ARIZONA COURT OF APPEALS
DIVISION ONE

VOICE OF SURPRISE, a political action committee formed and registered pursuant to A.R.S. § 16-905, and QUINTUS SCHULZKE, individually and as Chairman of Voice of Surprise, Appellants, v. SKIP HALL, in his official capacity as Surprise Mayor; PATRICK DUFFY, in his official capacity as Surprise Councilman; CHRIS JUDD, in his official capacity as Surprise Councilman; ROLAND F. WINTERS, JR., in his official capacity as Surprise Councilman; ALY CLINE in her official capacity as Surprise Councilwoman; JACK HASTINGS, in his official capacity as Surprise Councilwoman; KEN REMLEY, in his official capacity as Surprise Councilman; SHERRY AGUILAR, in her official capacity as Surprise City Clerk; CITY OF SURPRISE, ARIZONA, a public entity; TRUMAN RANCH 46 SWC LLC, an Arizona limited liability company; and DOMINIUM, INC., a Minnesota corporation, Appellees.	Court of Appeals Division One No. 1 CA-CV 23-0698 EL Maricopa County Superior Court No. CV 2022-013360

BRIEF OF *AMICUS CURIAE*
LEAGUE OF ARIZONA CITIES AND TOWNS
IN SUPPORT OF APPELLEES

(filed with the written consent of the parties)

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INTEREST OF AMICUS CURIAE

This amicus curiae brief ("**Brief**") is submitted by the League of Arizona Cities and Towns ("**League**") under Rule 14 and Rule 16 of the Arizona Rules of Civil Appellate Procedure. This Brief is being filed with the written consent of the parties. No other person or entity made a monetary contribution for the preparation or submission of this brief.

The League is a voluntary association of all the 91 incorporated cities and towns in Arizona, representing approximately 79% of the state's total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and among the cities and towns of Arizona. The League also participates in federal and state litigation that may impact the interests of its members.

The League respectfully submits this Brief in support of Appellees because the questions presented in this case implicate important statewide issues relative to the scope and breadth of referendum power reserved to the citizens of Arizona under Ariz. Const. art. 4, pt. 1, § 1(8).

Only legislative acts are subject to referendum. *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 488 (1991). Here, the residents of Surprise certainly had the constitutional right to refer the 2008 ordinances regarding the property in question

("**Property**"), including the ordinance that rezoned the Property to the Truman Ranch Marketplace Planned Area Development ("**Truman Ranch PAD**") (Ordinance 08-37, which includes PAD 08-015). They didn't exercise that right. Fifteen years later, residents cannot attempt to kill a project they dislike by referring its preliminary development plan to the ballot. The 2008 ordinances were legislative in nature; the plan is not. The preliminary development plan that was approved by Ordinance 2022-18 ("**Plan**") is administrative in nature because it does not make any zoning change and merely implements the policies and standards of Ordinance 08-37 and PAD 08-015.

The implications of allowing plans to be "second guessed" by the electorate has the potential of hampering the planning processes and development in Arizona. Referenda could interfere with the approval of projects that *fully comply* with preexisting zoning ordinances and conform to voter-approved general plans, including much-needed affordable housing projects. The League's members have interests in avoiding this outcome and protecting their limited budgets from the costs of running referendum elections.

STATEMENT OF THE CASE
STATEMENT OF THE FACTS
ISSUE PRESENTED FOR REVIEW

The League concurs with the statement of the case, statement of the facts, and issue presented for review by Appellee City of Surprise ("City" or "Surprise").

INTRODUCTION

There is no denying that members of the public play a vital role in the planning process. A community's general plan is shaped by public input and is ultimately approved by the local electorate. Members of the public have influenced land use decisions by serving on planning commission, participating at public hearings, and communicating with their elected officials. They have filed written protests to trigger a supermajority vote requirement. *See* A.R.S. § 9-462.04(H) (requiring a supermajority vote if the owners of twenty percent or more within the affected area file a written protest). They have appealed decisions, challenged decisions in superior court, and filed referendum petitions. When all else fails, they have recalled elected officials or voted them out of office. Their rights to participate in the planning process, are, is not absolute. They can only refer *legislative* acts to the ballot – and the matter being referred cannot exceed the legislative powers conferred upon the governing body. *See* Ariz. Const. art. 4, pt. 1, § 1(8).

