

**ORDINANCE NO. 953**

**AN ORDINANCE OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, AMENDING THE TOWN CODE, TITLE XV LAND USAGE, BY REPEALING IN ITS ENTIRETY CHAPTER 157 PEOPLE’S RIGHT TO CONTROL PUBLIC LANDS; PROVIDING FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY AND DECLARING AN EMERGENCY.**

**WHEREAS**, at the August 28, 2019 election, Town voters approved Proposition 401, now codified as Town Code Chapter 157;

**WHEREAS**, Proposition 401 purported to require the Town Council to refer to the voters any lease, license or easement with a term of three or more years;

**WHEREAS**, no statute or Constitutional provision expressly allows or provides that a general law city or town is authorized to refer to the voters the subject matter of Proposition 401;

**WHEREAS**, the Arizona Supreme Court addressed whether municipalities have the power to refer matters to voters in a 1968 decision;

**WHEREAS**, in *City of Scottsdale v. Superior Court*, the Scottsdale City Council adopted an ordinance rezoning a parcel of land. Immediately after adopting the ordinance, the council adopted a resolution purporting to voluntarily “refer the ordinance to a vote of the electors of the City of Scottsdale”;

**WHEREAS**, the Court held that the council did not have the authority to refer the ordinance to the voters, reasoning that “[t]he cities and towns of this state are municipal corporations created by the state and possessory of no greater powers than those delegated to them by the constitution and the general laws of the state”;

**WHEREAS**, because neither the Arizona Constitution nor any law authorized a council to refer matters before it to the electors, the Court concluded that “the voluntary submission of the ordinance by the council to a special vote of the people, in the absence of a referendum petition therefor, was wholly without authority and outside the delegated powers of the city council”;

**WHEREAS**, the reasoning in *City of Scottsdale* was most recently applied and reaffirmed by the Arizona Supreme Court in the 2018 case *Crane v. Peterson*;

**WHEREAS**, in that case, the voters of the Town of Carefree adopted by initiative an ordinance that purported to place term limits on the mayor and councilmembers. One of the councilmembers challenged the ordinance, arguing it was contrary to established law;

**WHEREAS**, the Court agreed, citing to *City of Scottsdale* for the proposition that “[n]on-charter municipalities . . . possess no greater powers than those delegated to them by the Constitution and general laws of the state”;

**WHEREAS**, the Arizona Supreme Court in the 1953 case, *City of Flagstaff v. Associated Dairy Products Co.*, held that these powers may be delegated expressly or by necessary implication but that “the powers so delegated are to be strictly construed”;

**WHEREAS**, the Court in *Crane* concluded that because nothing in the Constitution or state law empowered municipalities to establish term limits, municipalities lack the authority to do so and found the voter-approved ordinance to be invalid;

**WHEREAS**, the League of Arizona Cities and Towns also ascribes to this interpretation;

**WHEREAS**, then League General Legal Counsel J. LaMar Shelley opined in “Re: Powers of the Initiative” that “Absent a specific provision authorizing it, a city or town council does not have the power to refer any ordinance to the electorate. It follows, then, that if the city or town council does not have authority to voluntarily submit an ordinance to a vote of the people, *then neither do the people by initiative have the right to submit such ordinance to a vote of the people because their powers are no greater than those of the city or town council*”;

**WHEREAS**, the League has opined similarly in its Election Manual that “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. This prohibition means that the council cannot refer an ordinance to the people in the absence of a referendum petition”;

**WHEREAS**, the Arizona Supreme Court in *Wennerstrom v. City of Mesa* opined that municipal corporations act in several capacities: legislative, executive, administrative, and quasi-judicial and that voters may challenge only legislative actions via referendum because permitting “referenda on executive and administrative actions would hamper the efficient administration of local governments”;

**WHEREAS**, the Court adopted a test for evaluating whether a particular act is legislative, and thus referable, or administrative, and not referable by stating that actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. In this connection an ordinance which shows an intent to form a permanent rule of government until repealed is one of permanent operation;

**WHEREAS**, the Court concluded that local government action that is “legislative”—establishes policy, enacts a law or permanent rule of government, or declares a public purpose and provides the ways and means of its accomplishment—is subject to referendum;

**WHEREAS**, the subject matter of Proposition 401, leases, licenses and easements, are not acts that establish policy, enact a law or permanent rule of government, or declare a public purpose and provides the ways and means of its accomplishment;

**WHEREAS**, under the law and Constitution of the State of Arizona as interpreted by the Arizona Supreme Court, the Payson Town Council has no legal authority to refer the matters that are the subject of Proposition 401 to voters, and the voters by extension cannot compel the Council to do so by initiative because their authority is no greater than that of the Council;

**WHEREAS**, Proposition 401 codified as Town Code Chapter 157 is of no legal force or effect and does not constrain the Council;

**WHEREAS**, applying these authorities and opinions here, Proposition 401 fails as a matter of law;

**WHEREAS**, in 1998 voters in the State of Arizona approved Proposition 105, known as the Voter Protection Act to amend the Arizona Constitution to expressly limit the legislature's "authority to amend measures approved by voters in initiative elections" providing that the legislature may only amend a voter initiative if "the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature ... vote to amend such measure";

