COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBORAH ROSE, Plaintiff/Appellant, v. TOWN OF PAYSON, et al., Defendants/Appellees.	Court of Appeals Division Two No. 2 CA-CV 2024-0346 Gila County Superior Court Case No. S0400CV202400271

DEFENDANTS/APPELLEES' ANSWERING BRIEF

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INTRODUCTION

This is a moot appeal of a moot complaint for declaratory and injunctive relief. The litigation was an injunctive challenge to a Payson Town Council ("Council") Resolution to sell tax-exempt bonds to generate revenue that would pay for needed, priority public projects. The Council voted 6-1 to pass this Resolution. Plaintiff/Appellant Deborah Rose ("Rose") failed to file a Petition for Referendum with the Payson Town Clerk within 30 days of the Council's passage of Resolution 3409 making her Complaint for Injunctive Relief moot. Two months later, the Council repealed the Resolution making this Appeal from the trial court's verdict and Judgment in favor of Payson moot. There is no Resolution to enjoin and no remaining case before this Court.

In addition to the mootness at the trial court level and at the appellate level, Rose lacked standing to individually petition for a referendum, Resolution 3409 was an administrative non-referable act, and the Council properly included an emergency clause in the Resolution that made it immediately effective.

On August 21, 2024, the Council passed Resolution 3409 approving the sale of bonds not to exceed the aggregate principal amount of $70 million to mature not later than 25 years. The vote was 6 to 1, including the Mayor. Resolution 3409 contained a severability clause as Section 10, and an emergency clause as Section

11. This Resolution became effective either immediately or no later than September 20, 2024 pursuant to A.R.S. § 19-142.

Resolution 3409 was the fourth of four related Resolutions by the Council to create appropriate funding to service debt needed to pay the costs of high priority public projects. Resolution 3409 was the final piece of a lengthy process and in-depth analysis of needed public projects and how to pay for them. Through meetings, workshops and active community participation, the Council passed a series of Resolutions on April 23, 2023, December 13, 2023, February 6, 2024 (Ordinances), and August 21, 2024 (an administrative funding Resolution).

On September 10, 2024, Rose filed a Verified Complaint for Declaratory and Injunctive Relief, along with an Application for a Preliminary Injunction and Temporary Restraining Order pursuant to Rule 65, Ariz.R.Civ.P. Rose never filed a completed Petition for Referendum with the Payson Town Clerk within the strict 30-day period required by A.R.S. § 19-142. On September 20, 2024, Rose's Complaint challenging the emergency clause became moot as the 30-day period had lapsed due to her inaction.

On September 24, 2024, a bench trial (Evidentiary Hearing) was held before Judge Bryan Chambers in which the Court received as evidence Payson's Verified Response with Exhibits 1 through 12 in Opposition to Rose's Application for Preliminary Injunction [ROA17] and Rose's Exhibits 1 through 9. ROA19 The

Court denied Rose's Application for Preliminary Injunction stating its detailed findings of fact and law on the record. The parties then stipulated that the Evidentiary Hearing be deemed consolidated with and considered to be the trial on the merits. Rule 65(a)(2), Ariz.R.Civ.P. Thus, the September 24, 2024 hearing was a bench trial, and the Court ruling was a verdict in favor of Payson Docket No. 4. It is the final judgment on that verdict that has been appealed to this Court ROA23.

On October 23, 2024, the Payson Town Council repealed Resolution 3409 rendering this appeal moot. The Council analyzed and evaluated the negative impact caused by the pendency of this appeal, pendency of an appeal in an earlier case involving its repeal of Ordinances 157.01 and 35.04, and statements made by certain persons that were required to be disclosed to the underwriters and investors. These collective items created risk that negatively impacted the marketability and anticipated revenue from a municipal bond sale.

The Town of Payson website contains the complete record of the October 23, 2024 Open Meeting, including a video recording, the agenda, and the minutes (https://payson.granicus.com/player/clip/2756?view_id=17&redirect=true). This is self-authenticating evidence pursuant to Rule 902(5), Arizona Rules of Evidence. This evidence of a material event that occurred subsequent to entry of the trial court's Judgment can be considered by this Court on appeal. Payson directs this Court to

review the CALL TO THE PUBLIC and AGENDA item at F3 as the relevant portions of this meeting.

This appeal should be summarily dismissed because it is moot without the underlying Resolution being in effect. If this appeal is not deemed moot, then the trial court's verdict and judgment should be affirmed on the legal and factual merits. If this Court determines there is reversible legal error, then this case should be remanded for a new trial.

I. STATEMENT OF THE CASE

Rose filed a Verified Complaint for Declaratory and Injunctive Relief on September 10, 2024 [ROA1]. Rose filed an Application for Temporary Restraining Order (with notice) and Preliminary Injunction [ROA2] and an Application for Order to Show Cause [ROA3]. On September 23, 2024, Defendants filed a Verified Response in Opposition to Rose's Application for Temporary Restraining (with notice) and Preliminary Injunction [ROA17]. Payson's Response included 12 Exhibits marked 1 through 12 [ROA17]. On September 23, 2024, Rose filed a Witness and Exhibit List that included nine Exhibits marked as Exhibits 1 through 9 [ROA19].

On September 24, 2024, the Court held an Evidentiary Hearing on Rose's Application for a Preliminary Injunction. The transcript from the Evidentiary Hearing was filed with this Court on January 24, 2025 and consists of 107 pages

Docket No. 4. The trial court denied Rose's Application for Preliminary Injunction setting forth its findings in detail at page 64, line 19 to page 72, line 9 Docket No. 4. The Court stated that Rose did not have a strong likelihood of succeeding on the merits. This finding then became the Verdict of the trial court as the parties stipulated that the hearing on the Motion for Preliminary Injunction was consolidated as the trial on the merits pursuant to Rule 65 [ROA23].

In its final Judgment in favor of Payson, the Court stated that evidence was admitted, and it made findings of fact and conclusions of law on the record. Based on the trial court's findings of fact and conclusions of law, the Court denied Rose's Application based upon its findings of fact and conclusions of law and the entirety of the record. The findings of fact and conclusions of law stated by the Court on the record in open court were incorporated in their entirety into the Judgment. Docket No. 4., p. 64, l. 19 to p. 72, l. 11, [ROA23]. Judgment was entered in favor of Payson and the individually named Mayor and Council Members [ROA23].

II. STATEMENT OF FACTS

There are five Council actions taken at Council open meetings relevant to this appeal: (1) the April 12, 2023, Council repeal of Propositions 401 and 402 as codified in Town Code Sections 157.01 and 35.04; (2) the December 13, 2023 Council repeal of the Sunset Clause adopted in Ordinance No. 888; (3) the February 6, 2024 Council passing Ordinance 964 that increased the transaction

privilege tax rate from 2.88% to 3.88%; (4) the August 21, 2024 Council Resolution 3409 that authorized the sale of excise tax bonds up to an amount of $70 million; and (5) the October 23, 2024 Council Resolution No. 3423 repealing Resolution No. 3409. Evidence regarding the first four Council meetings was admitted at trial as Payson's Exhibits 5 through 9 [ROA17]. Evidence regarding the fifth Council meeting that occurred after the trial is contained on the Payson website and admissible for this Court pursuant to Rule 902(5).

A. April 12, 2023 Council Repeal of Code Sections 157.01 and 35.04

Exhibit 5 in evidence consists of the Council Agenda Item Memo that was submitted to the Mayor and Council by Town Attorney Jon Palladini [ROA17], p. 31. The subject of the Memo was the repeal of Propositions 401 and 402 codified in Town Code as Sections 157.01 and 35.04. *Id.* The Memo states that the Town was moving forward with the possible issuance of bonds for the construction and improvement of much-needed infrastructure, and that these two Code Sections would have a detrimental effect on the issuance of bonds, including the cost of higher interest rates and the possibility of frivolous lawsuits. *Id.* The subject matter of Proposition 401, as written, involved leases, licenses, and easements for a term of three years or more. The subject matter of Proposition 402, as written, involved approval of bond measures other than general obligation bonds and expenditures over one million dollars. These Propositions were codified as Ordinance 157.01 and

35.04. *Id.* The Ordinances, as written, required a public vote on all such items. The second item in Exhibit 5 is the published agenda for the regular meeting on April 12, 2023 (see items F6 and F7 which were the repeal of these two Ordinances). *(Id.*, p.39) The third item is Ordinance 953 that repealed Ordinance 157.01. *(Id.*, p. 46) The fourth item in Exhibit 5 is Ordinance 954 that repealed Town Code Section 35.04. *(Id.*, p. 53) (Counsel advises the Court that a lawsuit was filed in Gila County Superior Court regarding repeal of these two Code Sections. The case first proceeded to an Evidentiary Hearing on those Roses' Application for Preliminary Injunction and then to a bench trial. The trial court issued a verdict and Judgment in favor of Payson. Plaintiffs appealed to this Court, this appeal is fully briefed, oral argument has been requested, and is pending before this Court as *Transparent Payson v. Town of Payson,* 2 CA-CV 2024-0195.)

