

Town Hall (928) 474-5242  
Fax (928) 474-4610



Town of Payson  
303 N. Beeline Highway  
Payson, Arizona 85541-4306

## STAFF REPORT TO COUNCIL

Date: 10/23/2024

To: Mayor and Council

From: Troy Smith, Town Manager

Subject: Rescinding Resolution 3409

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### PURPOSE:

The purpose of this item is for the Town Council to consider rescinding Resolution 3409, a resolution authorizing the sale of excise tax bonds to complete select public improvements.

### BACKGROUND:

On August 21, 2024, the Town Council passed resolution 3409 that authorized the sale of excise tax backed bonds for the purposes of funding select public improvements, such as public safety facilities, street and road improvements, paths and trails improvements, drainage improvements, parks and recreation facilities, an event center, an aquatic and recreation center, and additional related municipal facilities and capital improvement projects, including acquisition of interest in real property. This approval followed years of work by the Council, with the community and staff, to identify key assets and critical infrastructure needing to be updated, modernized, maintained, and constructed. The approval was in alignment with the recommendation of the Council appointed Capital Improvement Citizen Advisory Committee (CIPCAC).

In an effort to position the Town to create maximum value for taxpayers and deliver the infrastructure projects as quickly as possible, Resolution 3409 was passed with an emergency clause. This action, was supported by a number of factors, including the history of other municipalities passing excise tax bond sales with the same clause, by an overwhelming majority.

### Challenge to the Bond Authorizing Resolution:

On September 10, 2024, Deborah Rose, a Payson resident represented by Goldwater Institute filed a lawsuit against the Town of Payson in Gila County Superior Court seeking Declaratory and Injunctive Relief. The lawsuit challenged the Town of Payson's use of the emergency clause within Resolution 3409 and sought to have the court find the Resolution invalid.

On September 24, 2024, the Gila County Superior Court conducted an evidentiary hearing on the matter. Following the hearing, on October 2, 2024, the Honorable Judge Bryan Chambers issued a final judgement in favor of the Town of Payson. The Judge said that the Plaintiff (Ms. Rose) did not have a strong likelihood of success on the merits, given the mootness of the lawsuit. The Court continued by stating that the law requires that the Superior Court must give deference to an emergency clause vote of the Town Council because A.R.S. Section 19-142(B) requires a supermajority vote to approve the authorizing resolution with an emergency clause, and that's exactly what the Town Council had.

On October 9, 2024, Goldwater Institute on behalf of Deborah Rose filed a Notice of Appeal with the Arizona Court of Appeals to appeal the Superior Court's final judgement.

### Other Litigation:

In August 2019, Town voters approved two voter initiatives (the "2019 Voter Initiatives") that amended the Town Code to add sections requiring voter approval of certain Town actions. Specifically, Section 35.04 was added to the Town Code which required "(A) Any revenue bond for financing or debt that has a combination 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. In addition, Section 157.01 was added to the Town Code which requires any lease of the Town's real property for a term of three or more years shall be subject to a vote of the qualified electors to enact. The amendments to the Town Code in accordance with the 2019 Voter Initiatives are collectively referred to herein as the "Repealed Town Code Sections."

After the enactment of the Repealed Town Code Sections, Town Council approved, and the Town entered into, a lease-purchase agreement for certain public safety equipment in an amount greater than \$1,000,000 and there was no objection or challenge related to such lease-purchase agreement submitted to the Town.

In April 2023, the Town Council adopted two ordinances to rescind and repeal the Repealed Town Code Sections. The votes for each of the two ordinances were six "yes"

votes and one “no” vote. The councilmember that voted “no” on each ordinance has a current term that ends in 2026, including after the Mayor-Elect and New Councilmembers (each as defined herein) take office in December 2024.

