

**ARIZONA COURT OF APPEALS
DIVISION TWO**

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

Plaintiffs,

vs.

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

Defendants.

No. 2CA-CV2024-0009

Maricopa County
Superior Court Case No.
CV2023-014517

OPENING BRIEF OF PLAINTIFF-APPELLANT

Timothy A. La Sota (020539)
tim@timlasota.com
TIMOTHY A. LA SOTA, PLC
2198 East Camelback Road, #305
Phoenix, Arizona 85016
*Attorney for Plaintiffs-
Appellants*

TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	4
INTRODUCTION.....	6
STATEMENT OF THE CASE.....	7
STATEMENT OF FACTS.....	9
ISSUES PRESENTED.....	12
STANDARD OF REVIEW.....	12
LEGAL ARGUMENT.....	13
I. THE PROPOSITIONS	13
II. THE VOTER PROTECTION ACT DOES APPLY TO MUNICIPALITIES, AND THE TOWN OF PAYSON IN PARTICULAR.....	14
III. 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.....	17
IV. 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.....	21

A. Testimony from the Town Manager at the preliminary injunction hearing eviscerates the Town’s Claims that [Sections 35.04](#) and [157](#) have only unconstitutional applications in that only administrative matters could be referred, and his testimony at trial was not credible.....21

B. 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](#).....24

C. The Town’s argument proves too much.....25

V. CONCLUSION.....28

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Arizona</u>	
<i>Arizona Citizens Clean Elections Com'n v. Brain</i>, 234 Ariz. 322 (2014) ...	15
<i>City of Scottsdale v. Superior Court</i>, 103 Ariz. 204 (1968)	17, 18, 20
<i>Clay v. Town of Gilbert</i>, 160 Ariz. 335 (App. 1989)	17, 18
<i>Egan v. Fridlund-Horne</i>, 221 Ariz. 229 (App. 2009)	12
<i>Gemstar Ltd. v. Ernst & Young</i>, 185 Ariz. 493 (1996)	12
<i>In re U.S. Currency in Amount of \$26,980.00</i>, 199 Ariz. 291 ... (App. 2000)	12
<i>State v. Wein</i>, 244 Ariz. 22 (2018)	23
<i>Wennerstrom v. City of Mesa</i>, 169 Ariz. 485 (1991)	22, 25, 26, 27
<u>Other cases</u>	
<i>Berent v. City of Iowa City</i>, 738 N.W.2d 193 (Iowa 2007)	19
<i>City of North Little Rock v. Gorman</i>, 568 S.W.2d 481 (Ark. 1978)	19
<i>In re Woodfill</i>, 470 S.W.3d 473 (Tex. 2015)	19
<i>U.S. v. Salerno</i>, 481 U.S. 739, 107 S.Ct. 2095 (1987)	23
<u>Arizona Constitution</u>	
Art. IV, Pt. 1., § 4	20
Art. IV, Pt. 1., § 6	14

[Art. IV, Pt. 1, § 8](#).....14

[Ariz. Const. Art. VII, § 13](#).....13

Statutes

[A.R.S. § 9-282](#).....27

[A.R.S. § 9-514](#).....18

[A.R.S. § 9-523](#).....18

[A.R.S. § 12-2101](#).....7

[A.R.S. § 19-123](#).....18

[A.R.S. § 19-141](#).....18

Court Rules

[Arizona Rules of Civil Procedure, Rule 54](#).....8

Other Authority

[Section 157 of the Payson Town Code](#).....6, 9, 11, 13, 20, 21, 22, 24, 26

[Section 35.04 of the Town Code](#).....6, 10, 11, 13, 20, 21, 22, 24, 26

[Section 30.65 of the Payson Town Code](#).....16

[Chapter XXVII\(A\), Phoenix City Charter](#).....26

[Article VIII, § 12\(A\), Scottsdale City Charter](#).....25

INTRODUCTION

This case involves two voter-approved ballot measures in the Town of Payson that the Town Council purported to repeal just short of 5 years after their passage. The lawsuit filed by Plaintiffs challenge the legal ability of the Town Council of Payson to repeal a voter-approved measure, as voter-approved measures are protected by the Arizona Constitution's Voter Protection Act.