B. December 13, 2023 Council Enacts Ordinance 963

Exhibit 6 in evidence contains the Staff Report, the Agenda for the regular meeting, and Ordinance 963 [ROA17], p. 60. The Staff Report is from Payson Town Manager Troy Smith to the Mayor and Council. *(Id.,* p. 61) The Report states that due to limited resources over many years, the Town has not been able to fund needed community projects identified in the Town's Corporate Strategic Plan, the Capital Improvement Plan, the Drainage Master Plan, the Transportation Study, and the Pavement Management Report. *(Id.)*Nor has the Town been able to keep up with

needed maintenance or replacement costs associated with its facilities and infrastructure. Past strategies to fund needed public projects such as "pay-as-you-go" financing has inhibited community priority projects reflected in the Town's Strategic Plan, Capital Improvement Plan, Transportation Study, Pavement Management Report, Drainage Master Plan, etc. *(Id.)* It has contributed to the current poor condition of its existing facilities and infrastructure. *(Id.)*

In 2023, the Council appointed a Capital Improvement Project Citizen Advisory Committee ("CIPCAC") to gain knowledge and formally engage the community to assist the Council in determining what projects Citizens want to complete, in what order, and evaluate designated funding strategies. *(Id.)* The decision to create and appoint this Citizen-based Committee came following three years of focused, strategic planning by the Council. After months of public meetings and community input, the CIPCAC made recommendations including removing the Sunset Provision within Ordinance 888 in order to maintain the Town's existing revenue sources. *(Id.)*

Additionally, the CIPCAC recommended that the Council institute a 1% increase to the Town's transaction privilege tax rate to generate revenue sufficient to allow the Town to utilize excise tax-backed bonds to fund select public improvements, as well as ongoing operation and maintenance costs for these improvements. *(Id.)* The increase would also help fund certain deferred maintenance

items for the existing public safety facilities. This type of debt financing would allow needed infrastructure to be delivered quickly and spread the cost of the infrastructure over the useful life of the asset. *(Id.)* By using long-term debt financing for major public infrastructure projects that have a long service life, governments can increase equity between generations with minimal impact to the annual operating budget. This means people most likely to use and benefit from the facility infrastructure are also paying their proportional share of the cost of the asset. *(Id.)*

The projects recommended by CIPCAC include the indoor aquatic/ recreation center, public safety facilities deferred maintenance, event center site improvement plan, Rumsey Park drainage, Rumsey Park improvements, American Gulch improvements, PATS trail improvements, and pavement and maintenance. *(Id.)*

The Town needed to remove the Sunset Provision in the existing TPT tax rate because investors would likely reduce the amount of available funding or could require financing terms that would significantly increase the cost of financing for local taxpayers, or may not choose to offer financing at all. *(Id.)*

Exhibit 6 includes the Agenda for the December 13, 2023 meeting which included the Ordinance to repeal the Sunset Provision of Ordinance 888 - Item F4 [ROA17], p. 65. Exhibit 6 then includes Ordinance 963 which repealed the Sunset Clause in Ordinance 988 preserving the 2.88% transaction privilege tax rate. *(Id.*, p. 71)

C. February 6, 2024 Council Passage of Ordinance 964

On February 6, 2024, the Council passed Ordinance 964 which amended the Town Tax Code to increase the transaction privilege tax rate from 2.88% to 3.88%. Exhibit 7 in evidence contains the staff report to Council, the Agenda, and Ordinance 964 [ROA17], p. 75. In the Staff Report to Council dated February 6, 2024, from Town Manager Troy Smith to the Mayor and Council, Town Manager Smith advises that the Council held a work session on November 5, 2023 to consider the recommendations of the CIPCAC. *(Id.)* At the conclusion of the work session, the Council directed the Town Manager to prepare an Ordinance to increase the transaction privilege tax (TPT) rate by 1% to 3.88%. *(Id.)*

In the Background Section of this Report, Town Manager Smith stated that the Town has not been able to fund needed community projects with its current financial resources. *(Id.)* Smith summarized that in 2023, the Town Council appointed a CIPCAC to gain knowledge and formally engage the community to assist the Council what projects citizens want to complete, in what order, and evaluate designated funding strategies. This CIPCAC came following three years of focus and strategic planning on the part of the Council. The CIPCAC met regularly for several months in a series of public meetings. The CIPCAC held an open house attended by 100 stakeholders and presented their findings during gatherings of at least five different community organizations to obtain community feedback. *(Id.)*

The CIPCAC made several recommendations to the Council including removal of the Sunset Provision within Ordinance 888 and instituting a 1% increase in the TPT. The 3.88% TPT would generate revenue sufficient to allow the Town to utilize excise tax-backed bonds to fund selected public improvements as well as ongoing operation and maintenance costs for those improvements. *(Id.)* The increase would help fund deferred maintenance items for existing public safety facilities. This type of debt financing would allow needed infrastructure to be delivered quickly and spread the cost of the infrastructure over the useful life of the asset. *(Id.)*

The TPT revenue was evaluated to be able to service debt of the bonds with a goal to get favorable rates to issue bonds in the amount of $70 million. By issuing long-term debt for major public infrastructure over projects that have a long service life, governments can increase equity between generations, with minimal impact to the annual operating budget. This means that the people most likely to use and benefit from the facility or infrastructure are also paying for their proportional share of the cost of the asset. *(Id.)*

There was a section why immediate implementation of the Ordinance is warranted which accounted for compliance with Arizona's statutes, including a 60-day public notice/comment period. *(Id.)* The timeframe for passing these Ordinances was discussed within the Council's calendar for the fiscal year 2025 budget calendar and routine Council business. The Council is currently funding design and

engineering services related to the construction of certain capital facilities projects. *(Id.)* The memo states that "these projects are necessary for the immediate preservation of peace, health, or safety of the Town." Exhibit 7 includes the Agenda for the Special Meeting and Ordinance 964 which passed an increase in the TPT from 2.88% to 3.88%. *(Id.*, p. 82, 84)

D. August 21, 2024 Council Passage of Resolution 3409

Exhibit 8 in evidence contains the Staff Report to Council from Town Manager Smith dated August 21, 2024, the Agenda for the Council Meeting and Resolution 3409 [ROA17], p. 82-92. In the Staff Report, Town Manager Smith states that Resolution 3409 is the final step in a series of CIPCAC and Council discussions and actions that began about three years ago and spanned roughly 20 meetings/work sessions, community outreach opportunities. *(Id.*, p. 93) Resolution 3409 authorizes the sale of the Obligations and delegates authority to staff to complete the transaction. As with the three prior Council votes, Resolution 3409 included an emergency clause and explains the basis why the Council added an emergency measure to Resolution 3409 pursuant to A.R.S. § 19-142. *(Id.)*

The Council is currently funding design and engineering services in the adopted fiscal year 2024-2025 budget related to the construction of certain capital improvements, including projects related to public safety, parks and recreation, transportation, trails, and efficient governmental administration. *(Id.)* These projects

are necessary for the immediate preservation of the peace, health, or safety of the Town. Financing these projects with bonds exposes the Town to the current, volatile financial markets and fluctuating interest rate terms. *(Id.)* Any delay in the Town's ability to act could prevent the Council from obtaining favorable financing terms on behalf of community and could unnecessarily delay the projects underway. *(Id.)* Passage of this Resolution will allow the Town to take advantage of favorable interest rates or rally in the market and to get ahead of the expected influx of the competing issuances in late September/October as other issuers look to lock in rates before the uncertainty related to the November 5, 2024 election. *(Id.)* The summation of these factors indicates that the immediate implementation of Resolution 3409 meets all the requirements and is necessary for the preservation of the peace, health, or safety of Payson.

