

# 2015 AG Opinions

Date	Description
December 21, 2015	<b>No. I15-013 (R15-017)</b> Re: The Authority of a County Board of Supervisors Regarding the County Assessor's Office
December 2, 2015	<b>No. I15-012 (R15-015)</b> Re: Are chiropractors, their profession or any other profession or individual exempt from the title and term protection granted to physical therapists under A.R.S. § 32-2042(C)(D)
December 2, 2015	<b>No. I15-011 (R15-013)</b> Re: Whether A.R.S. § 16-1019 requires an amendment
November 16, 2015	<b>No. I15-010 (R15-012)</b> Re: Statutory Record Retention Obligations
October 19, 2015	<b>No. I15-009 (R15-021)</b> Re: Hand Count Election Audit
October 9, 2015	<b>No. I15-008 (R15-016)</b> Re: Whether parents can opt their children out of statewide school assessment tests
July 31, 2015	<b>No. I15-007 (R15-008)</b> Re: Calculation of Bond Indebtedness
July 30, 2015	<b>No. I15-002 AMENDED (R15-002)</b> Re: Use of public funds to influence the outcomes of elections
July 16, 2015	<b>No. I15-006 (R15-007)</b> Re: May more than one non-profit organization be the "sponsoring organization" for a common raffle pursuant to section 13 3302(B)....
July 10, 2015	<b>No. I15-004 (R15-009)</b> Re: Immunity for Recreational Use of Aircraft on State Trust Lands
June 24, 2015	<b>No. I15-005 (R15-011)</b> Re: Small School Weight for Charter Schools
June 16, 2015	<b>No. I15-003 (R15-006)</b> Re: Rio Nuevo Multipurpose Facilities District
February 23, 2015	<b>No. I15-001 (R14-017)</b> Re: Zoning Rights of Charter School Leasing Facilities



STATE OF ARIZONA  
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION

by

MARK BRNOVICH  
ATTORNEY GENERAL

February 23, 2015

No. I15-001  
(R14-017)

Re: Zoning Rights of  
Charter School Leasing Facilities

To: Kimberly Yee  
Arizona State Senator  
Legislative District 20  
Senate Education Committee Chair

**Questions Presented**

You have asked whether a county or municipality can prohibit a charter school that leases a facility from availing itself of the zoning relief provided by A.R.S. § 15-189.01.

**Summary Answer**

No, a county or municipality cannot prohibit a charter school that leases a facility from availing itself of the zoning relief that A.R.S. § 15-189.01 provides.

**Background**

The Arizona Legislature added A.R.S. § 15-189.01 to the charter school statutes in 1996. 1996 Ariz. Sess. Laws ch. 356, § 3. This provision classified charter schools as public schools for purposes of assessing zoning fees, site plan fees and development fees. A.R.S. § 15-

189.01(A). The section also provided that “[n]o political subdivision of the state may enact or interpret any law, rule or ordinance in a manner that conflicts with subsection A.” A.R.S. § 15-189.01(B). In 2009, the Legislature amended A.R.S. § 15-189.01 to clarify that charter schools should be treated as district schools with respect to zoning regulations. 2009 Ariz. Sess. Laws ch. 98, § 1. Specifically, the Legislature added the following language:

Municipalities and counties shall allow a charter school to be established and operate at a location or in a facility for which the zoning regulations of the county or municipality cannot legally prohibit schools operated by school districts, except that a county or municipality may adopt zoning regulations that prohibit a charter school from operating on property that is less than an acre in size and that is located within an existing single family residence zoning district.

A.R.S. § 15-189.01(A). The Legislature further clarified that charter schools should be treated like district schools in terms of zoning, stating that:

[a] charter school is subject to the same level of oversight and the same rules, hearing requirements, application requirements, ordinances, limitations and other requirements, if any, that would be applied to and enforced against a school that is operated by a school district. A municipality or county shall not enforce, or attempt to enforce, any ordinance, procedure or process against a charter school that cannot be legally enforced against a school district.

A.R.S. § 15-189.01(B). The only exceptions require municipalities to adopt procedures that expedite hearing and administrative reviews involving charter schools (A.R.S. § 15-189.01(D)) and to establish that charter schools are subject to applicable building codes (A.R.S. § 15-189.01(C)).

When this Office requested additional information, you explained that at least one municipality has indicated that charter schools operating in leased premises could not avail

themselves of this statute unless the property's owner was also a governmental entity and was thus exempt from municipal zoning requirements. Stated otherwise, the municipality indicated that if the property's owner was subject to zoning requirements, the charter school lessee would likewise be subject to zoning requirements.

### Analysis

This Office has previously opined that when a school district uses a building or property for a public school, the school district is not subject to any local zoning laws of the municipality in which the school building is located.<sup>1</sup> Ariz. Att'y Gen. Op. I83-052. More specifically, the Opinion noted that school districts are political subdivisions of this State (*Amphitheater Unified School District No. 10 v. Harte*, 128 Ariz. 233, 234, 624 P.2d 1281, 1282 (1981)) and that political subdivisions are exempt from the regulations of other political subdivisions (*City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637 (1962)). Thus, if a municipality treats a charter school as it treats a district school for the purposes of zoning, the charter school should be exempt from the municipality's zoning regulations.

Arizona Revised Statute § 15-189.01 evinces a clear intent to ensure that municipalities do not impose zoning regulations on charter schools except to the extent they could do so on district schools. The language of A.R.S. § 15-189.01 (A) is clear on that point. The statute continues, "[a] municipality or county shall not enforce, or attempt to enforce, any ordinance, procedure or process against a charter school that cannot be legally enforced against a school district." A.R.S. §15-189.01(B). The statute's legislative history is consistent with this language. *See* HB 2099 Fact Sheet, 49th Leg., 1st Reg. Sess. (Ariz. 2009) ("HB 2099 classifies charter schools as public schools for the purposes of zoning in municipalities and counties.")

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<sup>1</sup> School districts are subject to state fire code regulations. A.R.S. § 34-461; *also* Ariz. Att'y Gen. Op. I86-033.

There is no indication that this exemption depends on whether the political subdivision leases, rather than owns, the property. The statute does not distinguish between leased and owned premises. Furthermore, nothing in the legislative history indicates that the legislature intended to allow municipalities to treat schools that operate in leased premises differently than schools that operate in owned premises.<sup>2</sup>

### **Conclusion**

A municipality cannot impose any zoning restriction on a charter school that leases its property that it could not impose on a district school or on a charter school that owns its property.

Mark Brnovich  
Attorney General

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<sup>2</sup> Practically speaking, permitting such a distinction would only affect charter schools, because district schools rarely operate in leased premises.



**MARK BRNOVICH**  
ATTORNEY GENERAL

**OFFICE OF THE ATTORNEY GENERAL**  
**STATE OF ARIZONA**

June 16, 2015

Senator Bob Worsley  
1700 West Washington  
Phoenix, Arizona 85007-2844

Re: I15-003 (R15-006)

Dear Senator Worsley:

You asked whether the Rio Nuevo Multipurpose Facilities District is subject to the restrictions of Article 9, Section 7 of the Arizona Constitution (the "Gift Clause") or is exempt from those restrictions pursuant to Article 13, Section 7 of the Arizona Constitution (the "Exemption Clause").

The Exemption Clause specifically states: "[T]ax levying public improvement districts, now or hereafter organized pursuant to law . . . shall be exempt from the provisions of [the Gift Clause]." The Rio Nuevo District is a Multipurpose Facilities District organized pursuant to Arizona Revised Statutes, Section 48-4202. That provision clarifies that a district formed pursuant to § 48-4202 "is a tax levying public improvement district." That designation is subject to any statutory limitations found elsewhere, as well as any limitations set forth in the relevant intergovernmental agreement or authorizing documents.

There is no statutory limitation, nor is there any provision in the authorizing agreements<sup>1</sup> related to the Rio Nuevo District, that affect its otherwise clear status as a "tax levying public improvement district." Therefore, the Rio Nuevo District is subject to exemption from the Gift Clause pursuant to the Exemption Clause.

Sincerely,

Mark Brnovich  
Arizona Attorney General

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<sup>1</sup> In evaluating this request, AGO staff reviewed the following relevant "authorizing" documents: Proposition 400; the original Intergovernmental Agreement (IGA) between the City of Tucson, the City of South Tucson, and the Town of Sahaurita; the subsequent IGA involving only the City of Tucson and the City of South Tucson; and the subsequent amendment to the second IGA.



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 10, 2015</p>	<p>No. I15-004 (R15-009)</p> <p>Re: Immunity for Recreational Use of Aircraft on State Trust Lands</p>
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To: David M. Gowan, Sr.  
Arizona Speaker of the House

**Questions Presented**

1. Does the immunity offered under Arizona Revised Statute (“A.R.S.”) § 33-1551 apply to state trust lands and/or the Arizona State Land Department (the “Department”) for access to trust lands by aircraft for recreational use?
2. Does a fee in the form of a lease or a special use permit required by the Department for access to an area by aircraft and paid by (a) an individual aviator or (b) an organization on behalf of all aviators, constitute “payment of an admission fee or other consideration”?
3. What statutory changes, if any, are necessary to provide immunity for access to trust lands by aircraft for recreational use?

## Summary Answers

1. Under certain conditions, A.R.S. § 33-1551 provides immunity for state trust land and the Department, and for operating recreational aircraft. However, the statute would only provide immunity to the Department for operation of an aircraft on state trust land if the Department permitted an aircraft operator to use state trust land under conditions that satisfy the definition of a “recreational user” under the statute. Accordingly, immunity would apply only if the Department permitted the aircraft operator to use state trust land without “payment of an admission fee or other consideration;” in other words, under a recreational permit or by paying only a nominal fee to offset the cost of providing access to the state trust land.

2. Yes. Payments to the Department for a lease or special use permit to use state trust land would constitute the “payment of an admission fee or other consideration” because those payments are not “nominal” and are not intended merely to offset the cost of providing access. Instead, the payments are rentals based on the appraised value of the land used and the nature of the use. Furthermore, the payments are required to generate revenue for the beneficiaries of the state land trust.

3. Attorney General Opinions answer questions relating to the current state of the law and do not make recommendations for future legislation.

## Background

### *Recreational Use Statute.*

A.R.S. § 33-1551, commonly known as the “recreational use statute,” was enacted “to encourage landowners to open their lands to the public for recreational use” by limiting the owners’ potential liability to recreational users. *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 2, ¶ 7, 66 P.3d 44, 45 (2003). Once a landowner receives an admission fee or other

consideration for allowing the recreational use on its land, the landowner loses the immunity.

A.R.S. § 33-1551 provides in relevant part:

A. A public or private owner, easement holder, lessee, tenant, manager or occupant of premises is not liable to a recreational or educational user except on a showing that the owner, easement holder, lessee, tenant, manager or occupant was guilty of willful, malicious or grossly negligent conduct that was a direct cause of the injury to the recreational or educational user.

...

C. For the purposes of this section: ...

5. "Recreational user" means a person to whom permission has been granted or implied without the payment of an admission fee or any other consideration to travel across or to enter premises to hunt, fish, trap, camp, hike, ride, engage in off-highway vehicle, off-road recreational motor vehicle or all-terrain vehicle activity, operate aircraft, exercise, swim or engage in other outdoor recreational pursuits. The purchase of a state hunting, trapping or fishing license, an off-highway vehicle user indicia or a state trust land recreational permit is not the payment of an admission fee or any other consideration as provided in this section. A nominal fee that is charged by a public entity or a nonprofit corporation to offset the cost of providing the educational or recreational premises and associated services does not constitute an admission fee or any other consideration as prescribed by this section. Recreational user does not include a student who is registered at a school during designated times that the student is allowed to be on the school grounds as determined by district personnel or who is participating in a school-sanctioned activity.

Arizona State Trust Land.

The State of Arizona owns over nine million acres of state trust land, which the United States granted to the State to hold in trust solely to assist specified beneficiary purposes, primarily public education, enumerated in the Arizona Enabling Act. *See* New Mexico-Arizona Enabling Act §§ 24-25, Pub. L. 61-219, 36 Stat. 557 (June 20, 1910). The Enabling Act and Arizona Constitution contain express restrictions on the use and disposition of the trust's assets to ensure that the beneficiaries receive "the most substantial support possible ... and that only those beneficiaries profit from the trust." *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385

U.S. 458, 467 (1967) (citing Enabling Act § 28); *see also* Ariz. Const. art. X, §§ 3-4.

Consequently, state trust lands are distinct from public lands that are managed for the use of the general public.

When the Department leases state trust land, it must receive at least appraised value and must auction all leases that are for a term greater than ten years. Enabling Act § 28; Ariz. Const. art. X, §§ 3-4. The Commissioner may also “Issue permits for short-term use of state land for specific purposes as prescribed by rule.” A.R.S. § 37-132(B)(6). Accordingly, the Department’s rules provide for “special use permits” which allow permittees “beneficial use” of state trust land “for special purposes” not appropriate for leases. Ariz. Admin. Code R 12-5-1101. Special use permittees must pay a fee no less “than appraised rental value of the land.” Ariz. Admin. Code R 12-5-1101(5). A state trust land “recreational permit,” expressly referenced in the recreational use statute, is distinct from a “special use permit” and is sold for a flat annual fee - \$15 to individuals and \$20 to families. Ariz. Admin. Code R. 12-5-1201.

