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

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

16 Plaintiffs,

17 v.

18 TOWN OF PAYSON, ARIZONA, a public
entity,

19 Defendant.

20

TOWN OF PAYSON, an Arizona
21 **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,**

27 **Plaintiffs/Counter-Defendants.**
28

Case No. S0400CV202300118

**TOWN OF PAYSON'S TRIAL
MEMORANDUM**

Trial set April 19, 2024

(Assigned to the Honorable Michael
Latham)

1 Defendant Town of Payson, Arizona (“Payson”), by and through counsel
2 undersigned, hereby provides its Trial Memorandum.

3 **I. INTRODUCTION**

4 Plaintiff concedes that if the Voter Protection Act (“VPA”) does not apply to general
5 law towns, then the Court’s verdict should be in favor of Payson. The VPA does not apply
6 to general law towns. It is conceded that Payson is a general law town. Therefore, the VPA
7 does not apply to Payson and verdict should be in favor of Payson.

8 In addition, Plaintiff concedes that administrative matters are not referable to the
9 electorate and cannot be initiated by the electorate. Plaintiff concedes that if the evidence
10 shows that Propositions 401 and 402 only deal with administrative matters, then such finding
11 would be favorable to Payson. Proposition 401 deals with leases, licenses, or easements for
12 a term of three or more years, and Proposition 402 deals with financing or debt with an
13 original amount of \$1 million or greater. The uncontradicted evidence provided by the
14 testimony of Payson Town Manager Troy Smith is that all the matters described in these
15 Propositions are exclusively administrative. On this basis, verdict must be in favor of Payson.

16 Propositions 401 and 402 codified as Sections 157.01 and 35.04 were unlawful and
17 properly repealed by the Payson Town Council. Plaintiff’s request for declaratory and
18 mandamus relief set forth in its First Amended Complaint should be denied. Further, the
19 Court should rule in favor of Payson on its Counterclaim which seeks declaratory judgment
20 that Propositions 401 and 402 now codified as Sections 157.01 and 35.04 are without
21 authority and outside the delegated powers of the Payson Town Council. They are
22 unenforceable, invalid, null and void, and of no legal force and effect. In making its ruling,
23 the Court should declare that the Payson Town Council is not permitted or obligated to
24 comply with such sections and properly repealed them through Ordinances 953 and 954 on
25 April 12, 2023.

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1 **II. 10/16/23 RULING – THE COURT FOUND THERE IS NO AUTHORITY**
2 **THAT APPLIES THE VPA TO GENERAL LAW TOWNS LIKE PAYSON**

3 On September 22, 2023, a hearing was held regarding Plaintiff’s Application for an
4 Order to Show Cause and for Preliminary Injunctive Relief. On October 16, 2023, the Court
5 denied Plaintiff’s Application. The Court found that Plaintiff had failed to establish the
6 necessary elements of a preliminary injunction. The Court found that there is insufficient
7 legal authority to support a finding that Plaintiff was likely to succeed in the trial of the
8 merits.

9 The Court found the lack of any case law applying the Voter Protection Act to general
10 law non-chartered towns to be significant. It is undisputed the Town of Payson is a general
11 law/non-chartered town. Title 9 of the Arizona Revised Statutes enumerates the powers of
12 an incorporated town. Pursuant to A.R.S. § 9-231(A) the “corporate powers of a town
13 incorporated under Section 9-101 shall be vested in a common council. The roles and
14 responsibilities of a “common council” of a town are different than that of the Arizona State
15 Legislature. The Court should remain consistent with its October 16, 2023 ruling, and the
16 Court’s verdict at trial should be in favor of Payson.

17 In its October 16, 2023 Order, the Court continued with respect to the “public policy”
18 argument, the Court found the testimony of the Payson Town Manager Troy Smith
19 persuasive. The Payson Town Manager testified that application of Propositions 401 and 402
20 (Town Code Sections 157.01 and 35.04; repealed by Ordinances 953 and 954) would
21 significantly impede the Town of Payson from efficiently and effectively performing the
22 roles and responsibilities mandated by Title 9 of the Arizona Revised Statutes.

23 The Court stated that something as simple as leasing an office space to the local
24 Chamber of Commerce for more than three years would require voter approval. Attempting
25 to secure needed emergency equipment in a timely manner would be impaired by the
26 logistical realities of what would be required to have the voters approve routine expenditures.
27 The Court found that Propositions 401 and 402, if applied as written, undermine the roles
28 and responsibilities of the Payson Town Council as set forth in Title 9 and hamper the

1 efficient administration of the Town. These findings support a verdict in favor of Payson at
2 trial.