Here, the superior court correctly concluded the Plan is not referrable because approval of the plan is administrative in nature. The League respectfully asks this Court to affirm and decline any invitation to expand referenda rights to the approval of plans. The implications of allowing plans to be "second guessed" by the electorate has the potential of hampering the efficient administration of local governments and of impeding lawful development and the construction affordable housing projects. The League's member municipalities have interests in avoiding this outcome and in protecting their limited budgets from the costs of running referendum elections.

ARGUMENT

1. Administrative actions are not subject to referenda.

The Arizona Supreme Court has provided the following guidelines when distinguishing between administrative and legislative decisions for the purpose of determining which acts can be referred to the ballot:

> 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 test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to

> it. Similarly, an act or resolution constituting a declaration of public purpose and making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body.

Wennerstrom, 169 Ariz. at 489 (quoting 5 McQuillin Mun. Corp. § 16:53 (3d ed.)).

Here, the Plan for the Property does not show any intent to form a permanent rule of government. It does not make a new law or city policy. It is not generally applicable and does not constitute a declaration of public policy.

Appellants Voice of Surprise and Quintus Schulzke (collectively, "**VOS**") claim that any land use could be developed on the Property and the Plan itself effectuates the rezoning (*see, e.g.*, Plaintiffs-Appellants Opening Br. 28). This is incorrect. The rezoning occurred in 2008 when Ordinance 08-37 and PAD 08-015 were approved by the City Council, which expressly allow all land uses permitted within the C-1 (neighborhood commercial), C-2 (community commercial), and MU-PD (mixed use-planned development) zoning districts as defined by the zoning code at the time. The Plan does not change the zoning classification or make any other zoning change. Rather, the Plan depicts the characteristics and configuration of a mixed-use project on the Property that conforms to the permissible land uses under Ordinance 08-37 and PAD 08-015. The characteristics and configuration of the specific site are not a matter of public policy.

At the root of VOS' concerns appears to be a general objection to the flexible nature of any planned area development. The entire purpose of a planned area

development, however, is to provide more flexibility. This zoning type allows for flexibility in the mixture of uses, design standards, building configurations, and open spaces. A a planned area development encourages creativity and allows departures from a zoning code in the interest of developing an integrated and harmonious project. *See, e.g*., 2008 Zoning Code § 125-194(b)(4). Surprise's zoning code in 2008 allowed any use for a planned area development so long as it was consistent with the general plan. *See id*. at § 125-194(b)(4). The zoning code provided flexibility in housing types subject to limitations. *See id*. at §§ 125-194(b)(5)(a); 125-194(b)(8). It also provided flexibility regarding housing densities subject to specific reasonableness factors and compliance with the general plan. *See id*. at §§ 125-194(b)(5)(a); 125-194(b)(5)(b); *see also* A.R.S. § 9-462.01(F) (requiring a rezoning ordinance to conform with the general plan−and stating that a rezoning ordinance conforms if it "proposes land uses, densities or intensities within the range of identified uses, densities and intensities of the land use element of the general plan"); A.R.S. § 9-461.05(C) (providing that a general plan is a statement of community goals and development policies that includes specific elements, maps, objectives, principles, standards, and plan proposals). Residents with concerns about the flexible nature of this type of flexible zoning had opportunities to object in 2008 when the City Council adopted Ordinance 08-37 and PAD 08-015.

The fact that a city has some discretion or flexibility in approving an application does not make the decision legislative in nature.[1] In *Redelsperger v. City of Avondale*, 207 Ariz. 430, 433, ¶ 13 (App. 2004), the court concluded that a governing body's level of discretion is not the ending point in the analysis of whether an act is administrative or legislative; it is simply *one factor* to be considered in the analysis. *See id. at* 434, ¶ 16.