### **Analysis**

The recreational use statute grants immunity to owners of land, including state trust land, A.R.S. § 33-1551(A), who permit “recreational users” to use the land, A.R.S. § 33-1551(C)(5). Operating an aircraft is a use within the protection of the statute. *Id.* However, the statute defines a “recreational user” not only with reference to the nature of the use, but also with reference to the terms under which the landowner permits the user on the land. A “recreational user” is only a user permitted on the land “without payment of an admission fee or any other consideration.” *Id.* The statute expressly explains that purchase of “a state trust land recreational permit” or payment of a “nominal fee ... to offset the cost of providing” access to the land “does not constitute an admission fee or any other consideration.” *Id.*

In this context, fees paid by an individual aviator or an organization on behalf of all aviators to the Department to obtain a lease or a special use permit would constitute “payment of an admission fee or other consideration.” Obtaining such instruments requires payment of rental reflecting the use and appraised value of the land, and not merely the cost of providing access to the land. *See* Enabling Act § 28; Ariz. Const. art. X, §§ 3-4; Ariz. Admin. Code R. 12-5-1101(5). Moreover, the cost would likely not be considered “nominal,” since the application fee alone would be at least \$300 for a permit or \$1,000 for a lease. *See* Ariz. Admin. Code R. 12-5-1201; *see also Prince v. City of Apache Junction*, 185 Ariz. 43, 912 P.2d 47 (Ct. App. 1996) (City not permitted to claim immunity under A.R.S. §§ 33-1551 for a softball injury when the plaintiff’s team paid a \$250 entry fee to use the City’s fields), *superseded by statute on other grounds as recognized in MacKinney v. City of Tucson*, 231 Ariz. 584, 590 n5, 299 P.3d 1282, 1288 (Ct App. 2013). These instruments are plainly distinct from the Department’s recreational permits, for which the Department receives a \$15 or \$20 administrative fee. *See* Ariz. Admin. Code R. 12-5-1201.

### **Conclusion**

Although the terms of the recreational use statute, A.R.S. § 33-1551, provide potential immunity for the State if the Department allowed aviators to use state trust land as “recreational users”, the rental charged for such use would eliminate the State’s immunity.

Mark Brnovich  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>June 24, 2015</p>	<p>No. I15-005 (R15-011)</p> <p>Re: Small School Weight for Charter Schools</p>
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To: Diane M. Douglas  
Arizona Superintendent of Public Instruction

**Questions Presented**

You have asked the following questions about Senate Bill 1476, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 15 (SB 1476), as amended by Senate Bill 1193, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 299 (SB 1193), legislation that affects the eligibility of certain charter schools for the Small School Weight:

1. Which charter holders are eligible for Small School Weight and which charter holders are eligible for a phase down of the Small School Weight, given the above-described changes.
2. Whether the changes in the calculation of the Small School Weight as a result of SB 1476 will affect the calculation and distribution of Classroom Site Fund monies.
3. Whether the changes in the calculation of the Small School Weight as a result of SB 1476 will affect the distribution of the inflationary increase set forth in Senate Bill 1469, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 8, § 34 (SB 1469).
4. How should the Small School Weight be calculated for charter holders that serve grades K-12, given that A.R.S. § 15-943(1) provides for separate Small School Weights for schools serving grades K-8 and schools serving grades 9-12.

## Summary Answers

1. A charter holder is eligible for application of the Small School Weight if that charter holder meets the definition of charter holder in A.R.S. § 15-101(3) and the student count of all charter schools held by that charter holder is less than 600. In other words, the controlling factor for eligibility as to this adjustment is the aggregate average daily membership and not the number of charters held.
2. Yes, the changes in the calculation of the Small School Weight will affect the amount of Classroom Site Fund monies that some charter schools receive.
3. Yes, the changes in the calculation of the Small School Weight will affect the distribution of the inflationary increase set forth in SB 1469.
4. For charter schools that serve students in grades K-12, the Department should separately determine the number of students in grades K-8 and 9-12, and apply the appropriate weighting factors set out in A.R.S. § 15-943(1)(a) and (b) to the K-8 students and the 9-12 students.

## Background

Charter schools are “established by contract with a district governing board,<sup>1</sup> the state board of education, the state board for charter schools, a university under the jurisdiction of the Arizona board of regents, a community college district . . . or a group of community college districts . . .” A.R.S. § 15-101(4). The contract that establishes a charter school is commonly known as a charter. The entities that may establish a charter school are referred to as “sponsors.” *See, e.g.*, A.R.S. § 15-183(C). Also defined by statute is the term “charter holder” which “means that person that enters into a charter with the state board for charter schools.” A.R.S. § 15-101(3). Notably, the definition of “charter holder” does not include all of the entities permitted to sponsor charter schools.

A charter holder may operate a single school. Or a charter holder might operate a number of charter schools. In such a case, the charter holder might hold one charter and operate one or more schools under that charter. Alternatively, a charter holder could hold one or more charters and operate one school for each of those charters. A charter school can serve just a few grades or it can serve grades K-8, 9-12 or K-12.

The questions at issue here relate to base support level funding, which is made available to charter schools by A.R.S. § 15-185(B)(1). A.R.S. § 15-943 describes how base support level is determined: it is calculated by multiplying a school’s weighted student count by a statutorily-set base level.<sup>2</sup> Weighted student count is determined by applying specific weights to student count, as set out in A.R.S. § 15-943. Application of the weights increases funding.

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<sup>1</sup> In 2014, the legislature imposed a moratorium on district-sponsored charter schools through that year’s budget. 2014 Ariz. Sess. Laws, 51st Leg., 2d Reg. Sess., ch. 17, §2 (SB 1488).

<sup>2</sup> For example, the base level for the fiscal year 2014-15 is \$3,373.11. A.R.S. § 15-901(B)(2)(e).

Paragraph (1) of A.R.S. § 15-943 addresses the Small School Weight. A Small School Weight is a statutorily-set weight (or adjustment) to a school district's student count for school districts with fewer than 600 students. The amount of the weight varies, depending on whether the school district serves students in grades K-8 or 9-12 and depending on the number of students.<sup>3</sup> A.R.S. § 15-943(1). Student count is also weighted to account for other factors, as set out in A.R.S. § 15-943(2), but those weighting factors are not relevant to this issue. While A.R.S. § 15-943 refers only to a school district's eligibility for Small School Weight, A.R.S. § 15-185(B)(1) established that charter schools would also be funded on the basis of a base support level as prescribed in A.R.S. § 15-943.<sup>4</sup>

For purposes of school finance, the Arizona Department of Education historically treated each separate charter school operated pursuant to an individual charter as a school district. By way of example, if a charter holder had three separate charters for three separate school sites, the Department treated each separately chartered site as a school district, even if the same charter holder held all three charters and operated the three schools as a system or set of related schools. Thus, the Department determined the student count of each individually-chartered school for purposes of determining eligibility for the Small School Weight. (E.g., if each separately chartered school had 500 students, then each would be eligible for the Small School Weight.) If, however, the charter holder had one charter and operated three school sites under that charter, the Department aggregated the student count of all three schools for purposes of determining eligibility for the Small School Weight. (E.g., if each school operated under the same charter had 250 students, none would receive the Small School Weight.)

In the 2015 legislative session, the Legislature enacted SB 1476, as amended by SB 1193, with changes effective in the 2015-16 school year. It provides as follows:

(b) The small school weights prescribed in section 15-943, paragraph 1 apply if a charter holder, as defined in section 15-101, holds one charter for one or more school sites and the average daily membership for the school sites are combined for the calculation of the small school weight. The small school weight shall not be applied individually to a charter holder if one or more of the following conditions exists and the combined average daily membership derived from the following conditions is greater than six hundred:

(i) The organizational structure or management agreement of the charter holder requires the charter holder or charter school to contract with a specific management company.

(ii) The governing body of the charter holder has identical membership to another charter holder in this state.

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<sup>3</sup> There are different Small School Weights for schools with 1-99 students, 100-499 students, or 500-599 students. A.R.S. § 15-943(1).

<sup>4</sup> The only difference between district and charter schools, in terms of determining base support level, is the calculation of the Teacher Experience Index, as required by A.R.S. § 15-941; no Teacher Experience Index is determined for charter schools. A.R.S. § 15-185(B)(1)(a).

(iii) The charter holder is a subsidiary of a corporation that has other subsidiaries that are charter holders in this state.

(iv) The charter holder holds more than one charter in this state.<sup>5</sup>

(c) Notwithstanding subdivision (b) of this paragraph, for fiscal year 2015–2016 the department of education shall reduce by thirty-three percent the amount provided by the small school weight for charter schools prescribed in subdivision (b) of this paragraph.

(d) Notwithstanding subdivision (b) of this paragraph, for fiscal year 2016–2017 the department of education shall reduce by sixty-seven percent the amount provided by the small school weight for affiliated charter schools prescribed in subdivision (b) of this paragraph.

SB 1476 changes the way that Small School Weights are calculated for charter schools. The first sentence defines charter schools that are eligible for consideration for the Small School Weight: they must be schools where a “charter holder, as defined in section 15–101, holds one charter for one or more school sites and the average daily membership for the school sites are combined for the calculation of the small school weight.” SB 1476, 2:34-37. The next sentence describes a set of charter holders that will no longer be eligible for Small School Weight. It states “the small school weight shall not be applied individually to a charter holder if one or more of the following conditions exists and the combined average daily membership derived from those conditions is greater than 600.” SB 1476, 2:37-40. Taken together, the conditions, which are listed in subsections (i) through (iv), describe ways of organizing charter schools as a system or a set of affiliated schools. They include an organizational structure or management agreement that requires the charter holder or charter school to contract with a specific management company, identical governing bodies for charter holders, the charter holder being the subsidiary of a corporation with other charter holders as subsidiaries, or the charter holder holds more than one charter in the state. *Id.*, 2:41-3:3. Finally, subsections (c) and (d) phase in the elimination of the Small School Weight for those schools no longer eligible, providing that it will be reduced by thirds over the next two years.

### **Analysis**

The intent of the new legislation appears to be to limit the application of the Small School Weight, and in particular, to eliminate eligibility for the Small School Weight for affiliated charter schools where the total student count for all affiliated schools exceeds 600. However, the language of the first sentence introduces two potential difficulties into the process of identifying the charter schools that are eligible for the Small School Weight. In addition, questions have arisen regarding the calculation of Classroom Site Funds, pursuant to A.R.S. § 15-977, and the amount of the inflationary increase provided by Senate Bill 1469. Finally, the Department has asked how it should determine eligibility for Small School Weight for charter schools that serve

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<sup>5</sup> SB 1476 originally provided “(iv) The charter holder holds one or more charters in this state.” SB 1193 amended the provision to read, “(iv) The charter holder holds more than one charter in this state.”

grades K-12, because the Small School Weight varies, depending on whether a charter school serves grades K-8 or 9-12.

## **I. Identification of Charters Eligible for Small School Weight**

The new legislation begins by defining a charter holder who is eligible for consideration of the Small School Weight as “a charter holder . . . [who] holds one charter for one or more school sites and the average daily membership is combined for the calculation of the small school weight.” SB 1476, at 2:34-37. The statute does not specifically address charter holders who hold more than one charter but have an aggregate student count less than 600. The statute could be read to eliminate their eligibility for Small School Weight, except that Arizona courts have made it clear that a statute’s silence cannot be conclusive as to legislative intent. *Sell v. Gama*, 231 Ariz. 323, 328, ¶ 21 (2013) (“we find it not plausible to interpret the statutory silence as tantamount to an implicit [legislative] intent.”) (internal quotation marks omitted, alterations in original); *see also Sw. Paint & Varnish Co. v. Arizona Dep’t of Env’tl. Quality*, 194 Ariz. 22, 26, ¶ 21 (1999) (“We have squarely rejected the idea that silence is an expression of legislative intent.”)

The silence in this case can be resolved by looking to “the context of the [legislation], the language used, the subject matter, the historical background, the effects and consequences, and the spirit and purpose of the law.” *Martin v. Martin*, 156 Ariz. 452, 457 (1988). By looking to the broader language and context of the legislation, it becomes clear that this legislation sought to ensure that affiliated charter schools whose aggregated student count exceeds 600 will no longer receive the Small School Weight adjustment. Thus, interpreting the silence as to charter affiliates with multiple charters and small enrollment such that these schools no longer receive this adjustment would be inconsistent with the purpose of SB 1476.

This conclusion is bolstered by “phase out” language in subsections (c) and (d) of the relevant provision. It would be illogical for the legislature to slowly phase out this funding mechanism for affiliated schools with aggregate student counts elevating them out of the “small school” category, while immediately eliminating eligibility for a class of affiliated schools that remain “small” even in the aggregate. In other words, the legislature made an effort to minimize the difficulty posed by this reduction in financing by phasing it out over time for the explicitly affected schools. To interpret the statute so as to maximize the burden on schools that remain “small” even in the aggregate runs contrary to that effort.

A more difficult situation is created by SB 1476’s statement that the Small School Weight applies if a “charter holder, *as defined in section 15-101*, holds one charter for one or more school sites.” (Emphasis supplied.) The reference to the definition of charter holder in A.R.S. § 15-101 introduces a limitation on the universe of affected entities. That statute defines a charter holder as “a person that enters into a charter with the state board for charter schools.” A.R.S. § 15-101(3). Notably, this definition does not include other entities that may grant charters, including the State Board of Education, a university under the Arizona Board of Regents, or a community college (or group of community colleges). Nor is it consistent with the definition of a charter school, found immediately adjacent, in A.R.S. § 15-101(4). That definition describes a charter school as

a public school established by contract with a district governing board, the state board of education, the state board for charter schools, a university under the jurisdiction of the Arizona board of regents, a community college district with enrollment of more than fifteen thousand full-time equivalent students or a group of community college districts with a combined enrollment of more than fifteen thousand full-time equivalent students pursuant to article 8 of this chapter to provide learning that will improve pupil achievement.