In May 2023, a lawsuit was filed against the Town by Transparent Payson, a political committee and Jeffrey Aal, a Payson resident, challenging the Town Council’s actions to rescind and repeal the Town Code Sections. A trial was held in April 2024, and in May 2024 the Superior Court of Gila County issued a final, appealable order stating, among other things, that the matters described in the 2019 Voter Initiatives were not legislative in character, and therefore were unlawful measures. Furthermore, the Superior Court found that the Town, as a “general law” municipality under State law, is restricted to the general powers and authority granted by State law, and there is no authority under State law for the Town to refer the matters described in the Repealed Town Code Sections for voter approval. The Superior Court’s order granted a declaratory judgment that the 2019 Voter Initiatives are unenforceable, invalid, of no legal force and effect and therefore the Town Council was within its legal authority to rescind and repeal the Repealed Town Code Sections. The Superior Court also found that the Voter Protection Act applies only to the State Legislature and not to local government councils.

On August 27, 2024, Transparent Payson and Jeffrey Aal filed a Notice of Appeal with the Arizona Court of Appeals to appeal the Superior Courts final judgement.

#### Other Considerations:

During their respective campaigns, the Mayor-Elect and two Council Members-Elect from time to time referenced or implied being in support of a possible reduction or elimination of the one cent increase to the Town’s transaction privilege tax rate from 2.88% to 3.88% approved by the current Town Council on February 6, 2024.

The Mayor-Elect and two Council Members-Elect from time to time referenced or implied being in support of reinstating a “sunset clause” on 0.88% of the Town’s transaction privilege tax rate, whereby such 0.88% transaction privilege tax rate would expire on December 31, 2027 without further action by the Town Council. The current Town Council approved an ordinance on December 13, 2023, authorizing the permanent removal of the “sunset clause” on the 0.88% transaction privilege rate.

Furthermore, the Mayor-Elect and two Council Members-Elect have publicly spoken against the authorization of the sale of bonds for the purposes of constructing public improvements. A current Council member, whose term expires in 2026, also voted against the 1% tax increase, the removal of the .88% sunset provision, and the authorizing resolution (3409). It would appear that a majority of the new Council, who will be seated on December 11, 2024, is opposed to the bond sale and may act to reduce or eliminate portions of the funding that would be pledged for the repayment of bonds.

## Required Financial Disclosures & Assessment of Risk:

In order to sell tax exempt bonds a municipality must, among many other tasks, assess and disclose any risk associated with the sale. As a direct result of the all of the facts and circumstances outlined above, and in spite of a very strong AA- credit rating, the Town has come to the conclusion that it is not capable of selling bonds given the pending litigation and other considerations. Investors buying tax exempt government bonds gravitate towards these types of investments to avoid risk; reliant on the fact that government bonds, backed by excise tax revenue, are usually associated with very low risk. Unfortunately, that is not the case for the Town of Payson, in the current environment.

### **SUMMARY:**

The Town of Payson Council has worked with the community and staff for more than 3-years to identify key public infrastructure and improvements desired by the community. The Council took several steps to create funding to build a better Payson and meet the needs of the community, including the authorization to sell excise tax backed bonds.

As a result of the multitude of circumstances outlined in the previous sections of this report, the Town has been placed in the unfortunate position that it cannot realistically sell bonds to fund numerous improvements desired by the community. Staff has prepared for the Town Council's consideration, an act to rescind resolution 3409, which was passed by the Council on August 21, 2024.

### **FINANCIAL IMPACT AND FUNDING SOURCE:**

The financial consequences associated with this action are significant and likely will not be realized for many years. In addition to the hard costs associated with land purchases, design, staff time, consultant fees, and legal expenses, the current environment has caused the divestment of up to \$70 million of investment in the community (Payson).

### **RECOMMENDATION:**

Staff recommends that Council rescind Resolution 3409, a resolution authorizing the sale of excise tax bonds to complete select public improvements.

The inability to sell bonds has necessitated the need to initiate the immediate stoppage of work associated with all bond funded projects, with the exception of design work on two stormwater drainage projects. The American Gulch and Rumsey Park design projects will continue. These projects were started prior to the creation of the bond initiative and are funded by the general fund. No funding exists for construction of any improvements related to either project, although funding could be allocated in the future.