Resolution 3409 Recitals state that the Mayor and the Town have determined to finance the construction of public safety facilities, treatment facilities, improvements of paths and trails, drainage improvements, parks and recreation facilities, an event center, an aquatic and recreation center, and additional related municipal facilities and capital improvement projects. *(Id.*, p. 106) By entering into a First Purchase Agreement to be dated as the first date of the month and date of the hereafter described obligations. *(Id.)* The Council deemed it necessary and desirable to provide for the sale and execution and delivery of pledged revenue obligations as

provided for in the Resolution (the "Obligations"). The payment represented by the Obligations will be secured by amounts received under the Purchase Agreement to which the Town will pledge the Excise Tax Revenues and State-Shared Revenues to service this debt. Financing the cost of the project pursuant to the Purchase Agreement is in furtherance of the purposes of the Town and is in the public interest. *(Id.)*

The Recitals and Sections 1 through 9 describe the terms of the Resolution authorizing the Town to enter into a Purchase Agreement, to incur Obligations not to exceed an aggregate principal amount of $70 million, and to secure same with the revenues from the 3.88% TPT and State-Shared Revenues. *(Id.)*

Section 10 of Resolution 3409 is titled "Severability". Section 10 provides that if any section, paragraph, clause or phrase of this Resolution shall for any reason be held to be invalid or unenforceable, such "shall not affect any of the remaining provisions of this Resolution." *(Id.)*

Section 11 is titled "Emergency" and provides that the immediate operation of the provisions of this Resolution is necessary for the preservation of the public peace, health, and safety, particularly to immediately sell the Obligation bonds to secure the best, available economic terms therefor, and an emergency is hereby declared to exist and this Resolution will be in full force and effect from and after

its passage by the Council and is hereby excepted from the referendum provisions of the Constitution and laws of the State of Arizona. *(Id.)*

Resolution 3409 passed by a 6 to 1 vote and was approved by the Mayor. The August 21, 2024 Special Council Meeting was an open meeting and is contained on Payson's public website. The video Table of Contents from this open meeting is set forth in Exhibit 1 admitted into evidence [ROA17], p. 18-19.

E. August 22, 2024 – Rose Obtains Referendum Packet

Exhibit 2 admitted into evidence is the Referendum Packet Receipt which lists all the documents and materials Rose received from Town Clerk Tracy Bailey on August 22, 2024 [ROA17], p. 20-22. It is signed by Rose and the Town Clerk's Office. Rose received the Application for a Serial Number Recall Petition, and the other items listed as items 1 through 11. The Receipt states in bold type:

> **WE STRONGLY RECOMMEND THAT YOU REVIEW THEM WITH AN ATTORNEY TO ENSURE COMPLIANCE WITH CURRENT LEGAL REQUIREMENTS. NOTHING IN THIS PACKET SHOULD BE DEEMED TO CONSTITUTE LEGAL ADVICE, NOR IS IT A SUBSTITUTE FOR COMPLIANCE WITH ALL LEGAL REQUIREMENTS. IT IS NOT APPROPRIATE FOR TOWN STAFF TO GIVE LEGAL ADVICE.**

Exhibit 3 admitted into evidence is an email chain that begins on August 22, 2024 at 2:40 p.m. between Rose and the Town Clerk. Rose advises the Town Clerk staff that as far as the Referendum Petition is concerned, she is filing as an individual. Rose states she does not have to file as a committee [ROA17], p. 23-26. At 2:58 p.m. Tracy Bailey responded stating the statute is clear and you must file a PAC not a

candidate committee. She then provides A.R.S. § 19-11 and A.R.S. § 19-141. At 3:05 p.m., Rose responded thank you and I will take a look.

Exhibit 4 admitted into evidence is an email thread from August 23, 2024 between Rose and the Payson Town Clerk's Office. At 9:53 a.m. Rose states thank you so much. I have a question on the Referendum process [ROA17], p. 27-29. Rose states it appears that Resolution 3409 includes an emergency clause. Is that Resolution eligible for referendum when it has an emergency clause, and she cites A.R.S. § 19-142(B). At 10:28 a.m., Town Clerk employee Harriet Bailey responded to Rose stating "we're unable to give legal advice. Please review the documents provided in the Referendum packet provided." *(Id.)*

F. Additional Evidence That Supports Resolution 3409 and the Use of Revenue Bonds to Fund Necessary Public Safety and Improvement Projects.

Exhibit 9 admitted into evidence is the Staff Report to Council dated September 27, 2023 from the Chair and Vice Chair of the CIPCAC. The Staff Report summarizes the Council's appointment of a 14-member volunteer Citizen Committee through an application process involving interested citizens to provide recommendations related to proposed capital projects [ROA17], p. 113-117. This Committee was appointed by the Council on May 13, 2023. The CIPCAC's role was to review a list of projects the Town had deemed beneficial and worthwhile to the

community but did not have the current ability to fund construction or operation through the general fund and capital budget sources. *(Id.)*

The CIPCAC's first meeting was on June 15, 2023. CIPCAC met 12 times with Town staff members to review capital improvement projects, past resident survey information, discussed financial options with Town finance leaders and outside bonding financial bond consultants. The CIPCAC toured public safety facilities. *(Id.)*

The CIPCAC made a presentation at a public meeting on August 10, 2023 at the Payson Library, and over 100 residents attended. The CIPCAC solicited input and provided information to organizations and groups by taking their presentation on the road. This included Chamber of Commerce luncheon, Payson Tea Party, the Senior Center Luncheon, Democratic Party Luncheon, the Rotary Club, Senior Site Council, and the Veterans' Board. *(Id.)*

In the Discussion section, the CIPCAC Report states that after weekly meeting discussions and presentations on all the above projects, the CIPCAC recommended narrowing the list to 10 potential projects and future funding requirements. *(Id.)* Those 10 projects are listed in this report. After much discussion regarding the Town's budget, the financing options the CIPCAC narrowed their review to were: (1) To increase TPT to pay for the debt service with the issuance of excise tax-backed bonds; and (2) To propose general obligation bonds. *(Id.)*

The CIPCAC members "stressed a sense of urgency to act and they wanted to see the priority projects expedited." *(Id.)* The current status of the Town's facilities and assets is such because of past inabilities to fund deferred maintenance, and the Town's funding and budget do not allow us to take on these priority projects. *(Id.)* The CIPCAC recommended to increase the TPT sales tax to pay for the debt service that would be associated with the issuance of excise tax-backed bonds. *(Id.)* Police and Fire Deferred Maintenance Project, Combined Aquatic and Recreation Center, Drainage and Main Street Improvements, and several other necessary projects of this type are listed. *(Id.)*

Exhibit 10 admitted into evidence is a memo from Town Engineer Larry Halberstadt to the Mayor and Council regarding the Town's Pavement Management Program [ROA17], p. 118-125. The purpose of this presentation was to update the Council on the Town's Pavement Management Program and the Airport Road Rehabilitation Project. Engineer Halberstadt described the poor conditions of many roads in Payson that do not have adequate pavement structure and are past their useful life expectancy. The cost to perform roadway work has increased dramatically over the past four years. There was discussion on the need to repair Airport Road. (*Id.)*

Exhibit 11 admitted into evidence is a PowerPoint presentation that was presented to the Town Council on September 25, 2024 [ROA17], p. 126-152. The

Airport Road project and Town's pavement management program, challenges and costs is described in this admitted exhibit. The PowerPoint describes Town roadway project challenges, photos of pavement deterioration, Airport Road project constraints, Airport Road estimated costs, management, and maintenance, 2022 pavement report, pavement management, and budget information. *(Id.)*

Exhibit 12 admitted into evidence is a chart showing that Arizona City, Town, and County Revenue Bond issuances since January 2, 2021 [ROA17], p. 153-154. The chart shows that emergency clauses were included in 62 percent of such bond resolutions.

G. September 24, 2024 – Trial/Evidentiary Hearing on Preliminary Injunction.

The trial/Evidentiary Hearing was held on September 24, 2024. The trial transcript is Docket No. 4. The Town argued that the Court should not preliminarily or permanently enjoin the Town moving forward pursuant Resolution 3409. In determining whether to grant a preliminary injunction pursuant to Rule 65, the Court analyzes the following four factors: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury not remediable by damages; (3) a balance of hardships in that party's favor; and (4) a public policy favoring the requested relief. *Shoen v. Shoen,* 167 Ariz. 58, 804 P.2d 787 (App. 1991). (Note: The four *Shoen v. Shoen* factors were not accurately presented by Rose in her Application at page 4,

lines 24-27.) All four factors weigh in favor of the Payson Town Council's passage of Resolution 3409.

The Town argued that it was likely to succeed on the merits because the issue is moot, Resolution 3409 is administrative, and if deemed legislative, the Payson Town Council properly declared an emergency pursuant to Section 11 of Resolution 3409. The proceeds from this bond are necessary for numerous essential public projects that involve public safety, health, and welfare.

The threat and harm to the Town far outweighs this individual Rose's desire to file a Referendum that would delay issuance of these bonds until after the next consolidated election date well into 2025. There is a real threat of irreparable injury to the Town that will not be remediated by damages. As an example shown by the evidence, the Town was already placed in a position that it likely could not get insurance on the bonds, which would cost the town approximately $800,000 in lost proceeds. The evidence showed that if rates increase by just 0.1%, this can reduce the expected proceeds by approximately $640,000.