As a result of SB 1476's reference to the statutory definition of charter holder, the new law excludes from eligibility those charter schools that are chartered by entities other than the State Board for Charter Schools. There is no ambiguity in this reference; the legislature explicitly included a limiting provision by reference to a particular definition and there is no second, plausible interpretation of the language. *See CNL Hotels & Resorts, Inc. v. Maricopa County*, 230 Ariz. 21, 23, ¶ 9 (2012). To include charter schools sponsored by such other entities would effectively amend either SB 1476's reference to A.R.S. § 15-101 or the definition of charter holder in A.R.S. § 15-101(3),<sup>6</sup> to include sponsors that the legislature did not reference. Because there is no ambiguity, there is no need to consider legislative history. *Farris v. Advantage Capital Corp.*, 217 Ariz. 1, 2, ¶ 5 (2007). Even if it were appropriate to consider, however, the legislative history of SB 1476 does not explain why lawmakers excluded charter schools sponsored by entities not listed in A.R.S. § 15-101; it also does not provide any basis for including in SB 1476 charter sponsors not specifically listed there.

## **II. Calculation of Classroom Site Fund Monies**

You have also asked how the changes in SB 1476 will affect the calculation of Classroom Site Fund (CSF) monies. The CSF was established pursuant to Proposition 301, and the rules governing the CSF are set forth at A.R.S. § 15-977. Subsection G describes how the funds are distributed:

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<sup>6</sup> The inconsistency between the definitions of "charter school" and "charter holder" has existed since the legislature first defined "charter holder" in 2009. Nothing in the legislative history explains why the two definitions are not consistent with each other. The definition of charter school was added in 1994; it included all entities that could sponsor charter schools at that time. House Bill 2002, 1994 Ariz. Sess. Laws, 41st Leg., 9th Spec. Sess., ch. 2. The legislature added the definition of charter holder in 2009; it has always been limited to charters given by the State Board for Charter Schools and has never included all the entities that are able to sponsor charter schools. Senate Bill 1196, 2009 Ariz. Sess. Laws, 49th Leg., 1st Reg. Sess., ch. 95. Its legislative history gives no indication as to the purpose of defining charter holder. *See* Fact Sheet for Senate Bill 1196 as enacted, 49th Leg., 1st Reg. Sess., at p. 3. While the definition of charter school has been updated as the entities that can sponsor charter schools has changed, the definition of charter holder has remained the same. *See* Senate Bill 1263, 2011 Ariz. Sess. Laws, 50th Leg., 1st Reg. Sess., ch. 344 (amending definition of charter school to include entities given the ability to sponsor charter schools during the 2010 session). The change that increased the entities that could sponsor charter schools was made in House Bill 2725, 2010 Ariz. Sess. Laws, 49th Leg., 2d Reg. Sess., ch. 332.

G. Monies in the [Classroom Site F]und are continuously appropriated, are exempt from the provisions of section 35-190 relating to lapsing of appropriations and shall be distributed as follows:

1. By March 30 of each year, the staff of the joint legislative budget committee shall determine a per pupil amount from the fund for the budget year using the estimated statewide weighted count for the current year pursuant to section 15-943, paragraph 2, subdivision (a) and based on estimated available resources in the classroom site fund for the budget year adjusted for any prior year carryforward or shortfall.
2. The allocation to each charter school and school district for a fiscal year shall equal the per pupil amount established in paragraph 1 of this subsection for the fiscal year multiplied by the weighted student count for the school district or charter school for the fiscal year pursuant to section 15-943, paragraph 2, subdivision (a). For the purposes of this paragraph, the weighted student count for a school district that serves as the district of attendance for nonresident pupils shall be increased to include nonresident pupils who attend school in the school district.

A.R.S. § 15-977(G). In short, monies in the Classroom Site Fund are distributed based on a school district or charter school's weighted student count, calculated pursuant to A.R.S. § 15-943(2)(a), and multiplied by a per pupil amount determined by the Joint Legislative Budget Committee each year. Arizona Revised Statutes § 15-943(2)(a) specifically incorporates the Small School Weight when it states "subject to paragraph 1 of this section;" paragraph (1) of A.R.S. § 15-943 addresses the Small School Weight, and paragraph (2) describes other weights, related to factors such as ELL status, disability or homelessness. In other words, CSF monies are distributed based on weighted student count.

A.R.S. § 15-185(B)(1) provides, "the charter school shall calculate a base support level as prescribed in section 15-943, except [for the conditions described in (a)<sup>7</sup> and (b)]." SB 1476, which adds subsections (b) through (d), then explains how weighted student count is calculated, depending on whether a school's student count is more or less than 600 and on whether certain factors demonstrating affiliation are present. Because SB 1476 affects the calculation of weighted student count, and weighted student count is one factor in the equation for determining the allocation of CSF monies, the allocation of CSF monies is necessarily affected by SB 1476.

### **III. Distribution of SB 1469's Inflationary Increase**

You have also asked how SB 1476's reduction in the Small School Weight should affect distribution of the inflationary increase set forth in Senate Bill 1469. 2015 Ariz. Sess. Laws, 52d Lg. 1st Reg. Sess., ch. 8, § 34 (SB 1469). Senate Bill 1469 provides that the Department shall

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<sup>7</sup> Subsection (a) prevents charter schools from having access to the Teacher Experience Index funding, as provided by A.R.S. § 15-941. This provision is not new. Previously, it was found in subsection (B)(1); with the change, it is now separately enumerated as subsection (a).

allocate \$74,394,000 as though it were “an additional increase of \$54.31 in the base level defined for fiscal year 2015-2016 in section 15-901, subsection B, paragraph 2,” but specifies that the “additional inflation amount is not an increase in the base level” as defined by A.R.S. § 15-901. SB 1469 at 25:12-24. This language clearly indicates that the inflationary increase is to be treated as though it is part of the base level. A.R.S. § 15-943(3) states that a “base support level” is calculated by multiplying the weighted student count (as determined pursuant to subsections (1) and (2)) “by the base level.” A.R.S. § 15-943(3). Because the inflationary amount is to be allocated as “if the monies were for an additional increase . . . in the base level,” the inflationary increase amount should be added to the base level, and then the base support level should be calculated by multiplying that number by the weighted student count, determined pursuant to A.R.S. § 15-943, as affected by SB 1476, if appropriate.

#### **IV. Calculation of the Small School Weight for K-12 Charter Schools**

Finally, you have asked how the Department should apply SB 1476 to charter schools that serve grades K-12. This question arises because A.R.S. § 15-943(1) establishes different Small School Weights for K-8 schools and for 9-12 schools. *Compare* A.R.S. § 15-943(1)(a) *with* -943(1)(b). While neither SB 1476 nor A.R.S. § 15-943 address this question, the Department has developed its own interpretation, which arises independently of the change effected by SB 1476. For charter holders that serve both K-8 and 9-12 in one school, the Department determines the number of K-8 students and the number of 9-12 students separately. If the number of K-8 students is less than 600, it applies the K-8 Small School Weight, with a similar result if the number of 9-12 students is less than 600. The Department’s practice is reasonable; under this practice, students in grade K-8 are aggregated for purposes of determining their eligibility for the weight assigned to them, while 9-12 students are considered as a separate group for the weight assigned to them. With SB 1476, the Department should now aggregate all students in grades K-8 in schools held by a single charter holder to determine whether to apply the Small School Weight, and should make similar calculation as to all students in grades 9-12.

#### **Conclusion**

The legislative change to eligibility for the Small School Weight will not change eligibility for those affiliated charter schools with aggregated student counts below 600, regardless of the number of charters held. It will, however, affect both the Classroom Site Fund and inflationary increase monies that some charter schools receive. Finally, the Department of Education should separately determine the number of students in grades K-8 and 9-12 for purposes of applying the relevant weighting factors.

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Mark Brnovich  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 16, 2015</p>	<p>No. I15-006 (R15-007)</p> <p>Re: May more than one non-profit organization be the "sponsoring organization" for a common raffle pursuant to section 13-3302(B)....</p>
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To: Senator Steve Farley  
Arizona State Senate

**Questions Presented**

You have asked whether more than one nonprofit organization may be the “sponsoring organization” for a common raffle pursuant to Arizona Revised Statutes Section 13-3302(B)?

**Summary Answer**

Yes. More than one nonprofit organization may be the “sponsoring organization” for a common raffle under section 13-3302(B), provided that each organization independently meets the exclusion requirements.

**Background**

Gambling is generally illegal in Arizona. *See* A.R.S. § 13-3303 (Promotion of gambling), § 13-3304 (Benefitting from gambling). The Arizona Legislature has identified particular conduct that is excluded from the general prohibition. A.R.S. § 13-3302 (Exclusions);

*see also* Ariz. Atty Gen. Op. I90-035 (1990). Of relevance to this opinion, section 13-3302(B) permits certain organizations to conduct a raffle, which would otherwise constitute unlawful gambling, under specific conditions:

**B.** An organization that has qualified for an exemption from taxation of income under § 43-1201, subsection A, paragraph 1, 2, 4, 5, 6, 7, 10 or 11 may conduct a raffle that is subject to the following restrictions:

1. The nonprofit organization shall maintain this status and no member, director, officer, employee or agent of the nonprofit organization may receive any direct or indirect pecuniary benefit other than being able to participate in the raffle on a basis equal to all other participants.
2. The nonprofit organization has been in existence continuously in this state for a five year period immediately before conducting the raffle.
3. No person except a bona fide local member of the sponsoring organization may participate directly or indirectly in the management, sales or operation of the raffle.

A.R.S. § 13-3302. The remainder of subsection B sets forth further specified exclusions relating generally to hospitals and certain non-profits engaged in child abuse prevention and related advocacy; entities meeting these criteria are permitted to contract with an outside agent for purposes of a raffle. A.R.S. § 13-3302(B)(4).

### **Analysis**

Because no court has addressed this issue, it is a basic question of statutory interpretation to determine the scope of the gambling exclusion under section 13-3302(B). “Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). “In determining the legislature's intent, we initially look to the language of the statute itself.” *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003). If the statute's language is clear, we apply it “unless application of the plain meaning would lead to impossible

or absurd results.” *Id.* “The general rule that a penal statute is to be strictly construed does not apply to [Title 13], but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law, including the purposes stated in section 13-101.” A.R.S. § 13-104.

Section 13-3302(B)(3) requires that only a “bona fide local member” of a sponsoring organization participate directly in a permitted raffle. This language does not explicitly prohibit two organizations from coming together to offer a raffle, but it could be read restrictively to imply such a prohibition given that a joint raffle would likely involve the participation of individuals who are not “bona fide local member[s]” of both organizations. Such a restrictive reading means two organizations that could legally conduct raffles independently would be guilty of illegal gambling when they do so collaboratively. Nothing in the statutory language indicates that our Legislature intended such an arbitrary result.<sup>1</sup> Moreover, A.R.S. § 13-104 specifically forbids such a strict construction because such an interpretation would not “promote justice and effectuate the objects of the law,” A.R.S. § 13-104, or otherwise serve the purposes of Title 13 set forth in section 13-101.

As noted previously, the statute is silent as to the question presented. Statutory silence cannot be invoked as an indication of legislative intent. *See, e.g., Sell v. Gama*, 231 Ariz. 323, 328 ¶ 21 (2013) (“we find it not plausible to interpret the statutory silence as tantamount to an implicit [legislative] intent.”) (internal quotation marks omitted, alterations in original). This silence may be resolved by looking to “the context of the [legislation], the language used, the subject matter, the historical background, the effects and consequences, and the spirit and

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<sup>1</sup> While legislative history is not relevant here (and in general is not a reliable source of authority), it is also instructive to note that the legislative history of section 13-3302(B) is devoid of any concern regarding such collaborative raffles.

purpose of the law. *Martin v. Martin*, 156 Ariz. 452, 457 (1988). Here, by creating the non-profit exception to the general prohibition on raffles, the Legislature expressed its concern with preserving a critical fundraising source for organizations that serve the public. By restricting “management, sales or operation” of the raffle to members of the sponsoring organization, and by strictly defining those organizations which can sponsor raffles, the Legislature codified its intent that raffles be conducted with integrity and inure to the benefit of the organization. There is no statutory language that indicates a concern with otherwise qualified organizations conducting a joint raffle. Accordingly, the intent, purpose, and fair meaning of the statute is clearly served and best effectuated if organizations that are independently qualified under § 13-3302(B) may cooperate in their objective to serve the public interest.<sup>2</sup>

### **Conclusion**

More than one organization may serve as the “sponsoring organization” for a raffle under section 13-3302(B), so long as each sponsoring organization is independently qualified to conduct such a raffle under the statute.

Mark Brnovich  
Attorney General

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<sup>2</sup> Nothing in this opinion should be read to suggest that an organization may gain a right or privilege it would not otherwise be entitled to by collaborating with another organization. This extends to the requirements in sections 13-3302(B)(1) and (3), that raffles be conducted by members of qualified organizations and that proceeds from the events redound to the benefit of the sponsoring organizations (e.g., an organization that is excepted from sections 13-3302(B)(1) and (3) cannot gain the advantage of the exception in section 13-3302(B)(4)).