**WHEREAS**, the VPA states that the Legislature "shall not have the power to repeal an initiative measure approved by the majority of votes cast" and "shall not have the power to amend an initiative measure ... unless the amending legislation furthers the purpose of such measure and at least three-fourths of the members of each house ... vote to amend such measure";

**WHEREAS**, in compliance with A.R.S. § 19-124, a legislative analysis was conducted prior to the adoption of Proposition 105;

**WHEREAS**, the analysis made the following conclusions:

- Proposition 105 would make a series of changes to the Arizona Constitution relating to initiative and referendum. Under current law, the State Legislature by a majority vote may subsequently amend or repeal any ballot measure that has been approved by the voters, except if that ballot measure was approved by a majority of the people who are registered to vote in this state, rather than by a majority of people who voted on the ballot measure.
- Proposition 105 would make all of the following changes apply to any ballot measure that is approved by a majority of the people who voted on that ballot measure:
  - Prohibits the Governor from vetoing the approved measure.
  - Prohibits the State Legislature from ever repealing the approved measure or from amending an approved measure except as provided below.
  - Requires a three-fourths vote of the State Legislature to amend or supersede the approved measure and requires that the legislation "furthers the purposes" of the approved measure.

- Requires a three-fourths vote of the State Legislature to appropriate or transfer funds that were designated to a specific purpose by the approved measure and requires that the appropriation or transfer of funds “furthers the purposes” of the approved measure.
- Provides that the State Legislature is not limited in its right to refer any measure to the ballot.

**WHEREAS**, there are numerous Courts of Appeal and Arizona Supreme Court cases that have analyzed the VPA, all of which have found that the VPA is a restriction on the State Legislature;

**WHEREAS**, the VPA, because of its plain language as well as multiple interpretations of the language, allows the Town Council to conclude that Proposition 401 is not protected by the VPA;

**WHEREAS**, the Town Council is currently prioritizing various capital facilities projects, including projects related to public safety, parks and recreation, and efficient governmental administration;

**WHEREAS**, most of these projects will be financed by the Town with short-term or long-term repayment obligations that may include installment purchase contracts or lease-purchase agreements;

**WHEREAS**, because Proposition 401 as codified in the Town Code contradicts or conflicts with Arizona law, potential investors or financial institutions that would otherwise be willing to assist the Town with the financing and construction of the projects may be unwilling to assist the Town or will assist the Town only at higher costs (i.e., higher interest rates or contractual protections) to mitigate any potential legal complications related to Proposition 401;

**WHEREAS**, in order to protect the Town’s ability to accomplish its governmental functions in an efficient and cost-effective manner, repeal of Proposition 401 is necessary;

**WHEREAS**, the Town Council is currently prioritizing capital facilities projects as described above, and these projects are necessary for the immediate preservation of the peace, health or safety of the Town;

**WHEREAS**, the Town will need to finance these projects with short-term or long-term obligations which may include bonds, installment purchase contracts, lease-purchase contracts, or otherwise, and these obligations may be purchased by investors or financial institutions;

**WHEREAS**, these financial institutions or investors may hesitate to purchase the Town’s obligations so long as Town Code Chapter 157 is in effect, or may charge the Town a higher interest rate to mitigate any investment risk created by Chapter 157;

**WHEREAS**, the interest rate environment is volatile and Town Code Chapter 157 potentially prevents Town Council from acting quickly to finance the projects under consideration;

**WHEREAS**, in order to put the Town in a position to obtain the best financing terms for the Town and its residents, it is warranted to include an emergency clause in this Ordinance repealing Town Code Chapter 157;

**WHEREAS**, the Town of Payson, Arizona desires to amend the Town Code by repealing in its entirety Chapter 157 People's Right to Control Public Lands; and

**WHEREAS**, it is in the best interest of the Town to preserve the health, safety and general welfare by adopting this Ordinance by emergency clause to effectuate the immediate implementation of the repeal of Town Code Chapter 157.

**NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA**, as follows:

Section 1. The recitals above are hereby incorporated as if fully set forth herein.

Section 2. The Town of Payson Town Code, Title XV Land Usage, is amended by repealing in its entirety Chapter 157 People's Right to Control Public Lands.

Section 3. All ordinances, parts of ordinances and resolutions in conflict with the provisions of this Ordinance, or any part of the Town Code amended here by reference, are repealed.

Section 4. If any provision of this Ordinance is for any reason held by any court of competent jurisdiction to be unenforceable, such provision or portion hereof shall be deemed separate, distinct and independent of all other provisions and such holding shall not affect the validity of the remaining portions of this Ordinance.

Section 5. The Mayor, Town Manager, Town Clerk and Town Attorney are hereby authorized and directed to take all steps necessary to carry out the purpose and intent of this Ordinance.

Section 6. The immediate operation of the provisions of this Ordinance is necessary for the preservation of the public peace, health, and safety of the Town of Payson, and an emergency is hereby declared to exist. This Ordinance shall be in full force and effect from and after its passage, adoption, and approval by the Common Council of the Town of Payson.

**PASSED AND ADOPTED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA** this \_\_\_\_ day of \_\_\_\_\_, 2023, by the following vote:

AYES \_\_\_\_ NOES \_\_\_\_ ABSTENTIONS \_\_\_\_ ABSENT \_\_\_\_

\_\_\_\_\_  
Christopher Higgins, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Tracie Bailey, Town Clerk

\_\_\_\_\_  
Pierce Coleman, PLLC, Town Attorney

