Complaint as follows:

4 **PARTIES, JURISDICTION, AND VENUE**

5 1. Payson has insufficient information to either admit or deny the allegations
6 contained in paragraph 1, therefore denies the same and demands strict proof thereof.

7 2. Payson has insufficient information to either admit or deny the allegations
8 contained in paragraph 2, therefore denies the same and demands strict proof thereof.

9 3. Payson has insufficient information to either admit or deny the allegations
10 contained in paragraph 3, therefore denies the same and demands strict proof thereof.

11 4. Answering paragraph 4, Payson admits it is a municipal corporation but denies
12 the remaining allegations contained in paragraph 4.

13 5. Answering paragraph 5, Payson admits this Court has jurisdiction.

14 6. Payson admits the allegations contained in paragraph 6.

15 7. Answering paragraph 7, Payson admits venue is proper in this Court.

16 **GENERAL ALLEGATIONS**

17 8. Paragraph 8 is a statement of law to which no response is required.

18 9. Paragraph 9 is a statement of law to which no response is required.

19 10. Paragraph 10 is a statement of law to which no response is required.

20 11. Payson has insufficient information to either admit or deny the allegations
21 contained in paragraph 11, therefore denies the same and demands strict proof thereof.

22 12. Payson denies the allegations contained in paragraph 12.

23 13. Payson denies the allegations contained in paragraph 13.

24 14. Payson admits only that the March 2021 Payson Council Meeting Agenda
25 included an item to consider a Resolution that would have repealed Payson Town Code
26 Section 157.01 and Payson Town Code Section 35.04. Payson denies the remaining
27 allegations in paragraph 14.

28 ///

1 15. Answering paragraph 15, Payson admits only that Transparent Payson’s
2 counsel sent the Payson Town Council a letter and denies the remaining allegations
3 contained in paragraph 15.

4 16. Answering paragraph 16, Payson admits only that on April 12, 2023, the
5 Council adopted an ordinance that repealed Town Code Chapter 157 and Town Code Section
6 35.04. Payson denies the remaining allegations contained in paragraph 16.

7 17. Payson denies the allegations contained in paragraph 17.

8 18. Payson denies the allegations contained in paragraph 18.

9 19. Paragraph 19 is a statement of law to which no response is required.

10 20. Payson denies the allegations contained in paragraph 20.

11 21. Payson denies the allegations contained in paragraph 21.

12 **COUNT ONE – INJUNCTIVE, MANDAMUS AND DECLARATORY RELIEF:**

13 **The Town Council’s Actions Purporting to Repeal the Propositions**

14 *is Ultra Vires, Void and of no Effect*

15 22. Payson incorporates all of its allegations in this Answer as if fully set forth
16 herein.

17 23. Payson denies the allegations contained in paragraph 23.

18 24. Payson denies the allegations contained in paragraph 24.

19 25. Payson denies the allegations contained in paragraph 25.

20 26. Payson denies the allegations contained in paragraph 26.

21 **COUNT TWO (MISNAMED COUNT I)**

22 **INJUNCTIVE AND DECLARATORY RELIEF:**

23 **The Town Council’s Actions Purporting to Repeal the Propositions**

24 *is Ultra Vires, Void and of no Effect*

25 27. Payson incorporates all of its allegations in this Answer as if fully set forth
26 herein.

27 28. Payson denies the allegations contained in paragraph 28.

28 29. Payson denies the allegations contained in paragraph 29.

1 **GENERAL DENIAL**

2 Payson denies any allegation not specifically admitted.

3 **DEMAND FOR JURY TRIAL**

4 Payson hereby demands a jury trial.

5 **AFFIRMATIVE DEFENSES**

6 Affirmatively, and so that the same are not waived until discovery is complete, Payson
7 alleges their defenses as follows:

8 A. There is no authority under Arizona statutes or constitutional provisions that
9 allows a general law/non-charter town such as Payson to refer to the voters the power to
10 approve or reject any lease, license, or easement with a term of three or more years.

11 B. There is no authority under Arizona statutes or constitutional provisions that
12 allow a general law/non-charter town such as Payson to refer to the voters the power to
13 approve or reject any revenue bond for financing or debt that has a combination and/or
14 double-barrel feature to be treated as a general obligation bond, and any contract/lease debt
15 incurred by the town with an original amount of \$1 million or greater.

16 C. There was an insufficient number of votes cast in the 2018 election required
17 for approval of Initiatives 401 and 402.

