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COUNCIL AGENDA ITEM MEMO

DATE: April 12, 2023
TO: Mayor and Council
FROM: Jon Paladini, Town Attorney
SUBJECT: Repeal of Propositions 401 and 402

ACTION PROPOSED: Repeal of Propositions 401 and 402 as codified in Town Code as Sections 157.01 and 35.04 respectively.

EXECUTIVE SUMMARY

At the August 28, 2019 election, Town voters approved Propositions 401 and 402, codified at Town Code §§ 157.01 and 35.04 respectively. Proposition 401 purported to require the Town Council to refer to the voters any lease, license or easement with a term of three or more years. Proposition 402 was an initiative petition that limits certain expenditures of taxpayer funds. Specifically, § 35.04(B) appears to require a “direct vote” (i.e., a vote of the qualified electors) to approve any expenditure of \$1 million or more.

Propositions 401 and 402 were invalid voter initiatives to begin with. General law municipalities lack the authority to refer matters to the voters except where constitutionally or statutorily authorized. Because a city or town council does not have the power to refer items to the electorate unless expressly authorized by the Arizona Constitution or state law, it follows, then, that neither do the people by initiative have the right to submit such ordinance to a vote of the people because their powers are no greater than those of the city or town council. Moreover, only legislative matters can be referred to the voters. The subject matters of Propositions 401 and 402 are not legislative in nature, and therefore are not referable.

Furthermore, Propositions 401 and 402 are not protected by the Voter Protection Act, adopted in 1998, and therefore can be repealed by this or future Town Councils.



In 2021, the Town Council held two public meetings to consider the repeal of Propositions 401 and 402 but at the time did not see the urgency in doing so. That conclusion is no longer the case. As the Town moves forward with the possible issuance of bonds for the construction and improvement of much needed municipal infrastructure, allowing these Code sections to remain on the books will have a detrimental effect on the issuance of bonds, including the costs of higher interest rates as well as the possibility of frivolous lawsuits.

TOWN CODE LANGUAGE

Section 35.04 provides as follows:

§ 35.04 PEOPLE'S RIGHT TO KNOW DEBT OBLIGATION.

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

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

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

Section 157.01 provides as follows:

§ 157.01 RIGHT TO CONTROL PUBLIC LAND.

- (A) Any lease of the town's real property, originating or renewal, excluding inter-governmental agreements, excluding utility and communication providers,

excluding Airport Commission agreements, excluding Water Department agreements, that has a stated or extended term of three years or more shall be subject to a vote of the qualified electors to enact.

- (B) For the purposes of this chapter, lease(s) with a utility and communication provider(s) are excluded.
- (C) The term *LEASE* shall include all forms of lease, license and easement.
- (D) For the purpose of this chapter the following definitions shall apply unless the context clearly indicates or requires a different meaning.

LEASE. A contract where the town agrees to give a tenant 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.

UTILITY AND COMMUNICATION PROVIDERS. Includes any organization which provides services to the general public, although it may be privately owned. Public utilities include electric, gas, telephone, water, sewer, waste management, broadcast systems and television cable systems.

DISCUSSION AND ANALYSIS

Municipal Authority to Refer Matters to the Voters

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

The Arizona Supreme Court addressed whether municipalities have the power to refer matters to voters in a 1968 decision. In *City of Scottsdale v. Superior Court*, the Scottsdale City Council adopted an ordinance rezoning a parcel of land. Immediately after adopting the ordinance, the council adopted a resolution purporting to voluntarily “refer the ordinance to a vote of the electors of the City of Scottsdale”. The Court held that the council did not have the authority to refer the ordinance to the voters, reasoning that “[t]he cities and towns of this state are municipal corporations created by the state and possessory of no greater powers than those delegated to them by the constitution and the general laws of the state”.