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION  By  MARK BRNOVICH ATTORNEY GENERAL  July 30, 2015	No. I15-002 AMENDED (R15-002)  Re: Use of Public Funds to Influence the Outcomes of Elections
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To: Sheila Polk  
Yavapai County Attorney

Bill Montgomery  
Maricopa County Attorney

**Questions Presented**

You have asked for guidance on the limitations imposed by Arizona Revised Statutes Section 11-410 on the use of county resources to influence an election. Your inquiry focuses on the relationship between section 11-410 and ballot measures, and raises two discrete questions:

1. When do the restrictions on the use of public resources “for the purpose of influencing the outcomes of elections” arise with regard to a ballot measure?
2. What conduct or communications does the prohibition in A.R.S. § 11-410 preclude?

**Summary Answer**

1. The prohibitions in Section 11-410 on the use of public resources “for the purpose of influencing the outcomes of elections” in the context of a ballot measure

proposition arise upon the filing of an application for a serial number for a ballot initiative or referendum.

2. Determining whether particular conduct or communications may be prohibited requires analysis under an objective two-part test:
  - a. Was there a use of public resources?
  - b. If so, were the public resources used “for the purpose of influencing the outcomes of elections?”

### **Background**

In 1996, the Arizona Legislature enacted a series of statutes to prohibit the use of public resources “for the purpose of influencing the outcomes of elections.” 1996 Ariz. Legis. Serv. Ch. 286 (S.B. 1247). The original statutory language did not define the phrase “influencing the outcome of elections,” but rather, generally prohibited expending public resources for that purpose. *Id.* The prohibitions, codified in the Arizona Revised Statutes, applied to cities (§ 9-500.14); counties (§ 11-410); state and public agencies (§ 16-192); school districts and charter schools (§ 15-511); community colleges (§ 15-1408); and universities (§ 15-1633). The Legislature clarified that it did not intend through these prohibitions to deny any civil or political liberties of public employees that are guaranteed by the federal and state constitutions. *See, e.g.,* A.R.S. § 11-410(G) (2015).

In 2000, this office looked to the campaign finance laws for guidance to determine what “influencing the outcome of elections” encompassed. Ariz. Atty. Gen. Op. I00-020. That guidance resulted in two general principles. First, determining whether something has the purpose of influencing an election should be generally an objective test. *Id.* at 2 (*citing Federal Election Comm’n v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1116 (9th Cir. 1988))

(Under federal campaign finance law, whether something is intended to influence an election is an objective test, rather than a test “based on the subjective state of mind of the actor.”)). Second, “campaign expenditures ‘for the purpose of influencing elections’ do not include ‘non-partisan activity designed to encourage individuals to vote or to register to vote.’” *Id.* (quoting A.R.S. § 16-901(9)(b)). This office set forth specific guidance for public officials stating that the operative statutes “do *not* prohibit

- elected officials from speaking out individually regarding measures on the ballot;
- the use of public resources to respond to questions about ballot measures, although responses should provide factual information that suggest neither support nor opposition to the measure;
- the use of public resources to investigate the impact of ballot measures on a jurisdiction;
- the use of public resources to prepare and distribute the election information required by statute; and
- the preparation and dissemination of materials ‘reporting on official actions of the governing body.’”

*Id.* at 3-4 (emphasis in original).

Two years later, Division Two of the Arizona Court of Appeals interpreted Section 9-500.14. *See Kromko v. City of Tucson*, 202 Ariz. 499 (App. 2002). The court noted, “[a]t the heart of the appeal and cross-appeal is the following question: precisely what constitutes ‘influencing the outcomes of elections’ for purposes of the statute?” *Id.* at 501 ¶ 6. The court ultimately settled on the “unambiguously urges” test, finding that an actor would not be found to violate the prohibition unless the communication at issue “unambiguously urges a person to vote

in a particular manner.” *Id.* at 503 ¶ 10 (internal quotation marks and alterations omitted). In applying this test, the court looked at whether “reasonable minds could differ” as to whether the particular communication encouraged a vote one way or the other on the propositions at issue. *Id.* (internal quotation marks omitted). In other words, the court imposed a very narrow reading of the prohibition at issue. The *Kromko* court explicitly rejected a requirement of impartiality similar to that in A.R.S. § 19-124(B) because Section 9-500.14 did not expressly require impartiality. *Id.* at 502.

In 2007, this office subsequently relied on the 2000 AG opinion, with reference to *Kromko*, in considering whether elected county officials may use their official titles in various materials that advocate the success or defeat of ballot measures. *See* Ariz. Atty. Gen. Op. I07-008 (“[E]lected officials may communicate their views on pending ballot measures and may use their official titles when doing so.” “Although county officials may sign their names and use their official titles in such communications, they may not use public resources or funds for the purpose of expressing these views.”).

In 2013, the Arizona Legislature substantially amended the prohibitions against the use of public resources to affect elections. *See* 2013 Ariz. Legis. Serv. Ch. 88 (H.B. 2156). Among the broad changes made, the Legislature provided a statutory definition of “influencing the outcomes of elections” lacking at the time of the *Kromko* decision:

“Influencing the outcomes of elections” means supporting or opposing a candidate for nomination or election to public office or the recall of a public officer or supporting or opposing a ballot measure, question or proposition, including any bond, budget or override election and supporting or opposing the circulation of a petition for the recall of a public officer or a petition for a ballot measure, question or proposition in any manner that is not impartial or neutral.

A.R.S. § 9-500.14(G)(2); § 11-410(G)(2); § 15-511(L)(2); § 15-1408(J)(2); § 15-1633(K)(2); § 16-192(G)(2).<sup>1</sup>

### Analysis

There are two questions pending: (1) when do the statutory prohibitions on the use of public resources “for the purpose of influencing the outcomes of elections” arise with regard to a ballot measure, and (2) what conduct or communications do the prohibitions preclude?

#### **1. Question One: When (temporally) do these prohibitions arise?**

The Legislature has not explicitly answered this question. This office’s 2000 opinion stated that the statutory prohibitions with regard to ballot measures “apply before a measure qualifies for the ballot.” Ariz. Atty. Gen. Op. I00-020 at 4. We now clarify that the language of Section 11-410<sup>2</sup> indicates that the prohibitions arise upon the filing of an application for a serial number for a ballot initiative or referendum. *See* A.R.S. § 19-111.

The 2013 amendments to Section 11-410 adding the operative definition make it clear that, for purposes of ballot measures, the prohibition against influencing an election includes “supporting or opposing a ballot measure, question or proposition” and “supporting or opposing *the circulation of a petition* for a ballot measure, question or proposition.” A.R.S. § 11-410(H)(2) (emphasis added). The statute makes plain that the prohibition applies not just to measures on the ballot, but also to supporting or opposing the circulation of a petition. *See id.* In other words, the Legislature defined this prohibition to apply beyond merely the time at which

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<sup>1</sup> As previously noted, the Legislature further amended the relevant statutes in 2015. *See* 2015 Ariz. Legis. Serv. Ch. 296 (H.B. 2613) (amendments to all relevant statutes except A.R.S. § 15-1633).

<sup>2</sup> For convenience, and because it is the direct subject of the inquiry, the analysis in this Opinion will reference Section 11-410. Because the operative language in that section is repeated elsewhere, the analysis in this Opinion applies equally to the same language as found in A.R.S. § 9-500.14(G)(2); § 15-511(L)(2); § 15-1408(J)(2); § 15-1633(K)(2); and § 16-192(G)(2).

the election participants (candidates and ballot measures) are fixed. A petition may be circulated once the Secretary of State issues an official serial number to the petition. *See* A.R.S. §§ 19-111(B), 19-121(A). Thus, for ballot measures, the prohibitions arise when an official serial number is assigned to the petition.

Aligning the statutory prohibitions with this objectively identifiable date is consistent with Arizona's election laws generally, which typically tie election-related prohibitions and duties to objectively identifiable dates and times. *See, e.g.,* Ariz. Const. Art. IV, Pt. 1 § 1(4) (setting the time for filing of initiative and referendum petitions); A.R.S. § 16-311 (time for filing a candidacy nominations paper); § 16-914.01 (duties for campaign finance reporting, including deadlines, for committee supporting or opposing a ballot measure); § 16-945 (prescribing contribution schedules for candidates participating in public financing scheme). A contrary rule would cause unnecessary ambiguity and potentially chill the otherwise permissible conduct or speech of elected officials and public employees. Accordingly, the prohibitions in Section 11-410 arise with regard to ballot measures when an application for a serial number for a ballot initiative or referendum is filed.

**2. Question Two: What conduct or communications do these prohibitions preclude?**

The Legislature's 2013 amendments to Section 11-410 effectively rejected the *Kromko* "unambiguously urge" test as the only measure of influencing the outcome of elections, but the Legislature did not clearly articulate its preferred alternative to that test. However, the definition of "influencing the outcomes of elections" provides sufficient guidance to construct an analytical framework to assist public officials in avoiding prohibited conduct under the statute.

Statutory interpretation principles require that each portion of the provision at issue be given effect; in other words, we do not read a statute in a way that would render a portion

superfluous or ineffective. *Grand v. Nacchio*, 225 Ariz. 171, 175-76 ¶ 21 (2010) (“We ordinarily do not construe statutes so as to render portions of them superfluous.”). Accordingly, whatever test the Legislature intended to adopt in its 2013 amendments, it must incorporate all elements of the definition.

To give full meaning to the statute, the analytical framework requires an objective two-part test: (1) was there a use of public resources; (2) if so, were the public resources used “for the purpose of influencing the outcomes of elections?”

*A. Was There A Use of Public Resources?*

As a threshold matter, the statutory prohibition does not become operative unless there is a use of public resources. In other words, there is no need to analyze the conduct or communication if there is no use of public resources because Section 11-410 does not apply.

Arizona’s statutory prohibitions are quite broad, including “the use or expenditure of monies, accounts, credit, facilities, vehicles, postage, telecommunications, computer hardware and software, web pages, personnel, equipment, materials, buildings or any other thing of value.” A.R.S. § 11-410(A). Although broad, this list is consistent in applying only to a “thing of value.” *See id.* A violation of the statutory prohibitions must therefore involve the use or expenditure of a public resource that has value.

In addition to the specific examples given in the statute, this prohibition also generally applies to the use of a public employee’s time during normal working hours, as that time is a public resource that has value. Employees’ time spent outside of normal working hours is not a public resource.

Elected officials’ time, however, should be considered differently. Elected officials’ titles and duties are not readily separated from their persons. *Colorado Taxpayers Union, Inc. v.*

*Romer*, 750 F. Supp. 1041, 1045 (D. Colo. 1990) (“the political personage which are not separable from the man in office. The official position is a part of the person of the incumbent at all times. Governors have no duty shifts or time off.”).<sup>3</sup> This should not lead to a conclusion that elected officials have less ability to participate in the political process than their employees. Rather, it suggests that whether particular conduct in question under this statute occurred during the traditional work day is not a relevant consideration to evaluating if public resources have been expended when the actor at issue is a politically elected official.<sup>4</sup> Instead, the inquiry for elected officials must consider whether the official used public resources other than his time.

The Legislature is not presumed to have adopted a statute intended to infringe state elected officials’ and employees’ ability to engage in the political process as citizens. And the Legislature expressly stated that it did not intend the prohibitions as prohibiting constitutionally protected speech. A.R.S. § 11-410(G) (“Nothing contained in this section shall be construed as denying the civil and political liberties of any employee as guaranteed by the United States and Arizona Constitutions”). Thus, elected officials and public employees do not use public resources when they take a position on a ballot proposition, where for the employee it is outside of their normal working hours or while on approved official leave, and for either an elected

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<sup>3</sup> In Arizona, state and county elected officials do not accrue sick or annual leave and are not required to use leave for time away from the office. *See* A.R.S. § 41-742(D)(1) (exempting state elected officials from the state personnel system), A.R.S. § 11-352(A) (exempting county elected officials from the county merit system). In other words, Arizona’s laws explicitly recognize that elected officials always carry their title and official persona, regardless of the time of day.

<sup>4</sup> This is consistent with the general jurisprudence regarding the federal Hatch Act, and related state “Little Hatch” Acts, which proscribe certain political activities by government employees, but generally exempt certain high level, primarily elected, officials. In *United States Civil Service Commission v. National Ass’n of Letter Carriers*, the Supreme Court held that the Hatch Act struck a constitutionally sustainable balance between First Amendment rights of public employees and “obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.” 413 U.S. 548, 564 (1973). *See also Patterson v. Maricopa County Sheriff’s Office*, 177 Ariz. 153 (App. 1993). The statutory framework in A.R.S. § 11-410 strikes that same balance.

official or a public employee, the individual does not otherwise expend public resources in taking that position. Examples of this type of permissible speech include drafting an editorial or participating in an interview or a debate.