It was a matter of common knowledge that last year's presidential election set November 5, 2024, presented uncertainty and volatility to financial markets. The Town needed to lock in favorable rates that would ensure the requisite level of proceeds necessary for Town public projects. The proceeds will necessarily correlate to the revenues expected from the sales tax previously enacted and shared proceeds

received from the State. The Town should be able to get the highest level of proceeds based on its debt service limit that it has placed in its budget. Since Resolution 3409 involves the public good, safety, and welfare, the balance of hardships, and public policy clearly favored denial of the Restraining Order and Preliminary Injunction. Again, Payson stated this would be more fully developed through admissible evidence at the hearing, if necessary. The admissible evidence would be pursuant to witness testimony, and documents that are matters of public record. Rose failed to establish her very heavy burden under Rule 65.

Payson argued that Rule 65, Ariz.R.Civ.P. requires the Court to hold a hearing before it can grant a Temporary Restraining Order or a Preliminary Injunction. Hearing means the opportunity to present evidence. *McCarthy Western Constructors, Inc. v. Phoenix Resort Corp.,* 821 Ariz. 520, 827 P.2d 181(1991). Payson stated it would be presenting three witnesses to testify at the Order to Show Cause Hearing. These witnesses included Payson Town Manager, Troy Smith, Payson Town Clerk, Tracie Bailey, and Payson Council Member Joel Mona. In addition, the Town offered the following exhibits into evidence at the hearing:

Exhibit 1 – Video Table of Contents for August 21, 2024 Special Payson Council Meeting.

Exhibit 2 – August 22, 2024 Receipt for Referendum Packet signed by Deborah Rose.

Exhibit 3 – August 22, 2024 email exchange between Deborah Rose and Payson Town Clerk.

Exhibit 4 – August 23, 2024 email exchange between Deborah Rose and Payson Town Clerk.

Exhibit 5 – Documents related to April 12, 2023 Payson Town Council Meeting / Ordinance No. 953 and Ordinance No. 954.

Exhibit 6 – Documents related to December 13, 2023 Payson Town Council Meeting /Ordinance No. 963.

Exhibit 7 – Documents related to February 6, 2024 Payson Town Council Special Meeting/Ordinance No, 964.

Exhibit 8 – Documents related to August 21, 2024 Payson Town Council Special Meeting/Resolution No. 3409.

Exhibit 9 – September 27, 2023 Staff Report to Payson Town Council from Mr. B.J. Bollier, Committee Chair, and Mr. Forrest Waggoner, Vice-Chair of the Capital Improvement Projects Citizen Advisory Committee.

Exhibit 10 – September 25, 2024 Staff Report to Payson Town Council from Town Engineer Larry Halberstadt regarding Pavement Preservation Program Update/Agenda for September 25, 2024 Payson Town Council Meeting.

Exhibit 11 – PowerPoint regarding Airport Road Project and Town's Pavement Management Program, Challenges and Costs for Presentation at September 25, 2024 Payson Town Council Meeting.

Exhibit 12 – Table Arizona City, Town, and County Revenue Bond Issuance since January 2, 2021/Use of an Emergency Clause [ROA17].

Rose filed a List of Witnesses and Exhibits. She listed herself as her only witness and her exhibits marked 1 through 9. These exhibits were admitted into evidence.

Based on the Court's ruling, it was unnecessary to present additional live testimony from the three Payson witnesses who were present in Court or Rose. Payson's Exhibits 1 through 12 were admitted into evidence. The trial record includes Payson's Verified Response, Exhibits 1 through 12, and the self-authenticated evidence contained on Payson's public website pursuant to Rule 902(5).

On September 24, 2024, the trial/evidentiary hearing on Rose's Application for Preliminary Injunction was held before Judge Bryan Chambers. The Court reached its verdict in favor of Payson and provided detailed reasons in open Court. *See* Transcript, Docket No. 4. p. 64, l. 19 to p. 72, l. 11. The Court found that it is the job of the Judge to call balls and strikes, which means that a Judge acts like an umpire or referee. Everyone is aware that these types of decisions, taxation, bonds,

are decisions that are generally left by and large to the legislative body. If we don't like what the legislative body does, there's always another election. But it is the Judge's job to call the balls and strikes.

The job of the Judge is to determine whether or not the rules of the game allow them to do what they did. Applying the standards in *Arizona School Board Association v. State,* 252 Ariz. 19, 501 P.3d 731 (2022), the Court found there is nothing that the requires the court to or would prevent the Court from giving the Town Council deference in the determination as to whether or not this was an emergency. It is not for the Court to decide whether this is a good idea or not. The *Arizona School Board* case does not require the Court to not give deference. The Court decides whether or not it was legal for the Town Council to do what it did. A.R.S. § 19-142 requires a super majority in order to approve this measure and that's exactly what they had. It was a 6 to 1 vote and this Court finds that the Court should give deference to the vote of the Town Council "having considered the exhibits and attachments that were made to the pleadings in this case." p. 68, l. 7 That draws the conclusion that the Court should deny the Request for Preliminary Injunction because the Plaintiff does not have a strong likelihood of success on the merits p. 68, l. 9-12.

The Court went on to discuss and make findings on the mootness issue. The requirements for a referendum to be filed within 30 days are strict p. 69, l. 3. It is

clear that the Plaintiff here within the 30 days is required to file a Petition for Referendum, had legal counsel, and was capable of filing this action here in Superior Court. If someone requests government to answer something and they say we cannot give legal advice, it generally is an invitation to try to seek legal advice and that appears to be what Rose did at least to initiating this lawsuit. After this lawsuit was initiated, there was still time within the 30 days to file a Petition for Referendum and "the evidence shows that there is no attempt to do that."

The Court should defer to the Town on the issue of the emergency clause and even if it's wrong this would have been a moot issue as there was no Petition or Referendum that was even attempted p. 69, l. 9 to p. 70, l. 1. Referendums are things that by statutes have to be strictly complied with. Rose has not done so. On this basis, there is no likelihood of success on the merits because of the fact there was no Petition for Referendum even attempted to be filed within the 30 days, Docket No. 4. p. 70, l. 2-9.

The Court then balanced the remaining factors to consider under Rule 65 which became academic when Rose stipulated that this hearing and the Court's findings were to be consolidated with the trial. The Court's findings set forth on Docket No. 4, p. 64, l. 19 to p. 72, l. 11, stand as the Court's Findings of Fact in Support of its Verdict for Payson. Ultimately, the Court gave the greatest weight to the likelihood of success on the merits.

H. October 23, 2024 Council Repeal of Resolution 3409

On October 23, 2024, the Payson Council issued Resolution 3423 repealing Resolution 3409. Evidence of the Meeting and Council Action is contained on the Payson website. See video, agenda, and minutes on the Payson website, admissible as evidence on appeal pursuant to Rule 902(5). Resolution 3409 was repealed due to the risk caused by the appeal in this case, the pending appeal in the *Transparent Payson* v. *Payson* and comments by persons made to the Town Manager that were reportable to the bond underwriter. Without such litigation and comments, Payson's projected bond rating would be AA. This rating could be further increased with insurance. But due to the risk caused by these three items in the eyes of the bond underwriter and potential investors, Payson was unable to issue municipal bonds that would obtain the desired revenue. Thus, the funding mechanism of selling municipal bonds, backed by the Payson TPT, and the State Shared Revenue, for these needed and essential priority public projects became economically non-viable. As such, the Payson Council voted 6 – 0 to repeal Resolution 3409.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether this appeal is moot and should be summarily dismissed because the Town of Payson repealed Resolution 3409 on October 23, 2024.

B. Whether the trial court's verdict in favor of Payson denying Rose's Complaint to Enjoin Resolution 3409 and Final Judgment should be affirmed.

1) Whether Rose lacks standing as an individual person to file an Application for a Referendum pursuant to A.R.S. § 19-111(A).
2) Whether Rose's failure to file a Petition for Referendum on or before September 20, 2024 pursuant to A.R.S. § 19-142 rendered Rose's Complaint moot.
3) Whether Resolution 3409 is an administrative act and not referable to the voters.
4) Whether the Town of Payson's inclusion of an emergency clause is an exercise of legislative discretion not reviewable by the judiciary.

