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SUPERIOR COURT OF ARIZONA

GILA COUNTY

TRANSPARENT PAYSON, *et al.*,

Plaintiffs,

vs.

TOWN OF PAYSON, ARIZONA, *et al.*,

Defendants.

No. CV2023-00118

TRIAL MEMORANDUM

(assigned to the Honorable Michael Latham)

I. INTRODUCTION

Normally governmental entities argue for the legal validity of measures that have been enacted by their governing bodies. In this case, the Town of Payson argues for the legal invalidity of measures passed by their ultimate governing body, the citizens of the Town of Payson. To wit, the Town argues that Propositions 401 and 402, ballot measures passed by the Payson electorate and codified in sections 157.01 and 35.04 of the Town Code, were never legal to begin with, and thus, were properly repealed, years after their passage, by the Town Council.

The Town's legal position, and attempts to undermine its own electorate, are unavailing. Voter approved measures passed after 1998 are protected by the Voter Protection Act enshrined in the Arizona Constitution, including measures passed by

municipal electors. And to dispel any doubt, the Payson Town Code makes that doubly clear.

Additional excuses the Town throws out to justify its actions simply do not hold up either. Propositions 401 and 402 do not require the Town to actually refer a matter to the ballot, but merely require the Town Council call an election as necessary, a ministerial act, just as is the case with other ballot measures and even candidate elections. And even if the law applicable to referenda applies, with its bar of administrative matters appearing on the ballot, the question of whether any particular plebiscite required by Propositions 401 and 402 embodies an administrative act cannot be determined until we actually know what the Town's legal actions are that triggered the plebiscite.

This Court should grant the relief requested by Plaintiffs.

II. THE PROPOSITIONS

Section 157 of the Payson Town Code, titled "Right to control public land" (Prop. 401), provides, in relevant part:

> 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.
>
> For the purposes of this chapter, lease(s) with a utility and communication provider(s) are excluded.
>
> The term ***LEASE*** shall include all forms of lease, license and easement.
>
> 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 the exclusive right to inhabit or occupy real property.
>
> ***LICENSE*** . A contract in which the town lets an individual or an 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…

This provision is fairly simple and requires leases of Town-owned, public property of over three years to be submitted to the electorate.

Section 35.04 of the Town Code, Titled "People's Right to Know Debt Obligation (Prop. 402), provides:

> (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.
>
> (D) For the purpose of this section the virgule shall be interpreted as "and" "and or" "or" as appropriate and inclusive of all forms.

This law requires a little background to explain. The Arizona Constitution already mandates a plebiscite before any general obligation bonds may be issued. Ariz. Const. Art. VII, § 13 ("[q]uestions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this state, and of the political subdivisions thereof

affected by such question.") So for general obligation bonds, a plebiscite is already required. What Section 35.04 gets at is a different type of bond that can arguably be issued by mere Council vote, and not sent to the electorate for approval. These bonds still result in indebtedness for the Town, and Proposition 402 aims to provide the same protections as for general obligation bonds.

III. THE VOTER PROTECTION ACT DOES APPLY TO MUNICIPALITIES, AND THE TOWN OF PAYSON IN PARTICULAR

The 1998 Voter Protection Act, itself an initiative passed by the Arizona electorate, enshrined the following into the Arizona Constitution: "the legislature shall not have the power to repeal an initiative measure approved by a majority of the votes cast thereon and shall not have the power to repeal a referendum measure decided by a majority of the votes cast thereon." Art. IV, Pt. 1., § 6(B). The Arizona Constitution further provides that the same powers and rights that state voters have are also enjoyed by municipal electors:

> Local, city, town or county matters. The powers of the initiative and the referendum are hereby further reserved to the qualified electors of every incorporated city, town, and county as to all local, city, town, or county matters on which such incorporated cities, towns, and counties are or shall be empowered by general laws to legislate.
>
> Art. IV., Pt. 1, § 8.