The use of either an elected official's title or other incidental uses of the attributes of office also is not a use of public resources for purposes of the statutory prohibition. The statutory prohibitions should be interpreted and applied to implement the Legislature's legitimate purpose of deterring the misuse of public funds, but they should not be employed to improperly silence public officials from expressing views on important matters of public policy. Although an elected official's title has some inherent value, it does not constitute a use of public resources under the statute when the elected official exercises his First Amendment rights to speak about elections. Thus, the use of a public official's name and title on a mailing that is not paid for with public resources would not constitute a use of public resources because the Legislature's legitimate regard for the First Amendment outweighs whatever minimal value that the use of an official's title may have. *See* Atty. Gen. Op. I07-008. Similarly, the presence of a regular security detail paid for by an elected official's office by itself does not constitute the use of public resources for purposes of the statutory prohibition because the security detail must accompany the elected official regardless of whether the elected official is communicating about a ballot measure. *See, e.g., Romer*, 750 F. Supp. at 1045 (The detail is generally considered an extension of the public official's political person and is not separable from the person in office; "There is a difference between the conduct of public officials in speaking out on controversial political issues and their use of governmental power to affect the election." ).<sup>5</sup>

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<sup>5</sup> *Romer* was "not a public expenditure case." *Id.* at 1044. The federal court instead considered whether the Colorado Governor's conduct and speech in opposition to a ballot measure violated state citizens' First Amendment rights as a result of the use of state resources as well as the

If an activity falls into one of the exceptions above, there is no need to move on to the second step of the analysis. But where an elected official or public employee does in fact use a public resource, additional analysis is required.

*B. Was the Public Resource Used “For the Purpose of Influencing the Outcomes of Elections?”*

*1. The standard is objective.*

Where there is a use of public resources, the analysis turns to purpose—whether the public resources were used “for the purpose of influencing the outcomes of elections.” Although examination of that purpose seems to implicate subjective intent, our office has previously adopted an objective test in determining whether something has the purpose of influencing an election. *Ariz. Atty. Gen. Op. I00-020 at 2 (citing Fed. Election Comm’n v. Ted Haley Congressional Comm., 852 F.2d 1111, 1116 (9th Cir. 1988)); see also FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 466-69 (2007) (rejecting intent-based test in the context of an as-applied constitutional challenge); Orloski v. Fed. Election Comm’n, 795 F.2d 156, 162, 165 (D.C. Cir. 1986) (approving of an objective test to determine whether a contribution is made for the purposes of influencing any election).* While the Legislature substantially amended the statutes at issue since this office’s 2000 opinion, it did not suggest that the standard should not be objective. Indeed, the primary concern—conduct or communications that have the purpose of influencing the outcomes of elections—has remained the same and thus the analysis regarding an

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“power and prestige” of the public office. *Id.* at 1042. The court’s analysis as to what constituted public resources in that context is relevant and instructive to the questions addressed in this opinion. A public official presented with an opportunity to exercise constitutionally protected rights to free speech, where such opportunity poses a potential security threat, must not be required to choose between his safety and the exercise of free speech. As previously noted, section 11-410 explicitly exempts conduct protected by state and federal constitutions so it is clear that our Legislature did not intend for public officials in this state to be faced with such a Hobson’s choice.

objective test endures. The objective test will necessarily involve a fact-specific, case-by-case evaluation. Ariz. Atty. Gen. Op. I00-020.

2. *The standard prohibits supporting, opposing, or disseminating information in a manner that is not impartial or neutral.*

The statutory prohibition on the use of public resources for the purpose of “influencing the outcomes of elections” precludes the use of public funds for “supporting or opposing” a candidate or ballot measure “in any manner that is not impartial or neutral.” A.R.S. § 11-410(H)(2). “Support” is defined as “to promote the interests or cause of.” Merriam-Webster.com. “Oppose” means “to place opposite or against something.” *Id.* By contrast, “impartial” is defined as “treating or affecting all equally” *id.*, while “neutral” means “a position of disengagement,” *id.* Thus, the terms “supporting or opposing” are antonymic to “impartial or neutral.” In other words, it is not possible to “support or oppose” a candidate or ballot measure in an “impartial or neutral” manner.<sup>6</sup>

Despite this apparent tension in the text of the statutory prohibition, it is possible to discern the Legislature’s purpose and intent from the language of the statute. Courts determine legislative intent from the statutory language, “the general purpose of the act in which it appears,

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<sup>6</sup> It is well-established that statutes “must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012). “The requirement of clarity is enhanced . . . when the statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms.’” *Info. Providers’ Coal. for Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) (internal quotation marks and citations omitted). Where a statute is vague, it will “inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1972)). The definition of “influencing the outcome of elections” presents some constitutional concerns because the uncertainty resulting from the inherent contradiction between “supporting or opposing” and “in any manner that is not impartial or neutral” may well deter public officials and employees from engaging in protected speech. The Arizona Legislature may consider looking to language that the State of Washington used in a similar statutory prohibition that does not present the same vagueness concerns. *See* Wash. Rev. Code Ann. § 42.52.180 (2012).

and the language of the act as a whole.” *No Ins. Section v. Indus. Comm’n*, 187 Ariz. 131, 132 (App. 1996) (internal citation omitted). Section 11-410 generally sets forth a prohibition against the use of public resources for the purpose of influencing the outcomes of elections, and attempts to give some parameters for that prohibition through carve outs (that is, distributing informational pamphlets or reporting on official actions (Subsection A); certain government-sponsored forums or debates (Subsection C); and any conduct protected by our federal or state constitution (Subsection G)). Moreover, the definition in subsection (H)(2) is self-evidently a response to the narrow test set forth in *Kromko*. The Court of Appeals in *Kromko* rejected an impartiality test because, “Had the legislature wanted to make presentation of an impartial analysis a prerequisite to [the use of public] funds and resources to educate the public on a ballot issue, it easily could have done so.” 202 Ariz. at 502 ¶ 7. With subsection (H)(2), the Legislature made clear that it did require impartiality as an element in the test. We can thus infer that the Legislature intended the prohibition on the use of public resources to apply not just to uses of public resources that unambiguously urge the electorate to vote in a particular matter, but also to uses of public resources that “support or oppose” a ballot measure ambiguously by presenting the information in “any manner that is not impartial or neutral.” See A.R.S. § 11-410(H)(2); see also Ariz. Atty. Gen. Op. I00-020 at 2 (allowing responses to inquiries on election issues “in a neutral manner that does not urge support or opposition to a measure”).

In the context of a ballot measure, we thus assess whether the use of public resources is for the purpose of influencing an election using an objective test to determine both its purpose and its manner. The test looks to: (1) whether the use of public resources has the purpose of supporting or opposing the ballot measure, and (2) whether the use of public resources involves

dissemination of information in a manner that is not impartial or neutral. As noted above, this test is objective.

In many cases, the application of the test will be straightforward. If the use of public resources unambiguously urges voters to vote for or against a ballot measure, it will violate the statutory prohibitions because (1) it supports or opposes the ballot measure, and (2) there is no question that the use is not impartial or neutral given its unambiguous message for or against the measure. Similarly, if a reasonable person could not find that the use of public resources supports or opposes a ballot measure, it will not violate the statutory prohibitions because (1) it does not support or oppose a ballot measure, and (2) it must therefore be impartial or neutral with regard to the ballot measure.

In other cases, the application of the test will require additional analysis. If a reasonable person could conclude that the use of public resources supports or opposes a ballot measure but reasonable minds could differ, *see Kromko*, 202 Ariz. at 503 ¶ 10, then the test will require closer examination of whether the use of public resources disseminates information in a manner that is not impartial or neutral. For this examination, we can analogize to the requirement that the legislative council provide “an impartial analysis” of each ballot measure or proposed amendment. A.R.S. § 19-124(B). Our Supreme Court has held that impartial analysis must “avoid[] argument or advocacy” and “be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring.” *Tobin v. Rea*, 231 Ariz. 189, 194 ¶¶ 12-13 (2013) (internal quotation marks and citations omitted). The use of “rhetorical strategy” in an attempt to persuade the reader is another signal that the dissemination of information violates this prohibition. *See Citizens for Growth Management v. Groscost*, 199 Ariz. 71, 72-73 ¶ 6 (2000). If an analysis of the manner of the use of public

resources reveals that it engages in advocacy, misleads, or uses rhetorical strategy, the use of public resources will violate the statutory prohibition because (1) a reasonable person could find that the use supports or opposes a ballot measure, and (2) it is not impartial or neutral.<sup>7</sup>

In other words, when assessing whether conduct implicates section 11-410's restrictions based on its purpose, we must account for the delicate balance between the prohibition on the improper use of public resources to influence elections and the need for public officials and employees to carry out their public functions. If a reasonable person could find that the use of public resources supports or opposes a ballot measure, we assess whether it is done in a neutral or impartial manner by examining whether it is: (1) free of advocacy; (2) free of misleading tendencies, including amplification, omission, or fallacy; and (3) free of partisan coloring.

3. *The standard may be applied practically.*

To clarify the application of the standard set forth above, we provide the following practical application examples, each of which is subject to the purpose and manner analysis as set forth above.

Routine uses of public resources made in the normal course of government functions would be presumed not to run afoul of the statutory prohibitions unless additional evidence demonstrates the use of resources was for the purpose of influencing an election. If the use of public resources is a routine use in the normal course of government functions, an objective observer would likely conclude that the purpose of the use of public resources was not to promote the interests of the ballot measure or to be used against the ballot measure. As such,

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<sup>7</sup> This is consistent with our previous opinion assessing the circumstances under which informational materials that do not advocate for or against a measure, but are not specifically authorized or required by statute, may be disseminated using public resources. Ariz. Atty. Gen. Op. I00-020 (approving of "such factors as the style, tenor and timing of the publication" to determine whether a public resource was used for the purpose of influencing an election) (internal quotation marks and citation omitted).

routine communications are presumed to be permissible; but that presumption may be rebutted by evidence that the communication meaningfully deviated from the routine in a manner that objectively indicated it had the purpose of influencing an election in violation of the statutory prohibitions. For example, where a tough-on-crime ballot measure is being circulated, the release of statistics that report an increase or decrease in crime but did not expressly address the ballot measure would be presumed not to violate the statutory prohibitions if it is a routine communication. In order to rebut that presumption, there would need to be evidence that, considering the totality of the circumstances, the report disseminated information in a manner that was not impartial or neutral. Relevant circumstances may include evidence that the report was inaccurate, misleading, and/or used rhetorical strategies that attempt to persuade the voter.

Similarly, in the discharge of their duties, elected officials are often presented with inquiries from the press or constituents concerning their positions on a variety of public policy issues, including ballot measures. For example, a county attorney may be asked at an open press conference to express a position on a pending ballot measure. Given the First Amendment implications discussed above, the official may respond to the inquiry without violating the prohibition on the use of public funds where the statement does not otherwise result in a non-routine use of public resources. Ariz. Atty. Gen. Op. I00-020 at 3 (citing *Smith v. Dorsey*, 599 So. 2d 529, 541 (Miss. 1992) (“the effective discharge of an elected official’s duty would necessarily include the communication of one’s considered judgment of the proposal to the community which he or she serves.”)). Although the use of the official’s time during the press conference has some value, the First Amendment implications of the official’s speech and the explicit carve-out in subsection (F) for speech protected by the First Amendment both indicate that this should not be considered a use of public resources within the statutory prohibition.

Further, the statute and this office's previous guidance recognizes that public officials may expend public resources concerning elections for a variety of neutral or impartial reasons, including "the use of public resources to respond to questions about ballot measures, although responses should provide factual information that suggest neither support nor opposition to the measure;" "the use of public resources to investigate the impact of ballot measures on a jurisdiction;" "the use of public resources to prepare and distribute the election information required by statute;" and "the preparation and dissemination of materials 'reporting on official actions of the governing body.'"<sup>8</sup> Ariz. Atty. Gen. Op. I00-020 at 3-4. Again, any expenditure or use of resources related to the subject matter of a ballot measure and within the operative time frame will be subject to the purpose and manner analysis to determine whether it violates the prohibition. For example, the use of public resources to investigate the potential impact of a ballot measure on a jurisdiction could give rise to a challenge where the dissemination of information related to that investigation is made in a manner that fails to be neutral or impartial.

As expressly permitted by the statute, public officials also may sponsor forums or debates at public expense if they remain impartial, the events are purely informational and provide an equal opportunity to all viewpoints. A.R.S. § 11-410(B).

In contrast, the statute prohibits a non-elected public employee's attendance at a non-neutral event designed for the purpose of supporting or opposing a ballot measure if the employee attends the event during normal working hours unless the employee uses annual leave

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<sup>8</sup> Ariz. Atty. Gen. Op. I00-020 interpreted the prior version of the statutory prohibitions that did not have the definition of "influencing the outcome of elections" at issue here. But that opinion embraced a similar standard, as it indicated that the use of resources must be assessed in an objective manner on a case-by-case basis to determine whether, for example, information is provided "in a neutral manner that does not urge support or opposition to a measure."

personal time; such attendance would violate the statute's prohibition on use of personnel for the purpose of influencing the outcome of an election.

The importance of context in this objective analysis cannot be overstated. The use of public resources to disseminate information may be impartial or neutral in content, but violate the statutory prohibition in the manner in which it is disseminated. For example, if neutral or impartial information is disseminated through direct mail only to likely voters (as opposed to the full relevant constituency), that context may indicate that the public resources are being used for the purpose of influencing the outcome of elections.

### **Conclusion**

Section 11-410 prohibits counties from using public resources for the purpose of influencing the outcomes of elections. The statute seeks to balance a public official's First Amendment rights to participate in the political process, and the public's right against compelled subsidy of speech embodied in the improper use of public resources to influence elections. This opinion provides an analytical framework to assist public officials in their efforts to balance their First Amendment rights with the public's right against compelled subsidy of speech.