IV. STANDARD OF REVIEW

Issue A on the mootness of this appeal is a decision for this Court. *Contempo-Tempe Mobil Home Owners Ass'n. v. Steinert,* 144 Ariz. 227, 696 P.2d 1376 (App. 1985). Issue B-1 is a question of law that is reviewed *de novo.* Issues B-2 and B-4 involve findings of fact and are reviewed under the clearly erroneous standard. *Farmers Ins. Co. of Arizona v. Young,* 195 Ariz. 22, 985 P.2d 507 (App. 1998). The trial court considered and weighed the submitted evidence and proffers of witness

testimony. To the extent that the Court identifies ultimate legal issues within the trial court's factual finding, they are reviewed *de novo.* The trial court did not reach issue B-3 which is a question of fact. In the event of a remand, there would be a new trial on the merits regarding all fact issues contained within issues B-2, B-3, and B-4 within legal guidelines presumably to be set forth by this Court.

V. LEGAL ARGUMENT

A. October 23, 2024 Repeal of Resolution 3409.

Mootness is a doctrine of judicial restraint that courts can apply when "an event occurs that ends the underlying controversy and transforms the litigation into 'an abstract question which does not arise upon existing facts or rights.'" *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603, 382 P.3d 812, 818 (Ct. App. 2016). On Appeal, the event that makes this now moot is repeal of Resolution 3409. There is no longer an active Resolution to enjoin pursuant to Rose's Complaint. *Contempo-Tempe Mobil Home Owners Ass'n. v. Steinert, supra.*

Rose is wrong in trying to maintain this appeal. Like her Complaint which was deemed moot by the trial court for her failure to comply with the 30-day requirement under A.R.S. § 19-142(b), Resolution 3409 has been repealed since entry of the Judgment. Rose is not entitled to any substantive relief on appeal. This Court is not empowered to decide moot or abstract questions. Appellate Courts do not give opinions on moot questions. Rose's Complaint sought injunctive relief.

Council Resolutions are unique and the culmination of significant analysis, study, and community involvement. The supporting background for a Resolution is fact-intensive. This Court should not engage in an abstract legal exercise of a moot question. Rose's appeal is moot and should be summarily dismissed.

B. The Trial Court's Judgment for Payson Should be Affirmed

1. Overview

On August 21, 2024, the Payson Town Council passed Resolution 3409 ROA17, Exhibit 8. The Resolution passed by a vote of 6 to 1. The Resolution provides that the Mayor and the Payson Town Council (the "Council") have determined to finance the construction of public safety facilities, streets improvements, paths and trails improvements, drainage improvements, parks and recreation facilities, an events center, an aquatic and recreation center, and additional related municipal facilities and capital improvement projects. The Council desires to provide for the sale and execution and delivery of pledged revenue obligations as provided by this Resolution. The obligations will be secured with amounts received pursuant to the Purchase Agreement in which the Town will pledge excise tax revenues and State-shared revenues.

In Section 11 of Resolution 3409, the Council declared an emergency as the provisions of this Resolution are necessary for the preservation of the public peace, health and safety to be able to immediately sell the obligations to secure the best

available economic terms so that the Town has sufficient funding for the necessary public projects.

Notwithstanding the emergency clause, pursuant to A.R.S. § 19-142, a Referendum Petition for Resolution 3409 enacted on August 21, 2024, was mandatorily required to be filed with the Town Clerk within thirty (30) days after its passage. Thirty days from August 21 is September 21. The last business day within this thirty-day period was Friday, September 20, 2024. Rose failed to comply with this mandatory requirement. In addition, the Town has a likelihood of prevailing on the merits because Resolution 3409 is an administrative act, not referable to the voters. Likewise, enactment of Section 11 in declaring an emergency also renders Resolution 3409 not referable to the voters.

Rose filed an Application for a Temporary Restraining Order and Preliminary Injunction that alleges that the emergency is a "sham." This is an attorney argument without evidentiary basis. Rose alleged that if the Court finds there is no emergency, then the entire Resolution is null and void. This is incorrect. Section 10 of Resolution 3409 has a severability clause that refutes Rose's argument. Rose's Application for a Temporary Restraining Order and Preliminary Injunction was properly denied by the trial court.

2. Rose Lacks Standing

Rose lacks standing as an individual person to file an Application for Referendum. A.R.S. § 19-111(A) requires that a statement of organization must be filed as part of the application process before an official Referendum Serial Number can be issued. The Secretary of State "shall not accept an application for Referendum without an accompanying statement of organization as prescribed by this subsection." A.R.S. § 19-111. A.R.S. § 19-141(A) provides that the required duties of the Secretary of State shall be performed by the Town Clerk. Based on this, only a political action committee ("PAC") may apply for and obtain a referendum serial number. *See Israel v. Town of Cave Creek,* 196 Ariz. 150, 155, 993 P.2d 1114, 1119, n. 7 (App. 1999) (Failure to make a required organizational listing does not, strictly speaking, invalidate an application under A.R.S. § 19–111(A). Instead, pursuant to A.R.S. § 19–114(B), it invalidates any signatures obtained on referendum petitions circulated pursuant to an insufficient application. The effect, however, is the same, for it renders an insufficient application a futility. As a result, Rose failed to form a PAC and she does not have standing in this action.

3. Complaint for Injunctive Relief is Moot

Rose's Complaint is moot because: (1) Rose failed to complete and submit the Referendum Application; (2) Rose failed to obtain a Serial Number; and (3) Rose failed to turn in the requisite signatures required by A.R.S. § 19-242(A).

On August 21, 2024, the Payson Town Council passed Resolution 3409 by a 6 to 1 vote that included the vote of the Mayor. A.R.S. § 19-142 provides: "The Petition **shall** be filed with the City or Town Clerk within thirty (30) days after the passage of the Ordinance, Resolution, or Franchise." The thirtieth day from August 21, 2024 was September 21, 2024. The last business day within the 30-day period was Friday, September 20, 2024. Rose needed to file a Petition for Referendum with the necessary signatures by that date, and it is now forever barred. The language of the statute is mandatory by the use of the word "shall". There is no exception.

"Referendum proponents must file their completed petitions within 30 days after enactment of the county ordinance to be referred." *Perini Land & Dev. Co.*, 170 Ariz. at 384 n. 3, 825 P.2d at 5 n. 3. But, Arizona law does not absolutely guarantee referendum proponents a full thirty days to circulate and file a petition. Rather, the law requires the petition to be filed "*within* thirty days after passage of the ordinance." § 19–142(A) (emphasis supplied). *Robson Ranch Mountains, L.L.C. v. Pinal County*, 203 Ariz. 120, 129, 51 P.3d 342, 351 (2002). That thirty-day period began on August 21, 2024.

The well-established principle in Arizona is that referendum proponents must "comply strictly with applicable constitutional and statutory provisions" because "the referendum is an 'extraordinary' power, *Direct Sellers Ass'n v. McBrayer*, 109

Ariz. 3, 5, 503 P.2d 951, 953 (1972)], that permits a 'minority to hold up the effective date of legislation which may well represent the wishes of the majority.' " *Western Devcor, Inc. v. City of Scottsdale,* 168 Ariz. 426, 429, 814 P.2d 767, 770 (1991), *quoting Cottonwood Dev.,* 134 Ariz. at 49, 653 P.2d at 697. *See also Lawrence v. Jones,* 199 Ariz. 446, ¶¶ 7–8, 18 P.3d 1245, ¶¶ 7–8 (App.2001) (although "constitutional right to referendum is to be broadly construed," referendum petition must strictly comply with all applicable statutory requirements); *Simpson v. Committee Against Unconstitutional Takings, L.L.C.*, 193 Ariz. 391, ¶ 9, 972 P.2d 1027, ¶ 9 (App.1998).

Moreover, "The time for filing a referendum petition is not subject to equitable tolling." *De Szendeffy v. Threadgill*, 178 Ariz. 464, 466, 874 P.2d 1021, 1023 (App.1994). Rather, "the referendum power must be exercised 'within a limited time or the legislation goes into effect.' " *Id., quoting Direct Sellers Ass'n,* 109 Ariz. at 5, 503 P.2d at 953. Rose has failed to submit any valid signature petitions to refer Resolution 3409 within the mandatory 30-day referendum period. As a result, even without the challenged emergency clause, Resolution 3409 is now in effect.

In Paragraphs 39 and 40 of the Complaint, Rose alleges that Resolution 3409 is void in its entirety because the emergency clause concerns essential details of the proposed bond transaction. This is false. The emergency clause at best concerns only

a 30-day period which passed. The substance of the Resolution is contained independently in Sections 1 through 9 and the Recitals. Rose cites *Randolph v. Groscost,* 195 Ariz. 423, 427 para. 14 and *City of Tempe v. Outdoor Sys., Inc.,* 201 Ariz. 106, 110, para. 12 in support of this erroneous argument. These cases support Payson's position. Randolph and City of Tempe both hold that if the remaining valid portion is independent of the invalid parts and can stand alone, the courts will enforce it. In both cases, the court upheld the validity of independent parts. Clearly here Sections 1 through 9 are independent of the emergency clause in section 11.