What the Town Council of Payson did with its purported repeal of Propositions 401 and 402 is precisely what the Voter Protection Act was designed to prevent. Richard Mahoney, the Chairman of the group that sponsored the Voter

Protection Act, stated in his argument in favor of the Voter Protection Act in the official publicity pamphlet:

> There is nothing more essential to a democracy than having your vote count. That's how we distinguish real democracies like our own from other regimes who only go through the motions of voting, while determining the actual results in a back room.
>
> Lately, this sort of back room manipulation of election results is exactly what the Arizona legislature has been doing to voter-approved ballot measures. A number of citizen measures dealing with campaign reform, health care, and the environment have been under assault by the politicians. Recently, the legislature repealed Proposition 200 only a few months after it had been approved.
>
> The message is clear from the politicians: "we know better than you."
>
> Let's send a message back in 1998 by approving the Voter Protection Act (Proposition 105). Proposition 105 will prohibit the Legislature from repealing citizen measures approved by voters and prohibit the governor from vetoing ballot measures…the legislature thwarting the will of the people seems to me the ultimate act of arrogance. Let put an end to this by voting Yes on Proposition 105[1].

As the Arizona Supreme Court has stated, "[o]ur primary objective in interpreting a voter-enacted law is to effectuate the voters' intent." *Arizona Citizens Clean Elections Com'n v. Brain*, 234 Ariz. 322, 324–25 (2014). But given the obvious intent of the electorate to protect voter-approved measures, why would that concern be any less in the case of a municipal initiative? Why would the voters, who clearly disapproved of the Legislature having the ability to immediately repeal a law adopted by the electorate, somehow be ok with a municipal council doing exactly that? The Town's argument simply lacks logical sense.

[1] https://apps.azsos.gov/election/1998/Info/PubPamphlet/Prop105.html

There is also A.R.S. § 19-141(D), which provides that "[t]he procedure with respect to municipal and county legislation shall be as nearly as practicable the same as the procedure relating to initiative and referendum provided for the state at large, except the procedure for verifying signatures on initiative or referendum petitions may be established by a city or town by charter or ordinance."

And the Town has thus far never really attempted to address Payson Town Code, § 30.65, which states: "[t]here is reserved to the qualified electors of the town the power of the initiative and the referendum as prescribed by the State Constitution." (Emphasis added). There can be no question that this provision is intended to keep whatever rights to referendum exist under the Arizona Constitution for state voters on par with those enjoyed by the Town's electorate. And the right to have a meaningful vote on a matter, one that cannot simply be negated by elected officials the next day, is part and parcel of the right to initiative in the Arizona Constitution thanks to the Voter Protection Act. The Town Code confirms that this applies to the Town, and not just to statewide matters.

Because the Voter Protection Act applies, it does not permit the type of "preemptive strike" that the Town has taken. Even if the Town may refuse to place certain matters on the ballot that embrace administrative matters, it does not follow that it may repeal Propositions 401 and 402 wholesale.

IV. PROPOSITIONS 401 AND 402 ARE AUTOMATIC PLEBISCITE PROVISIONS THAT DO NOT REQUIRE THE TOWN COUNCIL TO PASS A MEASURE REFERRING A MATTER TO THE BALLOT

Propositions 401 and 402 ("the Propositions") operate to place matters on the ballot automatically, as a requirement of law. The whole point of the Propositions is to cut the Town Council out of any meaningful decision-making role with regard to the realms in which the Propositions apply. The Town tries to conflate our facts with a case in which the Town Council is the body referring a measure to the ballot.

The Town Council is not required to do anything (other than perhaps ministerial election related duties). So there can be no argument that lack of authority is an excuse to invalidate the Propositions when such authority is not really needed anyway.

The City has cited the case of *City of Scottsdale v. Superior Court In and For Maricopa Cnty*. in an attempt to claim that somehow Propositions 401 and 402 require actions from the Town to refer matters to the ballot. 103 Ariz. 204, 206 (1968). That case had nothing to do with our facts as the Court there examined the Council's powers to order a referral to the ballot. Here it is the citizens who have ordered a referral to the ballot if the referral is triggered by certain circumstances identified in Propositions 401 and 402. *Id.* (examining the various laws applicable to the initiative and referendum process, and concluding that all applicable laws "reserve[] the powers of the initiative and referendum to the electors.")