The two measures approved by the voters were Propositions 401 and 402 (collectively, "the Propositions"), passed at the 2018 General Election and codified in [Sections 157](#) and [35.04](#) of the Town Code respectively. The Propositions require an automatic plebiscite for certain Town Council actions, including certain land leases and certain uses of debt financing instruments.

The Town of Payson argues that the Voter Protection Act does not apply. And, in a departure from the types of arguments that most governmental entities make seeking to justify power, the Town argues that even if the Voter Protection Act applies, because it is a general law city and because the Propositions necessarily embody only administrative acts, it cannot lawfully implement the Propositions.

None of the Town's arguments are availing. The Voter Protection Act applies, and Payson has eliminated any doubt by making that and other state law provisions regarding ballot measures applicable in its Town Code. In

addition, there is no law that prohibits the Town of Payson from having an automatic ballot placement provision for certain actions. And Arizona law is clear that those types of ballot measures are neither initiative nor referenda, but are different legal vehicles for ballot placement altogether, automatic ballot placement if the legal criteria is met.

This Court should vindicate the Payson Town electorate in the face of this assault by their elected officials on the Propositions and reverse the trial court.

STATEMENT OF THE CASE

Jurisdiction

This Court has jurisdiction under [A.R.S. § 12-2101\(A\)\(1\)](#).

Nature of the Case

The underlying action was a special action brought against the Town of Payson seeking injunctive and declaratory relief where Plaintiff alleged that the Payson Town Council had illegally rescinded a voter approved measure¹.

Proceedings Below

Because of conflicts within the Gila County Superior Court, Judge Michael Latham of the Apache County Superior Court served as a visiting

¹ [Index of Record “IR” 6](#).

judge and presided over this matter².

The trial court denied the request for a preliminary injunction³ and ultimately set this matter for a bench trial on the merits on April 19, 2024⁴. The trial court ruled in favor of the Town of Payson, denying the relief requested by Plaintiff in a May 1, 2024 final, appealable order under [Rule 54\(c\), Ariz. R. Civ. P.](#)⁵. Plaintiff filed a timely notice of appeal⁶.

² [IR 38.](#)

³ [IR 26.](#)

⁴ [IR 38.](#)

⁵ [Id.](#)

⁶ [IR 41.](#)

STATEMENT OF FACTS

Plaintiffs/Appellants believe that there is no dispute as to the facts in this matter except with respect to the testimony of Payson Town Manager Troy Smith that the Propositions would necessarily only trigger a public vote on matters of an administrative nature⁷. The relevant facts in this matter involve the Town electorate's adoption of the Propositions and the Town Council's subsequent purported repeal of the Propositions.

In August of 2018, the electors of the Town of Payson passed the Propositions, requiring a public vote for leasing public lands exceeding three years and a public vote for certain debt financing mechanisms. Plaintiff Transparent Payson sponsored the Propositions, circulating petition sheets to have these measures placed on the ballot, and urging the electorate to pass the Propositions⁸.

Proposition 401 was adopted⁹ and codified as [Section 157 of the Payson Town Code](#), titled "Right to control public land", 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

⁷ [IR 38](#). The trial court ruling summarizes Mr. Smith's testimony on this front.

⁸ [IR 6, ¶12](#).

⁹ [Id.](#)

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...¹⁰

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

Proposition 402 was adopted¹¹ and codified as [section 35.04 of the Town Code](#), Titled “People’s Right to Know Debt Obligation, and provided for a public vote for the following:

(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.

¹⁰ [IR 33, Ex. 4.](#)

¹¹ [IR 6, ¶12.](#)

(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 forms¹².

These propositions went into effect as provided by law, and were part of the Payson Town Code for a number of years¹³.