18 D. Entering into long-term leases, license agreements, and easement agreements
19 and contract/lease debt incurred by Payson with an original amount of \$1 million or greater
20 are administrative activities to be performed by the Town of Payson, through its Town
21 Council and authorized administrative officers.

22 E. Ordinance No. 953 legally and properly repealed Payson Town Code Section
23 35.04.

24 F. Ordinance 954 legally and properly repealed Payson Town Code Section
25 157.01.

26 G. Plaintiff did not timely collect and return signatures, and this action is not ripe.

27 H. Plaintiffs do not have standing to challenge Ordinance 953 and Ordinance 954.

28 An entity named Transparent Payson filed the Initiative for Propositions 401 and 402 to be

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1 on the ballot in 2018. That entity was terminated effective January 15, 2019. This Plaintiff
2 was organized on April 8, 2021. Thus, this Plaintiff does not have standing to bring this
3 action.

4 RESPECTFULLY SUBMITTED this 6th day of July, 2023.

5 **TITUS BRUECKNER SPITLER & SHELTS PLC**

6
7 By: /s/ Larry J. Crown

8 Larry J. Crown
9 Elan S. Mizrahi
10 *Attorneys for Defendants*

11 ORIGINAL of the foregoing filed electronically
12 via AZTurboCourt on this 6th day of July,
13 2023 with:

14 The Clerk of the Court
15 Gila County Superior Court

16 COPY of the foregoing delivered electronically
17 this 6th day of July, 2023 to:

18 The Honorable Michael Latham
19 Apache County Superior Court Judge

20 COPY of the foregoing emailed on
21 this 6th day of July, 2023 to:

22 Timothy A. La Sota, Esq.
23 TIMOTHY A. LA SOTA, PLC
24 2198 East Camelback Road, Suite 303
25 Phoenix, AZ 85016
26 tim@timlasota.com

27 *Attorneys for Plaintiffs*

28 /s/ Karin A. Meister

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DECLARATION OF TRACIE BAILEY

I, TRACIE BAILEY, pursuant to Rule 80(c)(1), Ariz.R.Civ.P., declare the following:

1. I am the Town of Payson Town Clerk and make this Declaration based upon my personal knowledge of the facts asserted herein.

2. I declare under penalty of perjury of the laws of the State of Arizona that the foregoing Verified Answer is true and correct to the best of my knowledge and belief.

3. This Declaration is executed by me on this 6th day of July, 2023 in Gila County, Arizona.



TRACIE BAILEY

1 **VERIFIED COUNTERCLAIM**

2 Defendant/Counterclaimant Town of Payson, (the “Town”) by and through under-
3 signed counsel, hereby initiates this action seeking a declaratory judgment.

4 **INTRODUCTION**

5 1. The Town brings this action for a declaratory judgment to determine that
6 Propositions 401 and 402, now codified in Payson Town Code as Sections 157.01 and 35.04
7 respectively, are wholly without authority and outside the delegated powers of the Payson
8 Town Council, *ultra vires* of the Town Council’s authority, unenforceable, invalid, null and
9 void, and of no legal force or effect, such that the Payson Town Council is not permitted or
10 obligated to comply with such Sections.

11 2. This Counterclaim is brought pursuant to A.R.S.§ 12-1831 *et seq.* and Arizona
12 Rules of Civil Procedure Rule 7 and Rule 13(a) and (c) (Compulsory Counterclaim) as this
13 Counterclaim arises out of the occurrence that is the subject matter of the Plaintiffs’ claim;
14 and does not require adding another party over whom the court cannot acquire jurisdiction.

15 3. In the alternative, this Counterclaim is brought as a permissive counterclaim
16 pursuant to Arizona Rules of Civil Procedure Rule 7 and Rule (b) and (c).

17 **PARTIES**

18 4. The Town of Payson is an Arizona municipal corporation.

19 5. Based on information and belief, Counter-Defendant Transparent Payson is the
20 successor political committee (“TransPayson 2”) to its predecessor political committee
21 Transparent Payson (“TransPayson 1”), which was the proponent political committee for
22 Propositions 401 and 402.

23 6. Based on information and belief, Counter-Defendant Jeffrey Aal is the current
24 chairman of TransPayson 2 and was the chairman of TransPayson 1.

25 7. Counter-Defendants initiated Special Action No. S0400CV202300118 against
26 the Town on May 8, 2023.

27 **JURISDICTION**

28 8. This Court has personal jurisdiction over the parties.