If the conditions identified in Proposition 401 and 402 are met, there must be an election, in the style of a referendum voted on by the electorate, to affirm or deny

the Council action. The Town Council has absolutely no role in this except the role that they have in any other ballot measure or candidate election—simply calling an election that by law must occur. *See, e.g., City of North Little Rock v. Gorman,* 568 S.W.2d 481 (Ark. 1978)(once the electors of the city complied with the filing of the sufficient number of signatures and initiative petitions, the only function remaining to be performed was the city council's ministerial responsibility and duty to call the election); *In re Woodfill*, 470 S.W.3d 473, 479 (Tex. 2015)(once legal conditions met necessitating an election, municipality had a "ministerial duty to carry out its obligations.") *Berent v. City of Iowa City*, 738 N.W.2d 193, 200 (Iowa 2007); *Joyner v. Shuman*, 116 So.2d 472, 474 (Fla.App. 1959)(stating that the duty of the municipal council to call a special election is purely ministerial,

Once the conditions are met, under Section 35.04 or Section 157.01 of the Town Code, for triggering a plebiscite, the Council must call an election, just as it must with a traditional initiative, referendum or recall. This is not tantamount to *City of Scottsdale* whereby the municipal council is actually attempting to make a discretionary decision to refer a question to the ballot. Here, the Council must act by law, and it is no more barred by Arizona law from completing the ministerial act of calling an election under Sections 35.04 or 157.01 then it would be for a recall, initiative or traditional referendum, or even a candidate election.

This is the essence of a ministerial act, and if principles of general law versus charter law cities prevent the Council from holding such an election, then how could the Town Council even call an election for an initiative or a candidate election?

The powers of initiative, exercised by the Town electorate, are very broad under the Arizona Constitution, and "the qualified electors shall have the right to propose any measure…" Ariz. Const. Art. IV, § 4, Pt. 1 (Emphasis added). If the Propositions require that an action by the Town appear on the ballot, that was a decision made by the electorate acting pursuant to its power of initiative. Any duties that the Clerk or Town Council have are ministerial.

The language of § 1(3) of Article IV of the Arizona Constitution supports this view. That section states that "the legislature…may order the submission to the people at the polls of any measure, or item, section or part of any measure, enacted by the legislature." (Emphasis added). This tells us what an actual referral is—it is something that the legislative body actually adopts and passes itself—hence the requirement that a measure receive 31 House votes and 16 Senate voters in the Arizona Legislature to appear on the ballot as a referendum. *Id.*

A call for an election adopted by a Town Council is not all the same as a "measure enacted by the legislature" that is referred to a vote of the people under § 1(3) of Article IV of the Arizona Constitution. If the Town Council passes something that falls within the purview of the Propositions, the measure automatically goes on the ballot for the electorate to decide whether the Council likes that or not.

But the Town conflates these two different things.

V. THE PAYSON ELECTORATE MAY ORDER SPECIFIC MATTERS TO AUTOMATICALLY BE PLACED ON THE BALLOT, AND EVEN IF THE TOWN'S ADMINISTRATIVE VS. LEGISLATIVE ARGUMENT HAS ANY MERIT, EACH PARTICULAR BALLOT PLACEMENT MUST BE JUDGED ON ITS OWN MERITS

A. Testimony from the Town Manager at the prior hearing eviscerates the Town's Claims that Sections 35.04 and 157.01 have only unconstitutional applications in that only administrative matters could be referred

At the prior hearing, the Town Manager was forced to make a number of admissions with regard to the legislative/administrative distinction. For example, The Town Manager responded to one colloquy between himself and counsel for Plaintiffs as follows:

> Q. Okay. But do you understand how it has a – it has a three-part test, essentially, for determining what is administrative and what is legislative?
>
> A. Yes, and I have read that.
>
> Q. Okay. Would you say that that inquiry is – is very much dictated by particular facts of a particular instance?
>
> A. The inquiry?
>
> Q. Whether something is administrative or legislative?
>
> A. I think the facts have to be taken on a case-by-case basis.
>
> ….
>
> Q. Okay. So but -- but you did say if you're taking a look at the administrative and legislative dichotomy, you have to take the facts of each case?
>
> A. Correct.
>
> Transcript, p. 78: 11-22; p. 79:3-6.

That much is obvious, as this Court also seemed to indicate: "the case-by-case administrative versus legislature -- and I think even the -- the City of Mesa [*Wennerstrom*] case kind of clarifies that and emphasizes that, that it's not a very clear-cut analysis always[2]." In fact, the inquiry into whether an action is legislative or administrative is a notoriously difficult one: "[t]he [legislative versus administrative] tests listed in *McQuillin* are, of course, far easier stated than applied." *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 489 (1991). And yet the Town's position is that it can sit here today and claim that there is no conceivable Town Council action that would not be both 1) legislative in nature, and 2) subject to plebiscite under Sections 35.04 or 157.01.