To that end, the operative time frame for the relevant prohibitions is triggered by the filing of an application for a serial number for a ballot initiative or referendum.

The determination of whether particular conduct is permissible requires analysis under an objective two-part test:

1. Was there a use of public resources?
2. If so, were the public resources used "for the purpose of influencing the outcomes of elections?"

Under this test, any use of public resources that occurs after the restrictions arise under the statute is subject to the objective test set forth above, which must necessarily constitute a fact-specific, case-by-case evaluation to determine whether such use was for the impermissible purpose of influencing the outcome of an election.

Mark Brnovich  
Attorney General



**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 31, 2015</p>	<p>No. I15-007 (R15-008)</p> <p>Re: Calculation of Bond Indebtedness</p>
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To: Bill Montgomery  
Maricopa County Attorney

**Questions Presented**

Which value, the full cash value or limited property value, is the value upon which school districts must base their bond indebtedness?

**Summary Answer**

The full cash value is the value upon which school districts should base their bond indebtedness. Recent changes to article IX, section 18, of the Arizona Constitution, and to Arizona Revised Statutes ("A.R.S.") section 15-1021, did not amend the language of article IX, sections 8 and 8.1, of the Arizona Constitution regarding the calculation of the bond debt.

## Background

The Arizona Constitution addressed limits on school district bond indebtedness at the time of its adoption in 1912:

No . . . school district . . . shall for any purpose become indebted in any manner to an amount exceeding 4 per centum of the taxable property in such . . . school district . . . without the assent of a majority of the property taxpayers, who must in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, *the value of the taxable property* therein to be ascertained by the last assessment for state and county purposes, previous to incurring such indebtedness . . . provided that under no circumstances shall any county or school district become indebted to an amount exceeding 10 per centum of such taxable property, as shown by the last assessment roll.

Ariz. Const. art. IX, § 8(1) (emphasis added). The Arizona Legislature gave the relevant language its first construction the following year with the adoption of the 1913 Arizona Code, section 4849 of which read:

All taxable property must be assessed at its full cash value. The term 'full cash value' whenever used in this act shall mean the price at which property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property is usually sold, and not the price which might be realized if such property was sold at a forced sale.

Thus the original understanding of article IX, section 8, was that it limited bond indebtedness based on the full cash value of taxable property. Subsequent iterations of relevant statutes continued this understanding. See Revised Code of Arizona 1928, § 3068; Arizona Code Annotated 1939, § 73-203; A.R.S. § 42-15001. Today, our county assessors must take an oath to assess all property at its full cash value. See A.R.S. § 11-542.

Article IX, section 8, has been amended a number of times, yet the operative language regarding the basis for the limitation—“the value of the taxable property”—has not changed since its adoption in 1912. Arizonans added section 8.1 of article IX in a 1974 election, which limits bond indebtedness for unified school districts. The language of the new section mirrored that found in section 8 in all relevant respects.

In 1980, Arizona voters approved a series of constitutional amendments through the referendum process. Among the 10 individual propositions considered, Proposition 106 added section 18 to article IX, creating and setting limits for an ad valorem residential property tax, and Proposition 104 amended sections 8 and 8.1 to increase debt limits and clarify that certain provisions of the new section 18 do not apply to these sections. *See* S. Con. Res. 1001, 34th Leg., 2d Spec. Sess. (Ariz. 1980) (referring measures to the ballot). Notably, the addition of section 18 introduced the concept of limited property value in Arizona, and the amendments to sections 8 and 8.1 explicitly excluded that concept from the debt limit sections.

In 1996, the Legislature for the first time adopted language providing specific statutory instruction regarding the calculation of debt limits under article IX, sections 8 and 8.1. Section 35-503 provided that the value of taxable property pursuant to article IX, sections 8 or 8.1, “shall be the aggregate net assessed value of property within the jurisdiction used for the levy of secondary property taxes, as determined pursuant to title 42.” 1996 Ariz. Sess. Laws, 42d Leg., 2nd Reg. Sess., ch. 332, § 7. At that time, county assessors used separate values to assess and levy primary and secondary taxes pursuant to section 42-11001. Primary taxes were assessed and levied against the limited property value; secondary taxes were assessed and levied against the full cash value. Thus, the 1996 statute clearly based the constitutional debt limit provisions on the full cash value.

In 2012, Arizona voters amended article IX, section 18, through Proposition 117 to add the following:

For the purposes of taxes levied beginning in tax year 2015, the value of real property and improvements, including mobile homes, used for all ad valorem taxes shall be the lesser of the full cash value of the property or an amount five per cent greater than the value of the property determined pursuant to this subsection for the prior year.”

Ariz. Const. art. IX, § 18(3)(b). This represented a significant change to the calculation of the limited property value. However, the amendment made no changes to the debt limit provisions in article IX, sections 8 and 8.1. In 2013, the State enacted Senate Bill 1169 for the purpose of conforming various statutory provisions to the constitutional changes in Proposition 117. S.B. 1169, 2013 Ariz. Sess. Laws, 51st Leg., 1st Reg. Sess., ch. 66. Among the changes in the bill, the Legislature clarified that both primary and secondary property taxes would be based upon the “limited property value” for all property except property described in section 42-13304. *Id.* § 7.<sup>1</sup> The legislation did not make explicit statutory changes related to debt limit calculation, but the change as to the calculation of secondary property taxes altered the previous clarity in section 35-503(B). In other words, that 1996 statute that had clearly tied debt limit calculations under sections 8 and 8.1 to full cash value now could be read to apply both full cash value and limited property value.

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<sup>1</sup> The property described in A.R.S. § 42-13304 includes all personal property, other than mobile homes, and property included in class one property under section 42-12001, paragraphs 1 through 7 and 11. A.R.S. § 42-13304. The statute specifies that the full cash value is to be used for all purposes for this property. *Id.* This distinction is immaterial to the discussion here.

In 2015, the State enacted House Bill 2479, which amended statutory language to provide a new method for computing statutory debt limits. H.B. 2479, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 310. In particular, the bill amended section 15-1021(B) as follows:

From and after December 31, 1998, a school district may issue class B bonds for the purposes specified in this section and chapter 4, article 5 of this title to an amount in the aggregate, including the existing class B indebtedness, not exceeding ten ~~per cent~~ PERCENT of the VALUE OF THE taxable property ~~used for secondary property tax purposes, as determined pursuant to title 42, chapter 15, article 1, within a school district as ascertained by the last assessment of state and county taxes previous to issuing the bonds~~ IN THAT SCHOOL DISTRICT, or one thousand five hundred dollars per student count pursuant to section 15-901, subsection A, paragraph 13, whichever amount is greater. THE VALUE OF THE TAXABLE PROPERTY SHALL BE ASCERTAINED AS PROVIDED BY ARTICLE IX, SECTION 8, CONSTITUTION OF ARIZONA.

*Id.* § 4.<sup>2</sup> The member who proposed adding this particular language intended to “require[] school districts [to] use the same valuation of taxable property . . . as all other political subdivisions.” Ward Floor Amendment #2, Floor Amendment Explanation, *available at* <http://www.azleg.gov/legtext/52leg/1r/adopted/2479ward1045.pdf>; *See* A.R.S. § 35-451(B) (providing that the debt limits for counties, cities, towns, or similar municipal corporations “shall be ascertained as provided by article IX, § 8, Constitution of Arizona”). The removal of the reference to secondary property taxes in section 15-1021 resolved the issue of that calculation relying on both full cash value and limited property value. However, none of the statutory changes made in the wake of Proposition 117 amended the language in section 35-503(B), which continued to reference secondary property tax calculations, and by extension tied the debt limit calculation to both full cash value and limited property value.

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<sup>2</sup> The bill comparably amended similar language in A.R.S. § 15-1021(D). *Id.*

The County Assessors throughout Arizona now believe an ambiguity exists regarding how school districts are to calculate the value of the taxable property in the district for purposes of bond indebtedness limitations. The 2013 changes to section 42-11001 tied secondary taxes to both the full cash value and limited cash value depending on property type. The 2015 amendments removed the reference to secondary property taxes and referred back to the constitutional language. However, that amendment did not alter the statutory provisions that interpreted and applied that constitutional language. Thus, the 2015 amendments left in place section 35-503's reference to the "secondary property tax purposes," creating contradicting statutory direction regarding the proper value upon which to base the debt limit calculation.

### Analysis

Despite the somewhat complex legal history set forth above, and the resulting potential for concerns in three areas, basic statutory interpretation principles can resolve these concerns in a relatively straightforward manner. The primary rule of statutory construction is to find and give effect to legislative intent. *Mail Boxes Etc., U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121 (1995). The best and most reliable indicator of legislative intent is a statute's own words. *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996). Where the language of the statute or constitutional provision is plain and unambiguous, the text must generally be followed as written. When the statute's language is not clear, legislative intent is determined by "reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Id.*

In the wake of the most recent amendments, all relevant statutes now specify that the value of the taxable property for all political subdivisions shall be ascertained as provided by article IX, section 8, Constitution of Arizona. H.B. 2479, 2015 Ariz. Sess. Laws, 52d Leg., 1st Reg. Sess., ch. 310, § 4 (amending A.R.S. § 15-1021); A.R.S. § 35-451. While article IX, section 8 does not specify the basis for ascertaining the value of taxable property, the clear historical understanding of this provision has been that the values are based on the full cash value.<sup>3</sup> Further, as previously noted, both limitation provisions at issue (sections 8 and 8.1 of article IX) explicitly exclude provisions of section 18 in that same article from application to the debt limitations. Ariz. Const. art. IX, § 8(2) & 8.1(2). The excluded provisions in section 18, among other things, establish the limited property value. Ariz. Const. art. IX, § 18(3). In other words, Proposition 117's constitutional changes, and the resulting statutory conformations, made changes to the application of limited property value but they did so only in the context of property tax levies, and not debt limits.

The ambiguity remains, however, because section 35-503 still provides that the basis for ascertaining the value of taxable property "shall be the aggregate net assessed value of property within the jurisdiction used for the levy of secondary property taxes, as determined pursuant to title 42." A.R.S. § 35-503(B). And title 42 now requires that secondary property taxes be determined based on both the full cash value and the limited property value (depending on whether the property at issue is described in section 42-13304). A.R.S. §§ 42-11001(1), (6), & (7).

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<sup>3</sup> As discussed earlier, before the Proposition 117 amendments, section 35-503(B) required that bond debt limits be calculated using the full cash value. This further supports our view that full cash value is, and always has been, the proper value for calculating constitutional bond debt limits.

This would create a problematic interpretive situation, except that the 2015 amendments to section 15-1021 repeal by implication section 35-503(B). *See Hounshell v. White*, 219 Ariz. 381, 386, ¶ 13 (App. 2008) (holding that there are two recognized bases to implicitly repeal a statute: (1) “when a statute is unavoidably inconsistent with another more recent or more specific statute” and (2) “when two statutes cover the same subject matter and the earlier statute is not explicitly retained by the later statute.”); A.R.S. § 1-245 (stating that an earlier statute, “unless expressly continued in force by [the later statute], shall be deemed repealed and abrogated.”). The revisions to section 15-1021 specifically address the calculation of constitutional debt limits for school districts, and establish that they should be calculated on the full cash value, rather than tying that calculation to “secondary property taxes” and thereby to both full cash value and limited property value. Thus, because section 35-503(B) is unavoidably inconsistent with section 15-1021, and was not explicitly retained by H.B. 2479, it should be deemed repealed and abrogated. The consequence of that abrogation is that there is no ambiguity due to the title 42 requirements for determining secondary property taxes.

In summary, despite the apparent complex and overlapping nature of the constitutional and statutory amendments adopted in recent years, the long-standing constitutional construction remains in effect: the full cash value should be used for the purposes of calculating the bond indebtedness of school districts pursuant to article IX, sections 8 and 8.1.<sup>4</sup>

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<sup>4</sup> The County Assessors have raised a related concern regarding a financial conundrum that may exist if district bond limits were set using the full cash value. This concern is not implicated for school district general obligation bonds. When issued, the Board of Supervisors must levy sufficient taxes each year to pay the bonds. A.R.S. § 15-1022. These taxes are unlimited as to rate or amount. Thus, if the value of the property subject to annual tax levies falls, the tax rate must increase to achieve the needed money to pay the bonds. Conversely, the same is true; if values increase the tax rate falls proportionally. Tax rates will rise if the limited property value

### Conclusion

For the foregoing reasons, the full cash value should be used for the calculation of bonded indebtedness by school districts.

Mark Brnovich  
Attorney General

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is applied and aggregate valuation falls below the last year's value of property for secondary tax purposes with respect to the school district bonds now outstanding.



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION  By  MARK BRNOVICH ATTORNEY GENERAL  October 9, 2015	No. I15-008 (R15-016)  Re: Whether parents can opt their children out of statewide school assessment tests
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To: Superintendent Douglas

**Questions Presented**

You have asked this Office to clarify the status of parents' rights to allow their children to opt out of statewide assessments such as the AzMERIT. You reference a December 10, 2014, letter from this Office to the Arizona Department of Education. That letter updated Arizona Attorney General Opinion No. I97-008, which concludes that parents may not withdraw their children from Arizona's required standardized tests.<sup>1</sup> In your Opinion Request, you indicate that the December, 2014 letter from this Office may have introduced an ambiguity regarding the rights of parents to withdraw their students from statewide assessments; you therefore ask the following questions:

1. Whether a statewide assessment, such as the AzMERIT test is considered a "learning activity or learning material" under A.R.S. § 15-102;
2. Whether the silence in A.R.S. § 15-102 to include statewide assessment could be read to protect a parent's ability to opt their child out of state assessments as the parent rights included within the statute are not an exhaustive list;
3. Whether a parent can choose to opt their child out of statewide assessments pursuant to A.R.S. §§ 1-601 or -602; and
4. Whether a child who has opted out of the statewide assessment may attend school during the testing window and not be required to test.