On April 12, 2023, the Council adopted an ordinance purporting to repeal the Ordinances¹⁴. Ordinance 953 repealed [Section 157](#), and Ordinance 954 repealed Section [35.04](#)¹⁵. Plaintiffs' lawsuit challenging the legality of this action followed.

¹² [IR 33, Ex. 5](#).

¹³ [IR6, ¶13](#).

¹⁴ [IR6, ¶15](#); Town meeting results also available at https://granicus_production_attachments.s3.amazonaws.com/payson/8d3a78a8b9d9da4342e88892f5692c770.pdf.

¹⁵ *Id.*

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in finding that the voter approved Propositions were not protected by the Voter Protection Act?
2. Did the trial court err in finding that the voter approved Propositions required the Town Council to refer certain matters to the ballot and that the Town Council lacks legal authority to do so?
3. Did the trial court err in finding that the voter approved Propositions, and the matters that were required to be referred to the ballot under the voter approved Propositions, could necessarily only be administrative in nature and non-referable?

STANDARD OF REVIEW

Issues 1 and 2 All issues involve questions of law that are reviewed *de novo*. See [*Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 499 \(1996\)](#). Issue 3 presents a mixed question of law and fact. As such, this Court should defer to the trial court's factual findings unless those findings are clearly erroneous. [*In re U.S. Currency in Amount of \\$26,980.00*, 199 Ariz. 291, 296 \(App. 2000\)](#). But this Court is not bound by the superior court's conclusions of law that combine both fact and law when there is an error as to the law. [*Egan v. Fridlund-Horne*, 221 Ariz. 229, 232 \(App. 2009\)](#).

LEGAL ARGUMENT

I. THE PROPOSITIONS

The Propositions were summarized above. [Section 157](#) is fairly easy to understand on its face and requires automatic ballot placement when the Town wants to encumber Town property through a lease of three years or more. [Section 35.04](#) 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 could otherwise be authorized by a 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.

For [Section 157](#), the electorate obviously did not trust the Town Council to properly manage Town property. As to [Section 35.04](#), the electorate did not trust that the Town Council would not seek to avoid a plebiscite already required by state law through one of these “creative” debt instruments which

do not qualify as a general obligation bond but nonetheless the Town electorate is on the hook for. But if the Town has the power to take a certain action, such as lease property or issue non-general obligation bonds, then why should the Town electorate not have the right to require an automatic plebiscite?

II. 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 105¹⁶.

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

¹⁶ <https://apps.azsos.gov/election/1998/Info/PubPamphlet/Prop105.html>

would the voters, who clearly disapproved of the Legislature having the ability to immediately repeal a law adopted by the electorate, somehow find it acceptable for a municipal council to do just that? The Town's argument simply lacks logical sense.

If there is any doubt as to the application of the Voter Protection Act, it is put to rest by the Payson Town Code. The [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.

III. 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

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, and relies on [*City of Scottsdale v. Superior Court*, 103 Ariz. 204 \(1968\)](#). The holding in that case is that general law municipalities lack the power to refer matters to their electorate for a vote. But the Propositions do not involve a Council decision to refer a matter to the ballot.

The Arizona Court of Appeals has recognized that automatic ballot referral provisions result in neither an initiative nor a referendum but are a separate matter altogether. The case of [*Clay v. Town of Gilbert*](#)¹⁷ dealt with the question of whether the Town of Gilbert was required to publish a publicity pamphlet for two ballot measures, one dealing with a proposed electricity

¹⁷ Plaintiff did not cite [*Clay*](#) below. However, Plaintiff did make the argument that any matter placed on the ballot pursuant to the Propositions would not be an initiative or referendum but would instead be an “Automatic Ballot Referral Provision” or an “Automatic Plebiscite Provision” and would not actually be a Town Council initiated referendum. *See, e.g.*, [IR 31, p. 7; 1-9, 14; 9-11; IR18, 3:20-21, 5:19](#).