Of course, the Town's position is untenable. The better course of action would be for it to refuse to place a matter on the ballot that it believed was administrative in nature, once that actual, real-life set of circumstances presented itself. That is a more defensible course of action[3], because then the issue of administrative versus legislative could be decided in the context of a real Council action.

In this posture, we have a situation in which the distinction between a facial challenge and as applied challenge to a law is critical. As the Arizona Supreme Court has stated:

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[2] Transcript, pp. 82-83: 23-25, 1-2.

[3] Plaintiffs do not concede that Wennerstrom bars placement on the ballot of a matter falling within the purview of Propositions 401 or 402 because it embraces administrative issues, but that issue is not yet ripe.

> To succeed on a facial challenge [to a law], an admittedly difficult feat, "the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."

See State v. Wein, 244 Ariz. 22, 31 (2018)(quoting *U.S. v. Salerno*, 481 U.S. 739, 745,107 S.Ct. 2095 (1987)(brackets in original).

Clearly, at best for the Town it has not even come close to meeting the difficult burden of demonstrating that this Court should strike down the Propositions as facially invalid, incapable of ever having a valid application.

B. As the Town Manager effectively admitted, there are any number of Town actions that would be legislative in nature that would trigger the plebiscite requirements in Sections 35.04 and 157.01

At the hearing, Plaintiff offered the professional sports team hypothetical. And again, because the Town's argument amounts to an argument that Sections 35.04 are 157.01 are facially unconstitutional in that they could only result in administrative matters going on the ballot, that is all Plaintiff's must to do defeat that argument. So while the notion of the Town leasing Town property to a professional sports team for 99 years for $1 may seem fanciful, how realistic a scenario may be is irrelevant. It is incumbent on the Town "establish that no set of circumstances exists under which the Act would be valid" and [t]he fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Wein*, 244 Ariz. at 31.

To give a real world example, there have been actions taken to try to lure a college to Payson, including perhaps a branch of Arizona State University.

https://www.universityinpayson.com/# . If the Town Council voted to lease Town property for 99 years to build a university campus, that would clearly be a legislative act, and would be subject to automatic plebiscite under Section 157.01, as demonstrated below. And if the Town Council voted to issue a bond with "a combination and or double barrel feature in the indenture agreement" for over $1 million dollars to build this campus, that would clearly be legislative, and would clearly be subject to automatic plebiscite under Section 35.04:

> [T]he Project [approved by the Mesa City Council that the Court ultimately deemed administrative in nature] merely carries out the public purpose declared in the April 28, 1987 bond election. At that election, Mesa's electors approved the City's request for authorization to issue and sell $30 million of general obligation bonds to improve, construct, reconstruct and rehabilitate the streets and highways of the City, to acquire land and interests in land for rights of way for that purpose, and to pay all costs in connection therewith…The voters of Mesa acted in a legislative capacity when they declared a public purpose (road improvement and construction) and provided the ways and means for its accomplishment (the bond revenues).

Wennerstrom, 169 Ariz. at 491.

Wennerstom also cited *Monahan v. Funk* and its holding that an ordinance authorizing purchase of property for incinerating plant was administrative where Portland electorate authorized the city to issue bonds for purpose of building a new crematory or incinerating plant. 137 Or. 580, 3 P.2d 778 (1931). But there the original decision would be legislative in nature and subject to plebiscite, just as here original decisions would be subject to plebiscite even though subsequent actions to implement that original decision would not be. But again, at least the electorate gets

its say at the beginning. *See, e.g., Voice of Surprise v. Skip Hall*, 2024 WL 356935, at *5 (Ariz.App. 2024)("…the time to challenge the breadth of permissible [land] uses was in 2008…[a]t that point, the public was on notice of which uses were sanctioned, rendering subsequent approval of conforming plans administrative in nature.")

C. The Town's argument proves too much

The Town's legal position, if credited, would put at risk a number of legal provisions of other municipalities that have these type of automatic ballot placement laws. These laws are hardly unusual, and a cursory survey of different municipal laws produces examples from both the Cities of Phoenix and Scottsdale. Phoenix and Scottsdale are charter cities—but while respective charter powers would seem to allow their councils to refer matters to the electorate, that would not give them the power to refer administrative matters to the ballot. *See Wennerstrom*, 169 Ariz. at 488 ("[U]nder the Arizona Constitution, only the Council's legislative actions were subject to referendum.")