Because Resolution 3409 contains a severability clause, Section 10, even if *arguendo* the Court's findings that the Town Council's adoption of the emergency clause was somehow improper, the remainder of the Resolution is independent of Section 11 and has now taken effect.

It is elemental in statutory construction that where an invalid portion of an ordinance is severable from the remainder and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected and the remainder will stand as valid and operative. In other words, if invalid language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance is permitted to stand. *CJS Municorp §347. See also Parrack v. City of Phoenix, 84 Ariz. 382, 329 P.2d 1103 (1958).*

Here, Resolution 3409 is a perfectly common form of authorizing the sale of excise tax bonds. Even if the court severed the emergency clause, the remainder of Resolution 3409 is a complete enactment of the Town Council's directive to proceed with the sale of the bonds.

Generally, the partial invalidity of an ordinance does not necessarily make the remaining provisions of the ordinance ineffective. Municipal ordinances may be valid in some of their provisions and invalid as to others. If a city ordinance contains valid and invalid provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid; in other words, the valid part may be carried into effect if what remains after the invalid part is eliminated contains the essential elements of a complete ordinance. If invalid language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance is permitted to stand. *See CJS Municorp §347*.

Mootness is a doctrine of judicial restraint that courts can apply when "an event occurs that ends the underlying controversy and transforms the litigation into 'an abstract question which does not arise upon existing facts or rights.'" *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603, 382 P.3d 812, 818 (Ct. App. 2016). In this case, the event at the trial court level that makes this dispute moot is the end of the referendum deadline. Regardless of the emergency clause's validity, the Resolution became incontrovertibly effective.

Put another way, even if the Court later invalidated the emergency provision, this would not render the resolution void. Rather, it would merely make the resolution inoperative until the thirty-day referendum period had elapsed, which happened in this case. While the issue of mootness in the referendum context has not been directly addressed by Arizona courts, other jurisdictions have addressed the issue. Notably, the Supreme Court of Washington has found emergency clause challenges moot due to the expiration of that state's referendum filing deadline. *See O'Day v. King Cnty.*, 109 Wash. 2d 796, 816, 749 P.2d 142, 153 (1988). The Court should apply similar reasoning and judicial restraint in this case and find the present dispute moot.

In paragraph 27 of her Complaint, Rose states she is opposed to Resolution 3409 "and wishes to organize a referendum to overturn the measure." In paragraph 28 of her Complaint, Rose alleges that she is a qualified elector who "could" lawfully organize, support, and vote in a referendum to overturn Resolution 3409." This means that Rose did not file a Petition for Referendum that fully complied with all requirements. A Petition for a Resolution is not a "wish" for an act to be done in the future. Referendums are time-sensitive, and Rose's lawsuit became moot as of September 20, 2024, at 5:00 p.m.

4. Only Legislative Acts Are Subject To Referendum

Resolution 3409 is an administrative act and not referable to the voters. If the decisions that are the subject of the Resolution in question were directly referred to the voters using the referendum process, such a referendum would be unlawful. The decision at issue was an administrative decision to be considered and acted upon by the Payson Town Council.

The Arizona Supreme Court in *Wennerstrom v. City of Mesa*, 169 Ariz. 485 (1991) opined that municipal corporations act in several capacities: legislative, executive, administrative, and quasi-judicial. Voters may challenge only legislative actions via referendum because "referenda on executive and administrative actions would hamper the efficient administration of local governments." Under Arizona law, "an act that declares a public purpose and provides for the ways and means of its accomplishment is legislative." *Wennerstrom*, 169 Ariz. at 489, 821 P.2d at 150; *Pioneer Trust Co. of Ariz. v. Pima County*, 168 Ariz. 61, 65, 811 P.2d 22, 26 (1991). Legislative acts are "distinguished" from non-referable administrative acts "which merely carr[y] out the policy or purpose already declared by the legislative body." *Wennerstrom*, 169 Ariz. at 489, 821 P.2d at 150 (emphasis omitted) (quoting 5 Eugene McQuillin, *The Law of Municipal Corporations* § 16:53 (3d ed. 1989)). "Under the *Wennerstrom* analysis, the court must consider whether the action is (1) permanent or temporary, (2) of general or specific (limited) application, and (3)

a matter of policy creation or a form of policy implementation." *Redelsperger*, 207 Ariz. at 433, ¶ 15, 87 P.3d at 846 (citing *Wennerstrom*, 169 Ariz. at 489, 821 P.2d at 150).

Prior to the approval of Resolution 3409 the Payson Town Council adopted a series of ordinances (legislative acts) as a precursor to approval of the sale of the excise tax bonds.

On April 12, 2023, the Town Council approved Ordinance Nos. 953 and 954 repealing Town Code Sections 35.04 and 157.01, which if such Sections had remained in effect, that would have negatively affected the sale of bonds and the construction of the projects to be funded by the bonds.[1] ROA17, Exhibit 5.

Subsequent to the repeal of Town Code Sections 35.04 and 157.01, on December 13, 2023, the Payson Town Council adopted Ordinance No. 963 repealing the "sunset clause" of a .88% Transaction Privilege tax ("TPT") in order for the Town to obligate fully through the anticipated term of future excise tax bonds all of its TPT to payment of the debt service. ROA17, Exhibit 6.

[1] Payson Town Code Section 157.01 purported to require the Town Council to refer to the voters any lease, license or easement with a term of three or more years and Section and 35.04 purported to limit certain expenditures of taxpayer funds. Specifically, § 35.04(A) purported to require voter approval of 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, and § 35.04 (B) purported to require a "direct vote" to approve any expenditure of $1 million or more.

Then, on February 6, 2024, the Payson Town Council adopted Ordinance No. 964 increasing the Town's Transaction Privilege Tax by an additional one percent (1.0%) to fund the payment of the debt service once bonds were sold and to fund the costs of maintenance and operations of the projects constricted by the bond funding. ROA17, Exhibit 7.

All of these ordinances established policy or a permanent rule or declared a public purpose that provides the ways and means of its accomplishment. In other words, they were legislative acts.

On the other hand, the subject matter of Resolution 3409, approval of a non-general obligation bond measure is not an act that establishes policy, enact a law or permanent rule of government or declare a public purpose that provides the ways and means of its accomplishment. The subject matter of Resolution 3409 is temporary (the bond sale approval sets a not more than 25-year term, and the bonds can be fully refunded after ten (10) years from the sale of same) and its special character is administrative. Resolution 3409 carries out the policy or purpose already declared by the Town Council by way of Ordinance Nos. 953, 954, 963 and 964. Resolution 3409 implements the Town Council's policy and is merely an administrative manner or method in which to achieve the goals and objectives of the Council. As a result, neither Rose nor the Payson Town Council have legal authority to refer the matters that are the subject of Resolution 3409 to the voters. ROA17, Exhibit 8.

5. Legislative - Emergency Clause Properly Invoked

a. *The Arizona Constitution Exempts Emergency Measures and Support and Maintenance Measures from the Scope of Referendum*.

If Resolution 3409 is deemed legislative, it is still not referable to the voters. A Town Council's resolution adopted on an emergency basis is not subject to a referendum if it falls within specific exceptions outlined in constitutional and statutory provisions. These exceptions include measures needed for the immediate preservation of public peace, health, or safety ("Emergency Measures"), or for the support and maintenance of state government departments and institutions ("Support and Maintenance Measures"). Arizona Constitution Article IV, Part 1, Section 1(3) and Section 1(8); A.R.S. § 19-142 (referendum against municipal actions).

b. *Emergency Measures are Necessary for the Immediate Preservation of Public Peace, Health, and Safety*.

First, as to Emergency Measures, the Arizona Constitution provides a framework under which emergency measures that are necessary for the immediate preservation of public peace, health, or safety are exempt from referendum. The specific requirements for a municipal resolution to qualify as an emergency measure include a detailed explanation of the necessity for its immediate operation, approval by a three-fourths majority, and the Mayor's signature. A.R.S. § 19-142. A determination by the legislative body of a city that an emergency exists, is an exercise of legislative discretion not reviewable by judiciary, and therefore where

the City Council of the City of Phoenix determined that an emergency with respect to parking facilities existed, the Arizona Supreme Court was without power to review its decision. *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382 (1951).