3 **III. ARIZONA CONSTITUTION AND TITLE 9**

4 The Arizona Constitution, Article II, Section 32, provides that the provisions of this
5 Constitution are mandatory. Article III titled “Distribution of Powers” provides that the
6 powers of the government of the State of Arizona **shall** be divided into three separate
7 departments: (1) the legislative; (2) the executive; and (3) the judicial, and such departments
8 shall be separate and distinct.

9 Article IV is titled the Legislative Department. Article V of the Constitution provides
10 for the Executive Department. Article VI of the Constitution provides for the Judicial
11 Department. Article XIII titled Municipal Corporations provides that municipal corporations
12 shall not be created by special laws, but the Legislature by general laws shall provide for the
13 incorporation and organization of cities and towns and for the classifications of such cities
14 and towns in proportion to population.

15 Article IV, Part I is titled “Initiative and Referendum.” Section 8 provides that the
16 powers of the Initiative and the Referendum are hereby further reserved to the qualified
17 electors of every incorporated city, town, and county as to all local city, town, or county
18 matters on which such incorporated cities, towns, and counties are or **shall** be empowered
19 by general laws to legislate. Such incorporated cities, towns, and counties may prescribe the
20 manner of exercising said powers **within the restrictions of general laws.**

21 Title 9 provides for the general law town powers. A.R.S. § 9-231, Common Council,
22 provides that the corporate powers of a town incorporated under Section 9.101, shall be
23 vested in a Common Council. A.R.S. § 9-240 provides that the Common Council shall have
24 control of the finances and property of the corporation, shall have the power to erect,
25 purchase, or lease necessary buildings for the purposes of the corporation, and shall have the
26 power to appropriate money and provide for the payment of its debts and expenses. The
27 Town Council has the power to repeal all ordinances necessary or proper for the carrying
28 into effect of the powers vested in the corporation. A.R.S. § 9-240(B)(28).

1 **IV. 9/22/23 PRELIMINARY HEARING EVIDENCE**

2 The transcript from the September 22, 2023 hearing will be provided to the Court as
3 an exhibit with the Joint Pretrial Report. Citations herein are to page and line of the transcript.

4 Plaintiff conceded and the Court found that Payson is a general law city (p. 35:5). The
5 Court then questioned the Plaintiff’s argument by stating that “arguing chartered cities’
6 charters and the governor’s approval or disapproval of those is kind of missing the point the
7 Court was trying to make. There is distinction and a process, a very prolonged process, to
8 become a chartered city. Payson is not a chartered city. And so the general law does not
9 allow for referendum or does not allow for the voters or the Town Council to take certain
10 action, then the voters also would not have that ability.” (p. 39:7-15). The Court’s point was
11 that Payson does not have authority outside what the general law allows the Town Council
12 to do, and therefore, neither do the voters.

13 Plaintiff conceded that if the Court holds that the Voter Protection Act does not apply,
14 then the Plaintiff “would lose this case no matter what their person says” (p. 47:22 to p. 48:9).
15 As stated and found by the Court, the VPA applies only to the Arizona Legislature. Plaintiff
16 further conceded that there are no cases that have held that the VPA applies to a general law
17 common non-chartered town (p. 51:23 to p. 52:2).

18 Payson Town Manager Troy Smith’s testimony is contained in the transcript at p. 55:1
19 to p. 99:25. Mr. Smith was the only witness at the hearing and will be the only witness at
20 trial. As Town Manager, Mr. Smith is the Chief Administrative Officer for Payson. Mr.
21 Smith testified that the Town Council sits as a legislative body, an executive body, an
22 administrative body and in a quasi-judicial capacity (p. 58:11-16). The Town Council’s
23 administrative duties included approval of items that are in the Annual Budget such as
24 leasing a piece of equipment such as a fire truck, easements, leases. And imposing
25 transaction and privilege taxes. The annual budget is an administrative activity that can
26 involve 25 or 30 meetings with the Council, which essentially is approving a financial plan
27 (p. 58:25 to p. 60:25). Title 9 is the primary source of authority to general law towns (p.
28 69:24-25).

