

**Propositions 401
and 402
Payson Town
Code Sections
35.04 and 157.01**

The Case for Repeal



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Propositions 401 and 402 Payson Town Code Sections 35.04 and 157.01

PROP 402

§ 35.04 PEOPLE'S RIGHT TO KNOW DEBT OBLIGATION

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

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

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



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PROP 401

§ 157.01 RIGHT TO CONTROL PUBLIC LAND.

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

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

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

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

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

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

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.



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City of Scottsdale v. Superior Court

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.” The Arizona Supreme 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.”



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Crane v. Peterson (Maricopa County Superior Court)

Voters of the Town of Carefree adopted an initiative 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. 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.” The court 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.



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The League of Arizona Cities and Towns v. J.
LaMar Shelley, General Counsel Opinion Re:
Powers of the Initiative, at 3 (July 1, 1996)

“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 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.*”



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The League has opined similarly in its Election Manual. *See* Municipal Election Manual, at p. 61

“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.”.



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No statutes or Constitutional provisions expressly allow or provide that a general law city or town is authorized to refer to the voters the subject matters of Propositions 401 and 402.



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Only Legislation May Be Referred

Action by county board of supervisors is subject to referendum only if it is legislative, as opposed to administrative, action. *State v. Oakley* (Court of Appeals).



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Only Legislation May Be Referred

Wennerstrom v. City of Mesa, (Arizona Supreme Court)

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.



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Only Legislation May Be Referred

Municipal corporations act in several capacities: legislative, executive, administrative, and quasi-judicial. Voters may challenge only legislative actions via referendum because permitting “referenda on executive and administrative actions would hamper the efficient administration of local governments.” *Id.*



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Only Legislation May Be Referred

Test for evaluating whether a particular act is legislative, and thus referable, or administrative, and not referable:

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.



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Only Legislation May Be Referred

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.



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Only Legislation May Be Referred

The subject matter of Proposition 402, approvals of bond measures other than general obligation bonds and expenditures over \$1 million, are previously established through an annual budgeting process (i.e., a establishing a policy) thus are not themselves 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.



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Conclusion as to Proposition 402

The Payson Town Council has no legal authority to refer the matters that are the subject of Proposition 402 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.

Proposition 402 codified as Town Code Town Code § 35.04 is of no legal force or effect and does not constrain the Council. Thus, applying these authorities and opinions here, Proposition 402 fails as a matter of law.



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VOTER PROTECTION ACT

In 1998 voters approved the VPA 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”.



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VOTER PROTECTION ACT

The VPA amended Arizona's Constitution to “limit[] the legislature's authority to modify laws enacted by voters at or after the November 1998 general election.” the VPA eliminated the legislature's authority to repeal a voter-approved law.

The VPA also prohibits the legislature from amending or superseding a voter-approved law unless the proposed legislation (1) “furthers the purposes” of the voter-approved law and (2) is approved by “at least three-fourths of the members of each house of the legislature.”



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VOTER PROTECTION ACT – Legislative Analysis

- ✓ 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.



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VOTER PROTECTION ACT – Case Law

Numerous Courts of Appeal and Arizona Supreme Court cases have analyzed the VPA.

All have found that the VPA is a restriction on the State Legislature. None have applied the VPA to local government measures.

The plain language of the VPA as well as multiple interpretations of the amendment, allows the Town Council to conclude that Proposition 401 is not protected by the VPA.



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Why Repeal of Propositions 401 and 402 is Necessary

To protect the Town's ability to accomplish its governmental functions in an efficient and cost-effective manner, repeal of Propositions 401 and 402 is necessary.

Town is currently prioritizing various capital facilities projects, including projects related to public safety, parks and recreation, and efficient governmental administration. Most projects will be financed by the Town with short-term or long-term repayment obligations. Because Propositions 401 and 402 contradict or conflict 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 will be unwilling to assist the Town or will assist the Town at higher costs (i.e., higher interest rates or contractual protections) to mitigate any potential legal complications related to Propositions 401 and 402.



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Why an Emergency Clause is Warranted

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 the Town Council ordinance repealing Town Code §§ 157.01 and 35.04.

Town is currently prioritizing capital facilities projects and these projects are necessary for the immediate preservation of the peace, health or safety of the Town. 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. These financial institutions or investors may hesitate to purchase the Town's obligations so long as Town Code §§ 157.01 and 35.04 are in effect or may charge the Town a higher interest rate to mitigate any investment risk created by these Town Code Sections. Furthermore, the interest rate environment is volatile and Town Code §§ 157.01 and 35.04 potentially prevent Town Council from acting quickly to finance the projects under consideration.



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