The word "emergency", as used in statutes, includes perplexing contingency or complication of circumstances, pressing necessity, or relatively permanent insufficiency of service or facilities, resulting in social distress. *Garvey v. Trew* (1946) 64 Ariz. 342, 170 P.2d 845, *certiorari denied* 67 S.Ct. 297, 329 U.S. 784, 91 L.Ed. 673. As was shown by the evidence at trial, the Town has an insufficiency of services or facilities that are creating distress for the residents of the Town, including streets and roads in need of significant repair, public safety buildings and stations that are outdated and undersized, and the lack of a Town pool to provide swimming lessons to children in order to prevent drownings (which is the number one killer of children under the age of 4 in the U.S.) and fitness opportunities for senior citizens who need low impact exercises to stay healthy.

The Legislature knows how to expressly exempt matters from the scope of emergency powers -- Arizona's statutory framework explicitly states that certain plans and amendments shall not be enacted as emergency measures and are subject to referendum (A.R.S. § 9-461.06) ("Except for general plans that are required to be submitted to the voters for ratification pursuant to subsection M of this section,

the adoption or readoption of a general plan, and any amendment to a general plan, shall not be enacted as an emergency measure and is subject to referendum as provided by article IV, part 1, section 1, subsection (8), Constitution of Arizona, and title 19, chapter 1, article 4."); A.R.S. § 11-805 ("The adoption or readoption of the comprehensive plan, and any major amendment to the comprehensive plan, shall not be enacted as an emergency measure and is subject to referendum as provided by article IV, part 1, section 1, subsection (8), Constitution of Arizona, and title 19, chapter 1, article 4."). In both municipal and county planning contexts the State Legislature has expressly carved out certain actions from the scope of emergency powers where it deemed appropriate. Absent express limitation of the emergency powers by the State Legislature, the authority to declare an emergency and act to immediately implement measures to protect public health and safety is left within the sole discretion of the legislative body (here, the Payson Town Council).

c. Support and Maintenance Measures are Necessary to Protect Government Funding.

Second, as to Support and Maintenance Measures, the Arizona Constitution explicitly recognizes that laws for support and maintenance of departments of the state government and state institutions are not subject to referendum powers. *Arizona Free Enterprise Club v. Hobbs,* 253 Ariz. 478 (2022) (tax revenue measures exempt); (*Garvey v. Trew,* 64 Ariz. 342 (1946). In *Wade v. Greenlee County,* 173 Ariz. 462, 463 (App. 1992), the referability of a sales tax

ordinance adopted by Greenlee County was considered. In that case, the Arizona Court of Appeals concluded that the constitutional exception to the referendum power applies to "support measures," which includes sales tax ordinances. The court reasoned that to permit referendum of sales tax measures "would allow a small percentage of the electorate . . . effectively to prevent the operation of government."

This applies with equal force to the Town of Payson. Under A.R.S. § 19-141(D), "procedures with respect to municipal and county legislation shall be as nearly practicable the same as the procedure relating to initiative and referendum provided for the state at large . . . ." In *Sedona Private Prop Owners Ass'n v. City of Sedona,* 192 Ariz. 126, 127, ¶ 8, (App. 1998), the Arizona Court of Appeals relied on this language to apply then Article 4, Part 1, Section 1(6) of the Constitution prohibiting the legislature from repealing a measure passed by a majority of registered voters to cities and towns. The court reasoned that the "closest thing to a legislature at the city level is the city council . . . ." *Sedona*, 192 Ariz. at 127, ¶ 8. Section 1(3) and Section 1(8) must be read together, allowing both Emergency Measures and Support and Maintenance Measures to be protected from referendum to ensure the immediate operation of laws necessary to preserve public peace, health or safety and protect the funding of government.

When construing a statute, courts will attempt to examine the entire statute to achieve a consistent interpretation, *State v. Gaynor-Fonte,* 211 Ariz. 516, 518, ¶ 13,

(App. 2005), and if phrases relate to the same subject and can be read as in *pari materia*, they should be construed together as if they constituted a single law. *Bonito Partners, L.L.C. v. City of Flagstaff*, 229 Ariz. 75, 83, ¶ 30 (App. 2012). Notably, in *Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576 (2005), the Arizona Court of Appeals, one of the reasons the court found a utility rate ordinance to be an administrative act is that cities issue bonds for which sales taxes are levied to repay the bonds. This is part of a broad regulatory scheme that protects bondholders. Ultimately, cities and towns require the ability to adopt measures as emergencies or for the support or maintenance of the government and not have their hands tied through a small percentage of the electorate – any contrary ruling would compromise the financial operation of government and ability to fund bonds.

In short, resolutions adopted on an emergency basis or for the support and maintenance of government are not subject to referendum.

d. The Town of Payson's Resolution was Not Subject to Referendum.

In the Town of Payson's context, there are seven members of the Town Council. Therefore, the Council approval required to adopt a resolution on an emergency basis is: 3/4 of 7 = 5.25. Rounding up, 6 out 7 Councilmembers must approve. The Town had the requisite votes to put the resolution into immediate effect. Additionally, the resolution is clear regarding the need to adopt on an urgent basis to protect public health and safety and funding of the government.

Rose cites *Israel v. Town of Cave Creek,* 196 Ariz. 150 (App. Div. 1, 1999), which is misplaced. *Israel* involved annexation which is a power provided by the specific statutes A.R.S. § 9-471(C) and (D). These statutes make annexation ordinances final only after the expiration of 30 days. These specific annexation statutes supersede the general enactment statute A.R.S. § 19-142(B). *Israel* is limited to annexation issues and is not applicable here. Moreover, this highlights that courts do not have the authority to analyze and overrule a Town Council's declaration of an emergency.

VI. RESPONSE TO PLAINTIFF'S OPENING BRIEF

A. Plaintiff's Statement of Facts

The obvious deficiency in Rose's Statement of Facts is that it ignores the evidentiary record from the trial that supports the trial court's findings of fact. The failure to discuss the detailed history behind these necessary public projects shows that this appeal is largely based on the subjective opinion of one person, Rose. Rose's Statement of Facts ignores the lengthy history where there was a Citizens' Committee appointed by the Town upon application of citizens who spent tremendous time at public meetings and going into the field to obtain as much public input as was available. Resolution 3409 was the culmination of four significant Council votes, the first three involving enactment of Ordinances and the fourth being

an administrative resolution. Rose misses that it is the Council, not one person, who has the authority and responsibility to declare an emergency.

The determination of the emergency by the elected Council is well established in this factual record. A town council decides this with active involvement from its citizens identifying community problems that need correction, and the means how to generate sufficient funds to pay for it. These are complicated activities with multiple layers of factual intensity and balancing priorities. It is the Council who is best equipped to assess and balance the multi-layered, multi-factorial issues, problems, and projects needed by the community under the totality of circumstances. In our separation of powers system of government, it is the Council who carries multiple responsibilities, including legislative, administrative, executive, and quasi-judicial at the local level. It was for this Council to determine the existence of an emergency and for the Court to show deference to the 6 to 1 vote.

Rose stipulated that the evidentiary record from the Evidentiary Hearing would become the trial record on appeal. This Court has before it a strong evidentiary record and is reviewing a bench verdict in favor of Payson. The facts are strong that the Council identified the needs for capital improvements and how to fund them. The Council declared that an emergency was present on August 21, 2024 for the Town to be able to sell bonds at a favorable enough interest rate to generate the revenue needed to pay for these priority projects. Time was of the essence and the

Town needed to lock in favorable interest rates thereby removing the uncertainty of potential market volatility. The emergency was properly declared in the context of the totality of the specific circumstances. The deterioration of safety infrastructures for police and fire, and Town roads in disrepair would continue. These are not the type of public items that can go on without action.

The Council needed to address an unpredictable bond market with an upcoming federal election. The totality of the circumstances presented on August 21, 2024 supports the decision of the Council. The Council received input from numerous sources and was on solid ground to make decisions. It is the Council that made its administrative (or legislative) decision to declare the emergency. This Court should provide proper deference to the actions of the Town Council, whether deemed administrative or legislative.

Rose claims that she proffered her testimony of an alleged conversation with Town Clerk Tracy Bailey where Bailey told her that it would be pointless to file a Referendum Petition because of the emergency clause Docket No. 4, p. 40, l. 3-14. This proffer was rejected by the trial court in its findings of fact and not supported by the admitted evidence. It was Rose's obligation to present evidence and she chose to stipulate to the trial record. The trial record supports that Rose failed to file a Petition for Referendum within 30 days as required by A.R.S. § 19-142.