1 Proposition 401 which resulted in Town Code Section 157.01 describes lease, license,
2 or easement, and that if any of those activities are executed for a total of three or more years,
3 they must be approved by the voters of Payson. There is no authority in Arizona Statutes for
4 the Town of Payson, as a general law city, to refer such matters to the voters (p. 71:13-18).
5 Proposition 402 which resulted in Town of Payson Ordinance Section 35.04 describes debt
6 or loans for a \$1 million or greater. There is no Arizona Statute or Constitutional provision
7 that provides authority for a general law town like Payson to refer such matters to the voters
8 (p. 71:22 to p. 72:3). The matters covered by Section 157.01 and Section 35.04 are activities
9 that are part of the administrative duties of the Town Manager (p. 75:21 to p. 77:9 and 80:19-
10 24).

11 The subject matter of things that would come under 401 or 402 are administrative
12 (p. 79:18-21). It must be noted that Plaintiff conceded that if the Town Manager testifies that
13 the two Propositions involve only administrative matters that such finding would be in favor
14 of Payson (p. 46:14-23). That is the clear, uncontradicted testimony of Mr. Smith that this
15 Court found persuasive.

16 **V. LEGAL DISCUSSION**

17 There is no authority under Arizona Statutes or constitutional provisions that allows
18 a general law/non-charter Town such as Payson to refer to the voters the power to approve
19 or reject any lease, license or easement with a term of three or more years, or the power to
20 approve or reject any revenue bond for financing or debt that has a combination and/or
21 double-barrel feature to be treated as a general obligation bond, and any contract/lease debt
22 incurred by the Town with an original amount of \$1 million or greater. Since the Payson
23 Town Council does not have such authority, the voters likewise do not have authority to
24 initiate such ordinances.

25 Propositions 401 and 402, codified in Payson Town Code as Sections 157.01 and
26 35.04, respectively, are wholly without authority and outside the delegated powers of the
27 Payson Town Council, *ultra vires* of the Town Council's authority, unenforceable, invalid,
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1 null and void, and of no legal force or effect, such that the Payson Town Council is not
2 permitted or obligated to comply with such Sections.

3 On April 12, 2023, the Payson Town Council passed Payson Ordinance 953 that
4 legally and properly repealed Payson Town Code Section 157.01 and passed Ordinance 954,
5 that legally and properly repealed Payson Town Code Section 35.04.

6 **A. General Law Cities and Towns Have Only That Authority Granted by**
7 **Constitution and State Statute**

8 At the August 28, 2018 election, Town voters approved Proposition 401, now codified
9 as Town Code Section 157.01. Proposition 401 purported to require the Town Council to
10 refer to the voters any lease, license, or easement with a term of three or more years. Also at
11 the August 28, 2018 election, Town voters approved Proposition 402, now codified as Town
12 Code Section 35.04. Proposition 402 purported to require the Town Council to refer to the
13 voters “any revenue bond for financing or debt that has a combination and/or double-barrel
14 feature . . . to be treated as a general obligation bond”, and “any contract/lease debt incurred
15 by the Town with an original amount of a million dollars.”

16 The Payson Town Council does not have the authority to refer, in the first instance,
17 such three-year or longer leases, licenses, easements, or debt finance agreements for one
18 million dollars or greater. This is because cities and towns of the State are municipal
19 corporations created by the State and possess no greater powers than those delegated to them
20 by the Constitution and the general laws of the State. Thus, the voters do not have the
21 authority to pass by initiative an assumption of power over such non-referable activities.

22 In *City of Scottsdale v. the Superior Court*, 103 Ariz. 204 (App. 1968), the Supreme
23 Court of Arizona held that the cities and towns of this state are municipal corporations
24 created by the state and possess no greater powers than those delegated to them by the
25 Constitution and the general laws of the State. Voter initiations that exceed such power are
26 inoperative. The Payson Town Council does not have authority to voluntarily submit an
27 ordinance to a vote of the people regarding three-year or greater leases, licenses, or
28

1 easements, and debt financing agreements one million dollars or greater. The powers of the
2 people are no greater than those of the Payson Town Council.

3 Neither the Arizona Constitution nor any law authorizes the Payson Town Council to
4 refer matters set forth in Sections 157.01 or 35.04 to the electors. A voluntary submission of
5 these items by the Town Council to a special vote of the people would be outside the
6 delegated powers of the City Council. Thus, the voter-approved Proposition 401, codified as
7 Town Code Section 157.01 and voter-approved Proposition 402, codified as Town Code
8 Section 35.04 are wholly without authority and outside the delegated powers of the Payson
9 Town Council. These Code Sections are therefore unlawful and inoperative. Thus, the
10 Payson Town Council properly repealed these unlawful Code Sections through Ordinances
11 No. 953 and 954 at the Town Council meeting held April 12, 2023.