1 9. This Court has subject matter jurisdiction pursuant to A.R.S. § 12-1831, *et*
2 *seq.*, and the Arizona Constitution.

3 **FACTUAL ALLEGATIONS**

4 **Propositions 401 and 402**

5 10. At the August 28, 2019 election, Town voters approved Proposition 401, now
6 codified as Town Code § 157.01.

7 11. Proposition 401 purported to require the Town Council to refer to the voters
8 any lease, license or easement with a term of three or more years.

9 12. Payson Town Code §157.01 states as follows:

10 **§ 157.01 RIGHT TO CONTROL PUBLIC LAND.**

11 (A) Any lease of the town's real property, originating or
12 renewal, excluding inter-governmental agreements, excluding utility
13 and communication providers, excluding Airport Commission
14 agreements, excluding Water Department agreements, that has a stated
15 or extended term of three years or more shall be subject to a vote of the
16 qualified electors to enact.

17 (B) For the purposes of this chapter, lease(s) with a utility and
18 communication provider(s) are excluded.

19 (C) The term **LEASE** shall include all forms of lease, license
20 and easement.

21 (D) For the purpose of this chapter the following definitions
22 shall apply unless the context clearly indicates or requires a different
23 meaning.

24 **LEASE.** A contract where the town agrees to give a tenant the
25 exclusive right to inhabit or occupy real property.

26 **LICENSE.** A contract in which the town lets an individual or an
27 entity use real property for a specific purpose.

28 **EASEMENT.** A contract in which the town lets an individual or
an entity use real property for a specific purpose or prevents the use of
the real property.

UTILITY AND COMMUNICATION PROVIDERS. Includes
any organization which provides services to the general public,
although it may be privately owned. Public utilities include electric, gas,
telephone, water, sewer, waste management, broadcast systems and
television cable systems.

13. At the August 28, 2019 election, Town voters approved Proposition 402, now
codified as Town Code § 35.04.

1 14. Proposition 402 purported to require the Town Council to refer to the voters
2 “any revenue bond for financing or debt that has a combination and or double barrel feature
3 . . . to be treated as a general obligation bond”, and “any contract/lease debt incurred by the
4 town with an original amount of \$1,000,000.”

5 15. Payson Town Code § 35.04 states as follows:

6 **§ 35.04 PEOPLE'S RIGHT TO KNOW DEBT OBLIGATION**

7 (A) Any revenue bond for financing or debt that has a
8 combination and or double barrel feature in the indenture agreement, or
9 elsewhere in the bond terms, shall be treated as a general obligation
10 bond, requiring a vote of the qualified electors to enact or fund.

11 (B) For any contract/lease debt incurred by the town with an
12 original amount of \$1,000,000 or greater requiring a direct vote to
13 enact/fund.

14 (C) For the purpose of this section, FINANCING or DEBT shall
15 be defined as any debt, bond, note, loan, interfund loan, fund transfer or
16 other debt service obligation used to finance the development or
17 expansion of a capital facility or lease of a facility.

18 **General Law Cities and Towns Have Only That Authority Granted by Constitution
19 and State Statute**

20 16. Non-charter municipalities possess no greater powers than those delegated to
21 them by the Constitution and general laws of the state. These powers may be delegated
22 expressly or by necessary implication but that “the powers so delegated are to be strictly
23 construed.” *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 205 (1968).

24 17. Absent a specific provision authorizing it, a city or town council does not have
25 the power to refer any ordinance to the electorate.

26 18. Because the city or town council does not have authority to voluntarily submit
27 an ordinance to a vote of the people, neither do the people by initiative have the right to
28 submit such ordinance to a vote of the people because their powers are no greater than those
of the city or town council.

 19. The council may not voluntarily submit a measure to the people in the absence
of a referendum petition, except where referral is required or specifically allowed by statute.

 20. The Payson Town Council does not have the authority to refer the leases
purportedly required by Town Code § 157.01 to the voters because cities and towns of this

1 state are municipal corporations created by the state and possessory of no greater powers than
2 those delegated to them by the constitution and the general laws of the state.

3 21. The Payson Town Council does not have the authority to refer the financing
4 mechanisms, debt or purchases purportedly required by Town Code § 35.04 to the voters.

5 22. Neither the Arizona Constitution nor any law authorizes the Payson Town
6 Council to refer matters set forth in Sections 157.01 or 35.04 to the electors because the
7 voluntary submission of these items by the Town Council to a special vote of the people, in
8 the absence of a referendum petition is wholly without authority and outside the delegated
9 powers of the city council.