In Phoenix's case, its Charter provides:

> Notwithstanding any other provision of the charter of the City of Phoenix, the City shall not expend public funds, grant tax concessions or relief, or incur any form of debt in an amount greater than three million dollars, and/or exchange or grant City-owned land of a fair market value of three million dollars to construct or aid in the construction of any amphitheater, sports complex or arena, stadium, convention facility or arena without approval of the majority of the electorate voting thereon at the next general election.

Chapter XXVII(A), Phoenix City Charter[4].

In addition, Scottsdale has a charter provision requiring any change of land in the Scottsdale Preserve from its "natural state" to go to the ballot for the electorate's approval:

> No land designated as preserve land pursuant to Section 8 of this article shall be altered from its natural state unless specifically authorized by a majority of the votes cast thereon at a general or special municipal election.

Article VIII, § 12(A), Scottsdale City Charter[5].

In other words, if the city administration wanted to move a couple of cactuses to improve a sidewalk, an administrative act under the Town's logic if ever there were one, they would have to go to the electorate. And that is not the only such Scottsdale Charter provision. *See* Art. VIII, § 11[6] (requiring electorate approval of portions of land greater in size than one acre from the Scottsdale preserve).

The Town's legal position also calls into question various state laws that, just as with Sections 35.04 and 157.01 of the Payson Town Code, provide for automatic referrals to the voters of various actions of municipalities. To wit, A.R.S. §9-403(A) provides:

> Real property of a city or town, the value of which exceeds one million five hundred thousand dollars, shall not be sold unless first authorized by a special election called for the purpose of submitting

[4] Chapter XXVII Voter Approval for Certain Public Expenditures; Limitation on Emergency Clause | Phoenix City Charter (municipal.codes)
[5] City of Scottsdale - City Charter (scottsdaleaz.gov)
[6] City of Scottsdale - City Charter (scottsdaleaz.gov)

> to the voters of the city or town the question of selling or not selling the real property proposed for sale…

The above is an automatic plebiscite, whether provided for by City Charter or state law, in the same manner as Sections 35.04 and 157.01. It matters not that the state Legislature has authorized such an election. As the Supreme Court clearly found in *Wennerstrom* and subsequent cases, the limitations on referring legislative matters only flow from the Arizona Constitution. *Wennerstrom*, 169 Ariz. at 488 (holding that "under the Arizona Constitution, only the Council's legislative actions were subject to referendum" and "[t]he sound rationale for limiting the referendum to legislative actions is that to permit referenda on executive and administrative actions would hamper the efficient administration of local governments.")

Under the Town's interpretation, these Phoenix and Scottsdale charter provisions, and the state statute, are illegal, because they could result in administrative matters ending up on the ballot. And the state statute above suggests that sales of public lands by governmental entities are inherently legislative decisions, and thus their automatic referral to the ballot. According to the Town, if an automatic referral involved an administrative decision, the question should not appear on the ballot under *Wennerstrom*.

If we had only these Phoenix and Scottsdale municipal laws to look at, it might be tempting to simply conclude that those laws are illegal, and the fact that other municipalities have illegal provisions on the books does not make the Propositions legal. However, in this case, there is more to the story. Under A.R.S.

§ 9-282(C), "[i]f a majority of the electors voting thereon ratify the proposed charter, it shall be submitted to the governor for his approval, who shall approve it if not in conflict with the constitution or the laws of the state." That means the municipal charter provisions quoted above have been reviewed by the Governor and found to be consistent with the "constitution" and "laws of the state." While not a court of law, the highest public official in the State has nonetheless made the legal determination that these automatic ballot placement provisions are legal.

The potential that the Phoenix and Scottsdale charter provisions cited above could have both legal and illegal applications, depending on the specific circumstances of the municipal action that would be placed on the ballot pursuant to those charters, brings us back to the point alluded to above—every action must be judged to be legislative or administrative on its own merit. The Town's claim that the Court should just assume every single action coming within the purview of the Propositions would be administrative is simply wrong.

VI. CONCLUSION

For the foregoing reasons, the Plaintiff requests that this Court grant Plaintiffs the requested relief.

RESPECTFULLY SUBMITTED this 5th day of April, 2024.

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I hereby certify that on April 5, 2024, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants, with automatic email to the Judge.

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