Because neither the Arizona Constitution nor any law authorized a council to refer matters before it to the electors, the Court concluded that “the voluntary submission of the ordinance by the council to a special vote of the people, in the absence of a referendum petition therefor, was wholly without authority and outside the delegated powers of the city council”.

The reasoning in *City of Scottsdale* was most recently applied and reaffirmed by the Arizona Supreme Court in the 2018 case *Crane v. Peterson*. In that case, the voters of the Town of Carefree adopted by initiative an ordinance that purported to place term limits on the mayor and councilmembers. One of the councilmembers challenged the ordinance, arguing it was contrary to established law. The Court agreed, citing to *City of Scottsdale* for the proposition that “[n]on-charter municipalities . . . possess no greater powers than those delegated to them by the Constitution and general laws of the state”. The Arizona Supreme Court in the 1953 case *City of Flagstaff v. Associated Dairy Products Co.* held that these powers may be delegated expressly or by necessary implication but that “the powers so delegated are to be strictly construed”. The Court in *Crane v. Peterson* concluded that because nothing in the Constitution or state law empowered municipalities to establish term limits, municipalities lack the authority to do so and found the voter-approved ordinance to be invalid.

Moreover, it is a general rule that one governing body cannot enact irrevocable legislation or tie the hands of its successors with respect to a particular law. *Sedona Private Prop. Owners Ass’n v. City of Sedona*. This means that the voters cannot adopt an initiative that contains language restricting future councils from revising or repealing. Additionally, the League of Arizona Cities and Towns also ascribes to this interpretation. The then League General Legal Counsel J. LaMar Shelley opined in “Re: Powers of the Initiative” that “Absent a specific provision authorizing it, a city or town council does not have the power to refer any ordinance to the electorate. . . It follows, then, that if the city

or town council does not have authority to voluntarily submit an ordinance to a vote of the people, *then neither do the people by initiative have the right to submit such ordinance to a vote of the people because their powers are no greater than those of the city or town council*".

The League has opined similarly in its Election Manual that "The council may not voluntarily submit a measure to the people in the absence of a referendum petition, except . . . where referral is required or specifically allowed by statute. This prohibition means that the council cannot refer an ordinance to the people in the absence of a referendum petition."

Only Legislative Acts May be Referred

The Arizona Supreme Court in *Wennerstrom v. City of Mesa* opined that municipal corporations act in several capacities: legislative, executive, administrative, and quasi-judicial and that voters may challenge only legislative actions via referendum because permitting "referenda on executive and administrative actions would hamper the efficient administration of local governments". The Court adopted a test for evaluating whether a particular act is legislative, and thus referable, or administrative, and not referable by stating that actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. In this connection an ordinance which shows an intent to form a permanent rule of government until repealed is one of permanent operation.

The Court concluded that local government action that is "legislative"—establishes policy, enacts a law or permanent rule of government, or declares a public purpose and provides the ways and means of its accomplishment—is subject to referendum.

The subject matter of Proposition 401, leases, licenses and easements, are not acts that establish policy, enact a law or permanent rule of government, or declare a public purpose and provides the ways and means of its accomplishment.

The subject matter of Proposition 402, approvals of bond measures other than general obligation bonds and expenditures over \$1 million, are previously established through an annual budgeting process (i.e., a establishing a policy) thus are not themselves acts that establish policy, enact a law or permanent rule of government, or declare a public purpose and provides the ways and means of its accomplishment.



Conclusion

Under the laws and Constitution of the State of Arizona as interpreted by the Arizona Supreme Court, the Payson Town Council has no legal authority to refer the matters that are the subject of Proposition 401 to voters, and the voters by extension cannot compel the Council to do so by initiative because their authority is no greater than that of the Council.

Proposition 401 codified as Town Code § 157.01 is of no legal force or effect and does not constrain the Council. Thus, applying these authorities and opinions here, Proposition 401 fails as a matter of law.