distribution acquisition by the Town, the other dealing with a bond. The Court of Appeals ruled that it did not because the plebiscite at issue there was neither a referendum nor an initiative:

The Town correctly contends that [A.R.S. §§ 19–123](#) and [–141](#) [the publicity pamphlet statutes] apply only to initiatives and referenda. ...Unlike the state legislature, local legislative bodies have no authority to voluntarily refer matters to the electorate. [City of Scottsdale v. Superior Court, 103 Ariz. 204, 206 \(1968\)](#). The Town thus contends that submission of Questions 1 and 2 to the qualified voters of the Town could not have been a referendum, and so compliance with [§ 19–141](#) was unnecessary. We agree.

[A.R.S. § 9–514](#) provides that before the Town could acquire the electricity distribution system, the acquisition shall be authorized by the affirmative vote of a majority of the qualified electors who are taxpayers of the municipal corporation voting at a general or special municipal election duly called and held for the purpose of voting upon the question.

Regarding Question 2—the bond issue—[A.R.S. § 9–523](#) provides:

Questions on bond issues under this article shall be submitted to the qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

Thus, the Town was statutorily required to submit Questions 1 and 2 to its qualified voters...We conclude that the trial court erred in holding that the election was a “referendum” election and that a publicity pamphlet was required...

[Clay v. Town of Gilbert, 160 Ariz. 335, 340–41 \(App. 1989\)](#).

And just as Questions 1 and 2 in Gilbert were not referenda, neither were they initiatives, or the Town would have been required to publish a publicity

pamphlet. *Id.* And similarly, if a matter meets the requirements of either of the Propositions for automatic placement on the ballot, that is neither a voter approved measure or a referendum to the ballot by the Town Council. *Id.*

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.

If the conditions identified in Proposition 401 and 402 are met, there must be an election 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 \(Iowa 2007\)](#)(same).

Once the conditions are met for triggering a plebiscite under [Section 35.04](#) or [Section 157](#) of the Town Code 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](#) then it would be for a recall, initiative or traditional referendum, a candidate election, or even other elections that are required by statute such as those in [Clay](#).

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 that is the case, then why is the Town electorate not permitted to submit a measure for the voters consideration that has the type of automatic ballot referral provision such as the ones above?

IV. 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 preliminary injunction hearing eviscerates the Town's Claims that [Sections 35.04](#) and [157](#) have only unconstitutional applications in that only administrative matters could be referred, and his testimony at trial was not credible**

At the hearing on the Motion for Preliminary Injunction, 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. Correct¹⁸.

That much is obvious, and the trial court pointed to “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 always¹⁹.” 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](#).

At the trial on the merits, the Town Manager evaded basic questions about obvious situations that would trigger the Propositions’ automatic plebiscite provisions and insisted there could never be a Council measure that both embodied a legislative act and was subject to either of the Propositions.

¹⁸ [IR 33, Ex. 1, p. 78: 11-22; p. 79: 3-6.](#)

¹⁹ [Id., pp. 82-83: 23-25, 1-2.](#)

And he claimed that hypothetical scenarios that obviously involve legislative determinations were “administrative” in nature:

Q. We have a resolution of the town council of Payson, it is hereby resolved that we've decided that Rumsey Park [a municipal park in Payson] is going to be turned into an affordable housing project, and we are going to offer a 99-year lease to the affordable housing project company to effectuate that change. Is that legislative or administrative?

A. Administrative.²⁰

Of course, the Town’s position is untenable, and the Town Manager’s claims are not credible. The trial court’s crediting of Town Manager Smith’s clearly noncredible testimony was an abuse of discretion.

If the Town wants to not hold an election based on a particular application of the Propositions that it contends would result in an administrative matter appearing on the ballot that is one thing. But to claim that the Propositions are facially invalid is nonsense. See [State v. Wein, 244 Ariz. 22, 31 \(2018\)](#) (“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.”)(quoting [U.S. v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095 \(1987\)](#)).