10 23. Voter approved Proposition 401, codified as Town Code § 157.01 is wholly
11 without authority and outside the delegated powers of the Payson Town Council, ultra vires
12 of the Town Council’s authority, invalid, null and void, and of no legal force or effect.

13 24. Voter approved Proposition 402, codified as Town Code § 35.04 is wholly
14 without authority and outside the delegated powers of the Payson Town Council, ultra vires
15 of the Town Council’s authority, invalid, null and void, and of no legal force or effect.

16 **Only Legislative Acts May Be Referred to the Voters**

17 25. Municipal corporations act in several capacities: legislative, executive,
18 administrative, and quasi-judicial.

19 26. Voters may challenge only legislative actions via referendum because
20 permitting referenda on executive and administrative actions would hamper the efficient
21 administration of local governments.

22 27. The test to determine whether a particular act is legislative, and thus referable,
23 or administrative, and not referable, is that a legislative act deals with subjects of a permanent
24 and general character, while administrative actions deal with subjects of a temporary or
25 special character. *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 488-489 (1991).

26 28. Local government action that is “legislative”—establishes policy, enacts a law
27 or permanent rule of government, or declares a public purpose and provides the ways and
28 means of its accomplishment—is subject to referendum.

1 29. The subject matter of Proposition 401, codified as Town Code § 157.01, leases,
2 licenses and easements, are not acts that establish policy, enact a law or permanent rule of
3 government, or declare a public purpose and provides the ways and means of its
4 accomplishment.

5 30. The Payson Town Council has no legal authority to refer the matters that are
6 the subject of Proposition 401 to voters, and the voters by extension cannot compel the
7 Council to do so by initiative because their authority is no greater than that of the Council.

8 31. Proposition 401 codified as Town Code § 157.01 is of no legal force or effect
9 and does not constrain the Council.

10 32. The subject matter of Proposition 402, approvals of non-general obligation
11 bond measures and expenditures over \$1 million, are previously established through an
12 annual budgeting process (i.e., establishing a policy) thus are not themselves acts that
13 establish policy, enact a law or permanent rule of government, or declare a public purpose
14 and provides the ways and means of its accomplishment.

15 33. The Payson Town Council has no legal authority to refer the matters that are
16 the subject of Proposition 402 to voters, and the voters by extension cannot compel the
17 Council to do so by initiative because their authority is no greater than that of the Council.

18 34. Proposition 402 codified as Town Code § 157.01 is of no legal force or effect
19 and does not constrain the Council.

20 WHEREFORE, Defendant Counter-Plaintiff Town of Payson respectfully requests
21 that this Court:

22 A. Grant declaratory judgment in favor of Defendant Counter-Plaintiff Town of
23 Payson and against Plaintiffs Counter-Defendants to determine Proposition 401, codified as
24 Town Code § 157.01, is wholly without authority and outside the delegated powers of the
25 Payson Town Council, ultra vires of the Town Council’s authority, unenforceable, invalid,
26 null and void, and of no legal force or effect, such that the Payson Town Council is not
27 permitted or obligated to comply with such Sections;

28

1 B. Grant declaratory judgment in favor of Defendant Counter-Plaintiff Town of
2 Payson and against Plaintiffs Counter-Defendants to determine Proposition 402, codified as
3 Town Code § 35.04, is wholly without authority and outside the delegated powers of the
4 Payson Town Council, ultra vires of the Town Council’s authority, unenforceable, invalid,
5 null and void, and of no legal force or effect, such that the Payson Town Council is not
6 permitted or obligated to comply with such Sections; and

7 C. That this Court grant such other and further relief as this Court deems
8 appropriate, including an equitable and just award of costs to the Town.

9 DATED this 6th day of July 2023.

PIERCE COLEMAN PLLC

By /s/ Jon M. Paladini

Jon M. Paladini
7730 E. Greenway Road, Ste. 105
Scottsdale, Arizona 85260
Attorneys for the Town of Payson, Arizona

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DECLARATION OF TRACIE BAILEY

I, TRACIE BAILEY, pursuant to Rule 80(c)(1), Ariz.R.Civ.P., declare the following:

4. I am the Town of Payson Town Clerk and make this Declaration based upon my personal knowledge of the facts asserted herein.

5. I declare under penalty of perjury of the laws of the State of Arizona that the foregoing Verified Counterclaim is true and correct to the best of my knowledge and belief.

6. This Declaration is executed by me on this 6th day of July, 2023 in Gila County, Arizona.



TRACIE BAILEY