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<sup>1</sup> It also updated a September 16, 2013, letter from this Office on the same topic.

## Summary Answer

The answer to each of the first three questions is “no;” the last question is mooted by these responses. In 1997, this Office reviewed A.R.S. §§ 15-741, 743 and 746, which “establish a comprehensive statewide system for assessing the achievement of public school students through a series of mandatory essential skills tests and a standardized norm-referenced achievement test.” Ariz. Att’y Gen. Op. I97-008. We noted that the obligation to establish, implement, and maintain this system is mandatory, imposing duties on the State Board of Education, the Arizona Department of Education, local school district governing boards, and local schools. The 1997 Opinion also addressed A.R.S. § 15-102, and concluded that a standardized assessment was not a learning material or activity from which parents could exempt their children. *Id.* As a result of your Opinion Request, this Office has carefully reviewed its original conclusions in Opinion No. I97-008 in light of subsequent amendments to existing laws and new statutes. None of the changes affect the reasoning employed in the 1997 Opinion. Our conclusion remains the same: parents do not have a legal right to withdraw their children from state-mandated assessments in Arizona’s public schools.

## Analysis

### **1. Whether a statewide assessment, such as the AzMERIT test is considered a “learning activity or learning material” under A.R.S. § 15-102?**

Arizona Revised Statutes § 15-102 addresses schools’ obligations to encourage parental involvement in schools. It requires that “governing board[s], in consultation with parents, teachers and administrators, . . . develop and adopt a policy to promote the involvement of parents and guardians” in a variety of school-related issues. A.R.S. § 15-102(A). Among the procedures that must be developed is one “through which parents who object to any learning material or any activity that they believe to be harmful may withdraw their children from the activity or from the class or program in which the material is used.” Ariz. Att’y Gen. Op. I97-008 (citing A.R.S. § 15-102(A)(3)). The 1997 Opinion concluded that this language did not give parents the right to withdraw their children from standardized tests because such tests are “separate and distinct from the learning material or learning activity contemplated by A.R.S. § 15-102(A)” and added that the statute did not specifically include a right to withdraw from standardized tests. *Id.* The Opinion further noted that allowing such withdrawals might lead to manipulation of the testing system, thus “defeating the purpose of the legislative assessment and reporting mandates.” *Id.*

While Arizona now requires a different standardized assessment than it did in 1997, this difference does not compel a different conclusion regarding whether assessments are a “learning material” or “activity” as contemplated by A.R.S. § 15-102. An assessment is a means “educators use to evaluate, measure, and document the academic readiness, learning progress, and skill acquisition” of students of all ages. (*See* definition of “assessment” at

<http://edglossary.org/assessment/>, last visited Sept. 24, 2015). An assessment is thus not a “learning material” or “learning activity.”

**2. Whether the silence in A.R.S. § 15-102 to include statewide assessment could be read to protect a parent’s ability to opt their child out of state assessments as the parent rights included within the statute are not an exhaustive list?**

The 1997 Opinion concluded that the Legislature did not intend to allow parents to withdraw their children from statewide assessments on the basis of A.R.S. § 15-102. However, in 2010, A.R.S. § 15-102 was amended and a new statute, the Parents’ Bill of Rights (A.R.S. § 1-601 and 602), was added, by Senate Bill 1309. S.B. 1309, 49th Leg., 2d Reg. Sess. ch. 307 (2010). The changes to A.R.S. § 15-102 include new subsections (A)(4) through (A)(7). Subsection (A)(7) details, in 19 subparagraphs, local school boards’ obligations to ensure they inform parents about their rights to opt out of several obligations, such as the right to opt out of assignments, the right to opt out of immunizations, and the right to opt out of instruction on acquired immune deficiency syndrome. A.R.S. § 15-102(A)(7)(c), (d), and (g). School boards are also required to ensure they provide parents with information about numerous other rights, including the right to review test results, the right to receive a school report card, and the right to public review of courses of study and textbooks. A.R.S. § 15-102(A)(7)(h), (k), and (m). Notably absent from the list of parents’ rights is the right to opt out of any assessments. The Legislature’s failure to include such a right is especially telling because the statute specifically mentions the “right to review test results pursuant to section 15-743” and the “right to receive a school report card pursuant to section 15-746.” A.R.S. § 15-102(A)(7)(h) and (k). In other words, the changes to A.R.S. § 15-102 reinforce the conclusion of the 1997 Opinion: the Legislature could have included a parental right to exempt a child from statewide assessments, but did not. *See, e.g., State v. Roscoe*, 185 Ariz. 68, 71 (1993) (“A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.”) (quoting *Pima County v. Heinfeld*, 134 Ariz. 133, 134 (1982)).

Moreover, review of the “opt out” rights provided in A.R.S. § 15-102 indicates that the Legislature limited the authority of parents who choose public education to customize that education. While local school boards must provide parents with substantial information about their schools, rights to opt out are limited. Although parents may opt their children out of 1) assignments, on the basis that a learning activity or material is harmful because “it questions beliefs or practices in sex, morality or religion;” 2) immunizations; and 3) instruction on acquired immune deficiency syndrome, the limited nature of parents’ opt out rights that are

specified in A.R.S. § 15-102 indicates that the Legislature did not intend to include a right to opt out of statewide assessments.<sup>2</sup>

### **3. Whether a parent can choose to opt their child out of statewide assessments pursuant to A.R.S. §§ 1-601 or – 602?**

As noted above, Senate Bill 1309 also included the “Parents’ Bill of Rights,” which is codified at A.R.S. §§ 1-601 and 602. These statutes affirm parents’ fundamental rights to, among other things, “direct the education of the minor child.” A.R.S. § 1-602(A)(1). These statutes also note that “parents have inalienable rights that are more comprehensive than those listed in this section.” A.R.S. § 1-602(D). However, neither section 1-601 nor 1-602 specifically references any particular aspect of education, much less statewide assessments. Furthermore, to the extent A.R.S. § 1-602 and § 15-102 address the same topic—a parent’s rights with respect to the education of a child—they should be harmonized to effect legislative intent. *Arden-Mayfair, Inc. v. Dept. of Liquor Licenses and Control*, 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979). Reading a right to opt out of standardized testing into the more general statute, A.R.S. § 1-602, when the more specific statute, A.R.S. § 15-102, does not include such a right would be inconsistent with this principal of statutory construction.

Importantly, while a parent’s right to direct the education of a minor child allows a parent to choose whether to send a child to a public district or charter school, a private sectarian or secular school, or to choose homeschooling, it does not allow a parent who sends a child to a public school to prescribe the details of that child’s education. As the Ninth Circuit Court of Appeals noted, citing to the Sixth Circuit with favor,

While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the

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<sup>2</sup> Moreover, a statute added in 2011—A.R.S. § 15-113—clarifies a parent’s right to opt a child out of a “learning material or activity.” That statute describes a parent’s “right to review learning materials and activities in advance,” and the parent’s right to withdraw a student from a learning material or activity the parent views as harmful. It defines “harmful” by stating: “For the purposes of this section: (1) ‘Objects to any learning material or activity on the basis that it is harmful’ means objections to a material or activity because of sexual content, violent content, or profane or vulgar language.” A.R.S. § 15-113(E)(1). Thus, reading A.R.S. § 15-102 and 113 together, it is clear that a parent’s right to opt a child out of learning materials or activities is limited to material viewed as harmful because of “sexual content, violent content, or profane or vulgar language.” Such objections would not generally apply to statewide assessments.

school or, as here, a dress code, these issues of public education are generally “committed to the control of state and local authorities.”

*Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (citations omitted) (emphasis in original).

**4. Whether a child who has opted out of the statewide assessment may attend school during the testing window and not be required to test?**

Given the answers to the questions above, this question is moot. School districts are required to “administer the tests” prescribed by the State Board of Education. A.R.S. § 15-741(C). Given this requirement, and because there is no right to opt out of statewide assessments, children who attend school during the testing windows are required to take assessments as scheduled.

**Conclusion**

The answers to your questions are as follows:

1. No, a mandatory statewide assessment exam does not constitute a “learning material” or “activity” as contemplated by A.R.S. § 15-102.
2. No, a fair reading of the plain text in A.R.S. § 15-102 does not provide a basis for finding a parental right to opt out of state assessments.
3. No, the “Parents’ Bill of Rights” as set forth in A.R.S. §§ 1-601 and 602 does not encompass a right for parents to opt their children out of statewide assessments.
4. Because there is no parental right to opt out of a statewide assessment, children who attend school during testing windows must take the assessments as scheduled.

Mark Brnovich  
Attorney General



OFFICE OF THE ARIZONA ATTORNEY GENERAL

October 19, 2015

C.H. Huckelberry  
County Administrator  
Pima County Governmental Center  
130 W. Congress, Floor 10  
Tucson, AZ 85701-1317

Dear Mr. Huckelberry,

You requested a formal opinion from this Office, asking whether it would violate A.R.S. § 16-602(B)(2)(f) to conduct a hand count of Pima County's November 3, 2015 bond election, the City of Tucson's mayor and city council elections, and the Town of Oro Valley's recall election. As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. We understand time is of the essence regarding your request, at least in part because the Pima County Board of Supervisors is holding its final pre-election meeting this week and would like to consider this office's opinion on the question presented. For these reasons, we offer the following informal opinion regarding the applicability of A.R.S. § 16-602(B)(2)(f) to the upcoming elections: Pima County would not violate A.R.S. § 16-602(B)(2)(f) if it were to conduct a hand count of the races in question because (1) any hand count of these races would be outside the scope of A.R.S. § 16-602 and (2) A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside the scope of the statute.

A.R.S. § 16-602(B) applies to "*countywide* primary, special, general and presidential preference election[s]." (Emphasis added). Further, as part of the triggered A.R.S. § 16-602 hand count, the county official in charge of elections is instructed to count selections from the following categories of contested races: statewide ballot measures, races for statewide office, races for federal office, and races for statewide legislative office.<sup>1</sup> A.R.S. § 16-602(B)(a)-(e). If

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<sup>1</sup> Although it is possible to read ambiguity into whether A.R.S. § 16-602(B) intends to include only statewide ballot measures or statewide and local ballot measures, we believe the context of A.R.S. § 16-602(B) counsels in favor of the statewide ballot measure interpretation. The structure of A.R.S. § 16-602(B)(2) suggests that ballot measure in A.R.S. § 16-602(B)(2)(e) refers to the statewide ballot measures in A.R.S. § 16-602(B)(2)(a), as does the use of the modifier "additional" in A.R.S. § 16-602(B)(2)(e). This approach is also consistent with the approach taken in the Election Procedures Manual. See State of Arizona's Election Procedures Manual at 193 (2014); see also A.R.S. § 16-602(B) ("The hand count shall be conducted as prescribed by this section and in accordance with hand count

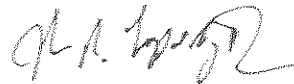
C.H. Huckelberry  
County Administrator  
October 19, 2015  
Page 2

there are no contested races from these categories in a particular precinct, A.R.S. § 16-602(B)(2)(f) instructs the county official in charge of elections not to conduct an A.R.S. § 16-602 hand count in that precinct. Under this analysis, none of the elections at issue would trigger a full A.R.S. § 16-602 hand count.

Further, A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside of A.R.S. § 16-602. That section only provides instructions for the county official in charge of elections on what races to count in an A.R.S. § 16-602 hand count. *See* A.R.S. § 16-602 (“The hand count shall be conducted in the following order”); A.R.S. § 16-602(B)(2) (“The races to be counted on the ballots from the precincts that were selected . . . shall include up to five contested races . . . as follows”); A.R.S. § 16-602(B)(2)(f) (“If there are no contested races as prescribed by this paragraph, a hand count shall not be conducted *for that precinct* for that election.”) (emphasis added).

Please note this informal opinion does not address any of the following issues: (1) the source of Pima County’s authority, if any, for a hand count outside the scope of A.R.S. § 16-602 for the races in question, (2) the procedures the County should use for any hand count since A.R.S. § 16-602 would not apply, and (3) what effect, if any, a hand count outside of A.R.S. § 16-602 would have on the official outcome of the election.

Sincerely,



John R. Lopez IV  
Solicitor General

JRL/bg

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procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.”).



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>November 16, 2015</p>	<p>No. I15-010 (R15-012)</p> <p>Re: Statutory Record Retention Obligations</p>
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To: Joan Clark  
State Librarian and Director  
Arizona State Library, Archives and Public Records

**Questions Presented**

You have asked the following questions about the statute establishing the Arizona State Library, Archives and Public Records (“State Library”), Arizona Revised Statutes Sections 41-151 through -151.24 (“State Library Statute”):

1. Is it accurate to interpret “agencies” when used alone to include both state and local agencies?
2. Are the records of an unincorporated city or town the property of the State? Are the records of Title 48 special taxing districts property of the State?
3. Is it accurate to state that Section 41-151.19, which concerns records disposition, applies beyond counties, cities and towns, and special taxing districts to also include “public bodies” as that term is defined at Section 39-121.01(A)(2)?