12 **B. Only Legislative Acts May Be Referred to the Voters**

13 If the decisions that are the subject of the Propositions in question were directly
14 referred to the voters using the referendum process, such a referendum would be unlawful.
15 The activities at issue are administrative activities to be considered and acted upon by the
16 Payson Town Council.

17 The Arizona Supreme Court in *Wennerstrom v. City of Mesa*, 169 Ariz. 485 (1991)
18 opined that municipal corporations act in several capacities: legislative, executive,
19 administrative, and quasi-judicial. Voters may only challenge legislative actions via
20 referendum because “referenda on executive and administrative actions would hamper the
21 efficient administration of local governments.” The test to determine whether a particular act
22 is legislative and thus referable, or administrative and not referable, is that a legislative act
23 deals with subjects of a permanent and general character, while administrative actions deal
24 with subjects of a temporary or special character. *Wennerstrom, supra*.

25 The subject matter of Proposition 401, codified as Town Code Section 157.01, deals
26 with leases, licenses, and easements, and are not acts that establish policy, enact a law or a
27 permanent rule of government or declare a public purpose and provide the ways and means
28 of its accomplishment. The Payson Town Council had no legal authority to refer the matters

1 that are the subject of Proposition 401 to the voters, and the voters by extension cannot compel
2 the Payson Town Council to do so by initiative because their authority is no greater than that
3 of the council. Nor can the voters by initiative directly refer administrative matters to the
4 voters for approval for the same reason. Thus, Proposition 401, codified as Town Code
5 Section 157.01, is inoperative and of no legal force and effect and does not constrain the
6 Payson Town Council.

7 The subject matter of Proposition 402, approvals of non-general obligation bond
8 measures and expenditures over a million dollars are previously established through an annual
9 budgeting process. Thus, they are not themselves acts that establish policy, enact a law or
10 permanent rule of government or declare a public purpose that provides the ways and means
11 of its accomplishment. The Payson Town Council has no legal authority to refer the matters
12 that are the subject of Proposition 402 to the voters, and the voters by extension cannot compel
13 the Payson Town Council to do so by initiative because their authority is no greater than that
14 of the Council. Nor can the voters by initiative directly refer administrative matters to the
15 voters for approval for the same reason. Thus, Proposition 402 codified as Town Code Section
16 35.04 is inoperative and of no legal force and effect and does not constrain the Council.

17 The subject matters of Proposition 401 and 402 are temporary and their special
18 character is administrative. Thus, Propositions 401 and 402, and their codifications as Town
19 Code Sections 157.01 and 35.04 are unlawful and were properly repealed by the Payson Town
20 Council on April 12, 2023.

21 **C. The Voter Protection Act Does Not Apply to City and Towns**

22 In 1998, voters in the State of Arizona approved Proposition 105, known as the Voter
23 Protection Act (VPA) to amend the Arizona Constitution to expressly limit the legislature's
24 “authority to amend measures approved by voters in initiative elections” providing that the
25 legislature may only amend a voter initiative if “the amending legislation furthers the
26 purposes of such measure and at least three-fourths of the members of each house of the
27 legislature ... vote to amend such measure”.

28 ///

1 The VPA states that the Legislature “shall not have the power to repeal an initiative
2 measure approved by the majority of votes cast” and “shall not have the power to amend an
3 initiative measure ... unless the amending legislation furthers the purpose of such measure
4 and at least three-fourths of the members of each house ... vote to amend such measure.”

5 In compliance with A.R.S. §19-124, a legislative analysis was conducted prior to the
6 adoption of Proposition 105. The analysis made the following conclusions:

- 7 • Proposition 105 would make a series of changes to the Arizona
8 Constitution relating to initiative and referendum. Under current law, the
9 State Legislature by a majority vote may subsequently amend or repeal
10 any ballot measure that has been approved by the voters, except if that
11 ballot measure was approved by a majority of the people who are
12 registered to vote in this state, rather than by a majority of people who
13 voted on the ballot measure.
- 14 • Proposition 105 would make all of the following changes apply to any
15 ballot measure that is approved by a majority of the people who voted on
16 that ballot measure:
 - 17 ○ Prohibits the Governor from vetoing the approved measure.
 - 18 ○ Prohibits the State Legislature from ever repealing the approved
19 measure or from amending an approved measure except as provided
20 below.
 - 21 ○ Requires a three-fourths vote of the State Legislature to amend or
22 supersede the approved measure and requires that the legislation
23 "furthers the purposes" of the approved measure.
 - 24 ○ Requires a three-fourths vote of the State Legislature to appropriate
25 or transfer funds that were designated to a specific purpose by the
26 approved measure and requires that the appropriation or transfer of
27 funds "furthers the purposes" of the approved measure.
 - 28 ○ Provides that the State Legislature is not limited in its right to refer
any measure to the ballot.

21 Moreover, the evidence will show that all the arguments for and against Proposition
22 105 contained in the Voter Publicity Pamphlet refer only to the State Legislature; none even
23 mention city and town initiatives.

24 Finally, all the Courts of Appeal and Arizona Supreme Court cases that have analyzed
25 the VPA have found that the VPA is a restriction on the *State Legislature*. None have applied
26 the VPA to local government measures. The plain language of the VPA as well as multiple
27 interpretations of the amendment, allow the Town Council to conclude that Propositions 401
28 and 402 are not protected by the VPA.

1 At the hearing Payson cited *Arizona Citizens Clean Elections Commission v. Brain*,
2 234 Ariz. 322, 322 P3d 139 (2014); *Arizona State Legislature v. Arizona Independent*
3 *Redistrict Green Commission*, 997 F.Supp.2d 1047 (2014); *State of Arizona v. Miestas*, 244
4 Ariz. 9, 417 P.3d 774 (2018); *Cave Creek Unified School District v. Ducey*, 233 Ariz. 1, 308
5 P.3d 1152 (2013); *Meyer v. State of Arizona*, 246 Ariz. 188, 436 P.3d 511 (App. Div. 1,
6 2019), and *Arizona Advocacy Network Foundation v. State*, 250 Ariz. 109, 475 P.3d 1149
7 (App. Div. 1 2020). These cases all describe the VPA expressly limiting the Legislature’s
8 authority.

9 **D. Permanent Injunction Must Be Denied**

10 Code Sections 157.01 and 35.04 are inoperative and cannot lawfully constrain the
11 Payson Town Council from executing three-year leases, licenses, and easements, or financing
12 agreements one million dollars or greater.

13 Administratively, the Payson Town Council prioritizes various capital facilities
14 projects, including projects related to public safety, parks and recreation, and the efficient
15 governmental administration. Because Propositions 401 and 402 contradict or conflict with
16 Arizona law, potential investors or financial institutions that would otherwise be willing to
17 assist the Town with the financing and construction of the projects would be unwilling to
18 assist the Town or would assist the Town at higher costs. Moreover, it is the public policy of
19 Arizona that executive and administrative actions are the province of the Payson Town
20 Council.

21 In contrast, Payson has shown that Proposition 401, codified as Town Code Section
22 157.01, and Proposition 402, codified as Town Code Section 35.04 are unlawful and have no
23 legal force and effect on the Payson Town Council’s authority. Again, these Propositions and
24 Code Sections relate to initiatives that were outside the delegated powers of the Payson Town
25 Council to have such matters decided by repetitive special votes of the people on a contract-
26 by-contract basis. Plus, these are administrative matters that are not referable to the voters.

27 **VI. CONCLUSION**

28 The verdict at trial should be for Payson. This Court should deny Plaintiff’s requested

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1 relief. This Court should grant Payson’s Counterclaim for Declaratory Relief by declaring
2 that the Payson Town Council properly repealed Propositions 401 and 402, and they have no
3 legal effect.

4 RESPECTFULLY SUBMITTED this 5th day of April, 2024.

5 **BRUECKNER SPITLER SHELTS PLC**

6 By: /s/ Larry J. Crown
7 Larry J. Crown
8 Elan S. Mizrahi
9 *Attorneys for Defendant/Counterclaimant*

9 ORIGINAL of the foregoing filed electronically
10 via AZTurboCourt on this 5th day of April,
11 2024 with:

11 The Clerk of the Court
12 Gila County Superior Court

12 COPY of the foregoing delivered electronically
13 this 5th day of April, 2024 to:

14 The Honorable Michael Latham
15 Apache County Superior Court Judge

16 COPY of the foregoing emailed on
17 this 5th day of April, 2024 to:

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