²⁰ [IR1, 53: 16-22](#).

B. 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](#)

There are any number of hypothetical examples of a Town Council act that would trigger one of the Propositions that would be legislative in nature. In its trial memorandum²¹, Plaintiff cited Payson's efforts 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 be a legislative act, and would be subject to automatic plebiscite under Section [157](#), 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).

²¹ [IR 31, pp.12-13.](#)

[Wennerstrom, 169 Ariz. at 491.](#)

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. As noted above, there are a number of state statutes requiring automatic plebiscites, 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.”)

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.](#)

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.

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.](#)

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](#). 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 through the statutory charter review of Phoenix and Scottsdale’s Charter.

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 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.

V. CONCLUSION

For the foregoing reasons, Plaintiffs/Appellants ask that this Court reverse the trial court.

RESPECTFULLY SUBMITTED this 27th day of August, 2024.

TIMOTHY A. LA SOTA, PLC

/s/ Timothy A. La Sota
Timothy A. La Sota
2198 E. Camelback Rd., Suite 305
Phoenix, AZ 85016-4237
Attorney for Plaintiffs-Appellants

**ARIZONA COURT OF APPEALS
DIVISION TWO**

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

Plaintiffs,

vs.

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

Defendants.

No. 2CA-CV2024-0009

Maricopa County
Superior Court Case No.
CV2023-014517

**OPENING BRIEF OF PLAINTIFF-APPELLANT
CERTIFICATE OF COMPLIANCE**

Timothy A. La Sota (020539)
tim@timlasota.com
TIMOTHY A. LA SOTA, PLC
2198 East Camelback Road, #305
Phoenix, Arizona 85016
Attorney for Plaintiffs-Appellants

The undersigned certifies that the accompanying Opening Brief complies with Rule 6(c) of the Arizona Rules of Civil Appellate Procedure. The Opening Brief uses proportionately spaced Times New Roman typeface, with a point size of 14, is double-spaced and contains 5,471 words, including headings, block quotes, and footnotes, according to the word count of the processing system used to prepare the Opening Brief.

RESPECTFULLY SUBMITTED this 27th day of August, 2024.

TIMOTHY A. LA SOTA, PLC

/s/ Timothy A. La Sota

Timothy A. La Sota

2198 E. Camelback Rd., Suite 305

Phoenix, AZ 85016-4237

Attorney for Plaintiffs-Appellants

**ARIZONA COURT OF APPEALS
DIVISION TWO**

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

Plaintiffs,

vs.

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

Defendants.

No. 2CA-CV2024-0009

Maricopa County
Superior Court Case No.
CV2023-014517

**OPENING BRIEF OF PLAINTIFF-APPELLANT
CERTIFICATE OF SERVICE**

Timothy A. La Sota (020539)
tim@timlasota.com
TIMOTHY A. LA SOTA, PLC
2198 East Camelback Road, #305
Phoenix, Arizona 85016
Attorney for Plaintiffs-Appellants

I certify that on August 27, 2024, I filed the stipulation to dismiss.

I certify that on August 27, 2024, I served same by emailing same to the following parties:

Jon M. Paladini

Justin Pierce
Pierce Coleman
7730 E Greenway Rd Suite 105
Scottsdale, AZ 85260
602-772-5506
justin@piercecoleman.com
jon@piercecoleman.com

Larry J. Crown, Esq.
TITUS BRUECKNER SPITLER & SHELTS PLC
8355 East Hartford Drive, Suite 200
Scottsdale, Arizona 85255
Email: Lcrown@tbsslw.com
Attorneys for Defendants

RESPECTFULLY SUBMITTED this 27th day of August, 2024.

TIMOTHY A. LA SOTA, PLC

/s/ Timothy A. La Sota
Timothy A. La Sota
2198 E. Camelback Rd., Suite 305
Phoenix, AZ 85016-4237
Attorney for Plaintiffs-Appellants