B. Repeal of Resolution 3409

In September and October of 2024, the underwriters tried but were unsuccessful in being able to purchase obligations that would generate up to $70 million in bond revenue based on the Town's ability to service such debt. This was extensively studied and evaluated. Once the realities of poor marketability caused by the impact of this appeal, the Transparent Payson appeal, and statements by persons reportable to the underwriters set in, the Town exercised its discretion and repealed Resolution 3409. There is no longer a Resolution to enjoin before this Court. Rose's argument for the Court to engage in an academic exercise that is not tethered to an active Resolution is without merit. If this Court were to find reversible error, it would need to remand this case back to the trial court for a new trial that seeks to enjoin a repealed Resolution. Clearly, this Court should dismiss this appeal based on mootness.

C. Rose's Lawsuit is moot.

The trial court very clearly found as a matter of fact that Rose could have and should have filed a Petition for Referendum within 30 days or by September 21, 2024. Rose's failure to do so meant that Resolution 3409 was effective regardless of the applicability of the emergency clause. Rose claims that the 30-day limit does not apply to her because a Referendum Petition would be futile. There is no authority that inclusion of an alleged improper emergency clause relieves a would-be

petitioner from strict compliance with the 30-day rule. The trial court's findings of fact are based on the strong evidentiary record concluding that Rose had opportunity to timely file a Referendum Petition. The trial court's finding of fact on mootness was not clearly erroneous and should be affirmed on appeal.

D. Emergency Clause

Instead of discussing the strong evidentiary record and history behind Resolution 3409, and everything that went into the lead up to that Resolution 3409, Rose cites old cases from other states such as the State of Washington, Oklahoma and Texas. These cases are off-point and non-controlling, from out of state jurisdictions. A.R.S. § 19-242 provides the Arizona definition for use of an emergency clause. The Arizona Constitution also provides for use of an emergency clause for support and maintenance of government institutions. Rose's attempt to redefine the term "emergency" based on dictionary definitions and old out-of-state cases is misplaced. *See* Section B-5 a. through d. above.

In Arizona, it is for town councils to decide whether a particular resolution should have an emergency clause. This is where the trial court's balls and strikes analysis applies. The trial court made express findings of fact that the Council's Resolution 3409 complied in all respects with A.R.S. § 19-242. It is the discretion of the Town Council whether acting administratively or legislatively to declare an emergency that should not be disturbed by the judiciary.

The strong record supports that, no matter how long the trial, a trial court would never be equipped to engage in the type of legislative and administrative activities that are established in this record. The Citizen's Committee, multiple meetings, multiple Town Council meetings, and votes all led to Resolution 3409. An in-depth study and analysis was conducted identifying priority projects and necessary maintenance, and the different means to pay for them over various short and long-term periods of time. It is not the Court's role to then, in a short trial, try to substitute its judgment for that of the Council and supersede what goes into town council resolutions such as what this record establishes.

Rose states, without authority, on p. 24 that broad macro-economic trends and upcoming elections do not constitute an emergency in her personal, self-serving definition. This truly ignores what is established in Exhibits 5 through 11. The emergency was determined by the Town Council based on the history of the inability to fund needed repairs and improvement projects. Those repairs and improvements are necessary for the safety, peace, and welfare of the community. And it was at this time when the funding mechanism was agreed upon that the Town declared an emergency to be able to lock in appropriate interest rates that would generate the revenue needed for these priority projects. Low interest rates would maximize revenue based on the level of debt service supported by the TPT and State-Shared Revenue. Unfortunately, that did not turn out to be the case, due to the risk factors

described above, but the emergency was no less apparent than when declared by the Council on August 21, 2024. Again, the Court should look at the totality of the analysis and factors that went into Resolution 3409, and give deference to the Town Council's declaration that this was an emergency.

As discussed above, Rose's citation to *Israel v. Cave Creek* is off point as that case involved annexation. An emergency clause is never allowed to inhibit the 30-day referendum required in an annexation measure. This is equally true in *Gieszel v. Town of Gilbert.* Those cases do not make the emergency declared here pursuant to A.R.S. § 19-242 improper.

On page 31, Rose concedes "It is true as the Superior Court said that it is the Judge's job to call the balls and strikes." Rose then goes on without authority to state that judicial deference to the Town Council's decision in this case hindered the democratic process. That is a false statement without authority. The Town Council is an elected body. It has four duties: legislative, administrative, executive, and quasi-judicial. The public elects the Council Members and the Mayor. In this case, it was the elected Town Council that created the Citizens' Committee to assist the investigation and analysis of priority public projects, the cost to build and repair, and the means to pay for it. The Town received input from experts in the field of financing with tax-exempt bonds. There was ample opportunity for the citizens to

participate in the Committee process and public meeting which invited public participation. The trial court properly ruled in favor of the Town.

Rose cited to *Arizona School Board Association v. State,* 252 Ariz. 19, 501 P.3d 731 (2022) at the trial. Rose had not cited this case in her Application or pleadings. The trial court took a break during the trial to read the case. The trial court concluded it was off-point and did not require the court to invade the Council's discretion.

Rose states that political questions are matters for review by the judiciary. To the contrary, political questions involve matters that the legislature commits to one or more of the political branches of government and are not susceptible to judicial resolution according to discoverable and manageable standards. Again, the trial court properly and simply stated the judiciary's role is to call the balls and strikes.

On Page 33, Rose tries to inject that an emergency must be "unforeseen." The word "unforeseen" is not contained in A.R.S. § 19-142(b). That said, it would be clearly unforeseen what the interest rates would be on any given day between August 21, 2024 and the approaching presidential election on November 5, 2024. The Town's priority projects were a necessity, and the Town needed in its discretion to declare an emergency to be able to create a certain funding mechanism to meet the needs of the Town. The Town's general budget would not cover these expenses.

The Town needed to lock in rates to remove the uncertainty and volatility from raising the needed revenue.

Rose states that her Complaint was not moot because judicial relief was still available. Rose is wrong as there is no exception to the strict 30-day requirement under A.R.S. § 19-142 to file a Petition for Referendum. This was not a forbidden or futile act. Moreover, the severability clause in Section 10 eliminates Rose's claim. With or without the emergency clause in Section 11, Resolution 3409 stands.

VII. ATTORNEYS' FEES

Payson requested attorneys' fees in its Verified Response. Payson requests attorneys' fees on this appeal pursuant to A.R.S. § 12-341, and A.R.S. § 12-349. Rose is not entitled to attorneys' fees ,and that claim should be rejected. Rose lost at trial, and this appeal should be dismissed or affirmed.

VIII. CONCLUSION

Rose stipulated to the admissibility of exhibits 1 through 12 and that the Evidentiary Hearing should be consolidated with the trial. The trial court's verdict was properly entered in favor of Payson. Based on the totality of the record, Rose's appeal is moot, Rose's Complaint for injunctive relief is moot, Rose lacks standing as an individual, Resolution 3409 was an administrative act not subject to referendum, and even if deemed legislative, the Council properly exercised its discretion in voting to include an emergency clause. If this Court determined that the

Council's declaration of an emergency was improper, Section 11 is severable from the rest of Resolution 3409. There are multiple reasons both factually and legally that support the trial court's verdict and Judgment in favor of Payson.

Payson requests that this Court affirm the trial court's verdict and Judgment in its favor. If this Court concludes that there is reversible legal error, then it must remand the case back to the trial court for a new trial that would apply the legal principles that would be set forth by this Court. The issues of mootness, administrative versus legislative and the propriety of the emergency clause are fact-intensive that must be resolved at a trial by the trial court. Payson requests its attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 28th day of March, 2025.

BRUECKNER SPITLER SHELTS PLC

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBORAH ROSE, Plaintiff/Appellant, v. TOWN OF PAYSON, et al., Defendants/Appellees.	Court of Appeals Division Two No. 2 CA-CV 2024-0346 Gila County Superior Court Case No. S0400CV202400271

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Pursuant to Rule 23(e), Arizona Rules of Appellate Procedure, and in compliance with Rules 6(c) and 14(a)(1), Arizona Rules of Civil Appellate Procedure, the undersigned counsel for Appellees hereby certifies that the text of Appellees' Answering Brief is proportionately spaced, has a typeface of 14 points or more, is double spaced using a Times New Roman font, contains 12,776 words, and otherwise complies with the requirements of these Rules. A copy was sent via email to:

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CERTIFICATE OF SERVICE OF DEFENDANTS/APPELLEES' ANSWERING BRIEF

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Pursuant to Rule 4, Arizona Rules of Civil Appellate Procedure, the undersigned counsel for Appellees hereby certifies that on this 28th day of March, 2025, he filed the foregoing Answering Brief, with the Clerk of the Arizona Court of Appeals, Division Two, using the electronic filing system and, on the same date, he caused one copy of the foregoing to be sent via email to:

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