The planning commission in *Redelsperger* was afforded some discretion under the zoning code regarding the grant or denial of a conditional use permit, but the discretion was not without limitation because the commission was required to examine several factors, including consistency with the general plan and general compatibility of use with adjacent properties. *See id*. at ¶¶ 16, 17. The commission also had discretion to impose conditions so long as the conditions carried out the provisions and intent of the zoning code. *See id*. at ¶ 17. The plaintiff in *Redelsperger* had argued that "by simply listing mini-storage facilities as possible conditional uses without delineating any development standards, and by making approval subject to the broad exercise of discretion, the City was reserving its legislative powers until an actual application for the use was filed." *Id*. at ¶ 18. The court rejected the

[1] See discussion below regarding a city council's ability to delegate some or all of the administrative tasks associated with approving development plans, site plans, plats, and the like.

argument because city councils do not have the authority to delegate legislative powers to administrative powers. *Id*.

The fact that discretion may be exercised by a city council does not make the decision legislative in nature either. City councils in Arizona can perform the administrative tasks of approving development plans, share the tasks with a planning commission and/or staff, or delegate the tasks completely. *See, e.g.*, A.R.S. § 9-500.49 (providing that a city council can authorize administrative personnel to review and approve site plans, development plans, land divisions, lot line adjustments, lot ties, preliminary plats, final plats and plat amendments without a public hearing). In contrast, city councils in Arizona *cannot* delegate their legislative powers to rezone property from one zone to another, annex land, or amend a general plan. *See, e.g.*, A.R.S. §§ 9-462.04 (describing the legislative process of rezoning property from one zone to another); 9-461.06 (describing the legislative process of amending a general plan); and 9-471 (describing the legislative process of annexing land).

Regardless of the nature of a decision, any referendum is strictly limited to matters upon which a city council is "empowered by general laws to legislate." Ariz. Const. art. 4, pt. 1, § 1(8) (citations omitted). If a city council is not empowered to deny the approval of a development plan because it complies with the city's

requirements, it stands to reason that the electorate is also limited in its ability to "deny" approval of the plan by voting "no" vote at a referendum election.

In sum, a development plan is not legislative in nature when it does not rezone land and merely executes the policies and standards of a preexisting ordinance in accordance with a general plan.

2. Allowing referenda on administrative matters would result in negative statewide impacts.

Expanding the power of referendum to administrative matters would run afoul of the Arizona Constitution and disrupt governmental operations. The impacts would be especially harsh on local governments because city councils in Arizona are frequently called upon to act in administrative capacities. For example, a city council can perform the functions of a planning department. *See* A.R.S. § 9-461.03 (giving city councils the *option* of creating a planning department). A city council can also act as the planning agency. *See* A.R.S. § 9-461.01 (giving city councils the *option* of delegating the functions of a "planning agency" to staff). In fact, state law defines a city's "planning agency" as whoever is designated by local ordinance to carry out municipal planning functions, which may be performed by the planning department, a planning commission, a hearing officer, the legislative body itself, or any combination thereof. *See* A.R.S. § 9-461(4) (defining "planning agency" for the purpose of A.R.S., Title 9, Ch. 4, Art. 6 relating to municipal planning); *see also*

A.R.S. §§ 9-462(3) (defining "planning agency" for the purpose of A.R.S., Title 9, Ch. 4, Art. 6.1 relating to municipal zoning); 9-463(5) (defining "planning agency" for the purpose of A.R.S., Title 9, Ch. 4, Art. 6.2 relating to municipal subdivision regulations). Moreover, a city council can perform the functions of a planning commission. *See, e.g.*, A.R.S. §§ 9-461.02 (giving city councils the *option* of creating a planning commission); 9-462.04(G) (stating that, if there is no planning commission or hearing officer, the city council will perform the functions assigned to a planning commission or hearing officer).

In sum, local governments should not be bogged down with time consuming and costly referenda concerning basic administrative functions. If every dissatisfied resident could invoke the machinery of the referendum for administrative matters, thereby suspending the effective dates of such measures, the efficiency and economy in the business administration of Arizona's cities and towns would be seriously affected. A development plan's compliance with preexisting standards and requirements would be irrelevant. Residents could refer any and all plans to prevent or delay any development from ever occurring at a site. This would be especially problematic when Arizona is facing an affordable housing crisis. The League urges this Court to avoid these results and affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 1st day of December 2023 by:

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