Under the laws and Constitution of the State of Arizona as interpreted by the Arizona Supreme Court, the Payson Town Council has no legal authority to refer the matters that are the subject of Proposition 402 to voters, and the voters by extension cannot compel the Council to do so by initiative because their authority is no greater than that of the Council.

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

Voter Protection Act Analysis

Does the Town Council have the authority to repeal Propositions 401 and 402?

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

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

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

- Proposition 105 would make a series of changes to the Arizona Constitution relating to initiative and referendum. Under current law, the State Legislature by a majority vote may subsequently amend or repeal any ballot measure that has been approved by the voters, except if that ballot measure was approved by a majority of the people who are registered to vote in this state, rather than by a majority of people who voted on the ballot measure.
- Proposition 105 would make all of the following changes apply to any ballot measure that is approved by a majority of the people who voted on that ballot measure:
 - Prohibits the Governor from vetoing the approved measure.
 - Prohibits the State Legislature from ever repealing the approved measure or from amending an approved measure except as provided below.
 - Requires a three-fourths vote of the State Legislature to amend or supersede the approved measure and requires that the legislation "furthers the purposes" of the approved measure.
 - Requires a three-fourths vote of the State Legislature to appropriate or transfer funds that were designated to a specific purpose by the approved measure and requires that the appropriation or transfer of funds "furthers the purposes" of the approved measure.
 - Provides that the State Legislature is not limited in its right to refer any measure to the ballot.

Additionally, there are numerous Courts of Appeal and Arizona Supreme Court cases that have analyzed the VPA, all of which have found that the VPA is a restriction on the State Legislature. None have applied the VPA to local government measures. The plain language of the VPA as well as multiple interpretations of the amendment, allows the Town Council to conclude that Propositions 401 and 402 are not protected by the VPA.

Why Repeal of Propositions 401 and 402 is Necessary

As explained above, Propositions 401 and 402, and the related Town Code §§ 157.01 and 35.04, should be repealed because they contradict or conflict with Arizona law and established Arizona Supreme Court jurisprudence. These provisions are outside the governmental powers delegated to the Town in Arizona law as described in the *City of Scottsdale* case, and no other Arizona general law municipality has comparable restrictions. Town Council is currently prioritizing various capital facilities projects, including projects related to public safety, parks and recreation, and efficient governmental administration. Most of these projects will be financed by the Town with short-term or long-term repayment obligations. Because Propositions 401 and 402 contradict or conflict with Arizona law, potential investors or financial institutions that would otherwise be willing to assist the Town with the financing and construction of the projects will be unwilling to assist the Town or will assist the Town at higher costs (i.e., higher interest rates or contractual protections) to mitigate any potential legal complications related to Propositions 401 and 402. Therefore, in order to protect the Town's ability to accomplish its governmental functions in an efficient and cost-effective manner, repeal of Propositions 401 and 402 is necessary.

Why Repeal by Emergency Clause is Warranted

Pursuant to A.R.S. § 19-142 a Town Council ordinance or resolution subject to referendum, as described above, is not operative until thirty days after its passage. With respect to the repeal of Town Code §§ 157.01 and 35.04, Town Council is currently prioritizing capital facilities projects as described above, and these projects are necessary for the immediate preservation of the peace, health or safety of the Town. The Town will need to finance these projects with short-term or long-term obligations which may include bonds, installment purchase contracts, lease-purchase contracts, or otherwise, and these obligations may be purchased by investors or financial institutions. These financial institutions or investors may hesitate to purchase the Town's obligations so long as Town Code §§ 157.01 and 35.04 are in effect, or may charge the Town a higher interest rate to mitigate any investment risk created by these Town Code Sections. Furthermore, the interest rate environment is volatile and Town Code §§ 157.01 and 35.04 potentially prevent Town Council from acting quickly to finance the projects under consideration. Therefore, in order to put the Town in a position to obtain the best financing terms for the Town and its residents, it is warranted to include an emergency clause in the Town Council ordinance repealing Town Code §§ 157.01 and 35.04.