## Summary Answers

1. No. While the term “agencies” occasionally appears unmodified in some sections of the State Library Statute, the plain language of subsequent provisions of those same sections make clear whether they apply to state agencies, local agencies, or both.

2. By the plain terms of Section 41-151.15, neither the records of unincorporated communities nor those of Title 48 special taxing districts are the property of the State. Because unincorporated communities are not “public bodies” under Arizona public records law, they are not subject to Section 41-151.15’s record preservation requirements. In contrast, Title 48 special taxing districts are public bodies and, accordingly, their records must be preserved as Section 41-151.15 requires.

3. Yes, all “public bodies” as defined by Section 39-121.01(A)(1) are subject to Section 41-151.19’s record disposition requirements. A.R.S. § 39-121.01(C).

## Background

Although the State Library can trace its roots to the first Arizona Territorial Library in 1863, the Legislature established the State Library in its current form in 1976. 1976 Ariz. Sess. Laws 326-38. The State Library is required to contain “[c]opies of current official reports, public documents and publications of state, county and municipal officers, departments, boards, commissions, agencies and institutions, and public archives.” A.R.S. § 41-151.08(A)(1). The State Library also “is the central depository of all official books, records and documents not in current use of the various state officers and departments of this state, the counties and incorporated cities and towns.” A.R.S. § 41-151.09(A). The latter materials constitute the State Archives. *Id.* Whereas State officers must deposit State or territorial archival material with the State Library, “[a]ny county, municipal or other public official” has the option of either retaining

archival materials or depositing them with the State Library for preservation. *Cf.* A.R.S. § 41-151.09(B) *and* A.R.S. § 41-151.09(C).

The State Library’s Director is responsible for preserving and managing “records.” A.R.S. § 41-151.12(A). As defined by the Library Statute, “‘records’ means all books, papers, maps, photographs or other documentary materials . . . made or received by any governmental agency in pursuance of law or in connection with the transaction of public business.” A.R.S. § 41.151.18. Among other duties, the State Library’s Director must establish standards and procedures for managing, retaining, and disposing of “records” so defined. A.R.S. § 41-151.12(A)(1), (3).

The State Library Statute should be construed with Arizona public records statutes. Section 41-151.15 provides that every “custodian of public records shall carefully protect and preserve the records.” Section 41-151.19 provides that “[e]very public officer who has public records in the public officer’s custody shall consult periodically with the state library and the state library shall determine whether the records in question are of legal, administrative, historical or other value.”

These State Library Statute requirements correspond with the following public records law requirement:

Each public body shall be responsible for the preservation, maintenance and care of that body’s public records, and each officer shall be responsible for the preservation, maintenance and care of that officer’s public records. It shall be the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction, unless disposed of pursuant to §§ 41-151.15 and 41-151.19.

A.R.S. § 39-121.01(C).

## Analysis

### 1. **By Its Terms, The State Library Statute Makes Clear When the Term “Agencies” Applies to State Agencies, Local Agencies, or Both.**

“Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). “In determining the legislature's intent, we initially look to the language of the statute itself.” *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003). If the statute's language is clear, we apply it “unless application of the plain meaning would lead to impossible or absurd results.” *Id.*

The State Library Statute does not define the term “local agency.” Accordingly, the term “shall be construed to the common and approved use of the language.” A.R.S. § 1-213; *Circle K Stores, Inc. v. Apache Cnty.*, 199 Ariz. 402, 408, ¶ 18 (App. 2001) (“By declining to define a statutory term, the legislature generally intends to give the ordinary meaning to the word.”). *Black's Law Dictionary* defines the term “local agency” as follows: “A political subdivision of a state. Local agencies include counties, cities, school districts, etc.” *Black's Law Dictionary* 68 (8th ed. 2004).

A number of State Library Statute sections apply expressly to both state and local agencies. Specifically, Section 41-151.07 applies to “state and local institutions and governmental units.” A.R.S. § 41-151.07(2). Section 41-151.08 applies to “state, county and municipal . . . agencies.” A.R.S. § 41-151.08(A)(2). Section 41-151.09 applies to “the various state officers and departments of this state, the counties and incorporated cities and towns.” A.R.S. § 41-151.09(A). Section 41-151.14 applies to “[t]he head of each state and local agency” and “[t]he governing body of each county, city, town or other political subdivision.” A.R.S. § 41-151.14(A), (B), (C). Section 41-151.15 applies to “this state or the counties and incorporated cities and towns of this state.” A.R.S. § 41-151.15(A). And Section 41-151.16

applies to “[e]ach agency of this state or any of its political subdivisions.” A.R.S. § 41-151.16(A).

The term “agencies” appears unmodified in only three State Library Statute sections. But in each case, provisions directly following the term’s initial use clarify the extent to which the subsection applies to local agencies.

The first provision, Section 41-151.05 provides that “[a]fter consultation with other agencies,” the State Library Director will “adopt rules as provided by statute.” A.R.S. § 41-151.05(A)(7). Whether this consultation requirement applies to State agencies, local agencies, or both depends on the context that Section 41-151.05’s subsections provide. On the one hand, the Director must adopt rules as provided by Section 11-910, which concerns supervision of county free libraries, and Section 34-502, which charges the Director with adopting rules to enforce the technology protection measures for public access computers in all public—that is, not exclusively State—libraries. A.R.S. § 41-151.05(A)(7)(b), (d); *see also* A.R.S. § 35-502(B), (D). On the other hand, Section 41-151.05 also requires that the Director adopt rules “for the . . . [d]escription of state publications in all formats,” which unlike the two subsections previously mentioned, would not require consultation with local agencies. A.R.S. § 41-151.05(A)(7)(a).

The second provision, Section 41-151.12, which concerns records management, charges the Director with “[o]btain[ing] such reports and documentation from agencies as are required for the administration of this program.” A.R.S. § 41-151.12(A)(6). Subsequent provisions in this subsection make clear that the agencies participating in the Director’s records management program include local as well as State agencies. *See* A.R.S. §§ 41-151.12(7) (applying to “agencies of the state or its political subdivisions”); 151.12(9) (applying to “state agencies, political subdivisions of the state and other governmental units of this state”); and 151.12(10)

(also applying to “state agencies, political subdivisions of the state and other governmental units of this state”).

The third provision, Section 41-151.21 applies to “[a]n agency” that has or acquires furniture, equipment or other personal property that is over 50 years old or of known historical interest. A.R.S. § 41-151.21(A). However, this section subsequently defines “agency” as “any branch, department, commission, board or other unit of the state organization that receives, disburses or extends state monies or incurs obligations against this state.” A.R.S. § 41-151.21(F). By providing this definition, the Legislature intended Section 41-151.21 to apply to State agencies only.

In conclusion, the plain terms of the State Library Statute show which of its provisions the Legislature intended to apply to State agencies, local agencies, or both.

**2. Section 41-151.15’s Application to Unincorporated Communities and Title 48 Special Taxing Districts.**

**a. The Records of Unincorporated Communities and Title 48 Special Taxing Districts Are Not Property of the State Under Section 41-151.15.**

Section 41-151.15 of the State Library Statute provides that “[a]ll records made or received by public officials or employees of this state or the counties and incorporated cities and towns of this state in the course of their public duties are the property of this state.” A.R.S. § 41-151.15(A). Neither unincorporated communities nor Title 48 special taxation districts are listed among the public entities whose records are State property under Section 151.15(A). The Legislature’s omission of unincorporated communities and Title 48 special taxation districts suggests the intent to exclude them. *See Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 202, ¶ 7, 150 P.3d 773, 775 (App. 2007) (citing *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 249, 866 P.2d 1330, 1335 (1994)); *see also State v. Ault*, 157 Ariz. 516, 519, 759 P.2d 1320, 1323 (2008) (“Generally, when the legislature expresses a list, we assume the exclusion of items

not listed.”). Therefore, the records of unincorporated communities and Title 48 special taxing districts are not property of the State under Section 41-151.15.

**b. Title 48 Special Taxing Districts Are Public Bodies That Must Comply with Section 41-151.15 While Unincorporated Communities Are Not.**

Although their records are not property of the State, unincorporated communities and Title 48 special taxing districts may nevertheless be subject to Section 41-151.15’s record preservation requirements if they are “custodian[s] of public records.” A.R.S. 41-151.15(A). (“[T]he director and every other custodian of public records shall carefully protect and preserve the records.”) Whether an entity is a custodian of public records turns on whether it is a “public body” under Arizona public records law. *See* A.R.S. § 39-121.01(C) (“Each public body shall be responsible for the preservation, maintenance and care of that body’s public records.”) Unincorporated communities do not come within the statutory definition of “public body.” However, as both “political subdivision[s]” and “tax-supported district[s] in the state,” Title 48 taxing districts are public bodies subject to Arizona public records law and Section 41-151.15 record preservation requirements. A.R.S. § 39-121.01(A)(2).

**i. Unincorporated communities are not public bodies.**

Under Section 39-121.01(A)(2), any city or town is a “public body.” But in Arizona, a community must be incorporated to become a city or town. *See* A.R.S. § 9-101. An unincorporated community is “a locality in which a body of people resides in more or less proximity having common interests in such services as public health, public protection, fire protection and water which bind together the people of the area, and where people are acquainted and mingle in business, social, educational, and recreational activities.” A.R.S. § 9-101(A). Neither communities nor localities are listed among the entities that Section 39-121.01(A)(2) includes in the definition of “public body.” We therefore assume the Legislature intended to

exclude unincorporated communities from the reach of public records law and Section 41-151.15. *Accord Ault*, 157 Ariz. at 519, 759 P.2d at 1323.

**ii. Title 48 special taxing districts are public bodies.**

Under Section 39-121.01(A)(2), any political subdivision or tax-supported district in the State is a “public body.” Title 48 special taxing districts are public bodies by either classification. The Arizona Constitution states that “[i]rrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts . . . shall be political subdivisions of the state.” Ariz. Const. art. XIII, §7. The Legislature has established Title 48 special taxing districts as tax-supported districts. *See* A.R.S. § 48-101, et seq. Accordingly, this Office has reasoned that as an agricultural improvement and power district established as a special taxing district under Title 48, SRP is both a political subdivision and a tax-supported district and, therefore, a public body under Section 39-121.01(A)(2). *See* Ariz. Att’y Gen. Op. I90-0444 at 2 (1990). Consequently, this Office concluded that SRP was subject to Section 41-151.15’s predecessor statute,<sup>1</sup> among other statutes governing the preservation and public access to public records. *Id.* The same reasoning applies to all special taxing districts: as public bodies, Section 41-151.15’s public records preservation requirements apply to them.

**3. Section 41-151.19 Applies to All “Public Bodies” as Defined by Section 39-121.01(A)(1).**

Section 41-151.19 provides as follows:

Every public officer who has public records in the public officer’s custody shall consult periodically with the state library and the state library shall determine whether the records in question are of legal, administrative, historical or other value. . . . Those records determined to be of no legal, administrative, historical or other value shall be disposed of by such method as the state library may specify.

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<sup>1</sup> Section 41-1347 was the predecessor of Section 41-151.15. 1976 Ariz. Sess. Law 335-37.

A “public officer” obligated to adhere to these requirements is “any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.” A.R.S. § 39-121.01(A)(1). As previously discussed, “public bodies” include “this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.” A.R.S. § 39-121.01(A)(2). Thus, public officers of any of these listed public entities are obligated to consult with the State Library for determinations of records value and disposition as set forth in Section 41-151.19.

### **Conclusion**

1. The plain language of the State Library Statute shows which of its provisions the Legislature intended to apply to State agencies, local agencies, or both.
2. The records of unincorporated communities and Title 48 special taxing districts are not State property under Section 41-151.15. However, Title 48 special taxing districts are public bodies subject to Arizona public records law and Section 41-151.15’s record preservation requirements.
3. All public bodies as defined by Section 39-121.01(A)(1) are subject to Section 41-151.19’s consultation and record disposition requirements.

Mark Brnovich  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>December 2, 2015</p>	<p>No. I15-011 (R15-013)</p> <p>Re: Whether A.R.S. § 16-1019 requires an amendment</p>
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To: Senator John Kavanagh  
Arizona State Senate

**Question Presented**

What legal impact does the recent United States Supreme Court ruling in *Good News Presbyterian Church v. Town of Gilbert* have on Arizona Statutes regulating political campaign signs? In particular, does the Supreme Court ruling require an amendment to Section 16-1019, Arizona Revised Statutes, in order to comply with the Court's mandate?

**Summary Answer**

The Supreme Court's decision does not directly impact any Arizona statutes regulating political campaign signs. It does not require an amendment to Section 16-1019 because nothing in that statute restricts speech.

**Background**

In 1962, the Arizona Legislature adopted House Bill 198, which provided misdemeanor penalties for anyone to "remove, alter, deface, or cover any political sign." Laws 1962,

Chapter 124 (HB 198) [codified as A.R.S. § 16-1312(A) (1962)]. At the time, the provision did not apply to “signs placed on private property with or without permission of the owner thereof, or signs placed in violation of state law, or county, city or town ordinance or regulation.” *Id.* [§ 16-1312(B)].

Since 1962, the statute has been amended a number of times. Its original function—imposing misdemeanor criminal penalties for tampering with political signs—has remained unchanged. In 2011, the Legislature significantly amended the law by:

1. Clarifying that local governments generally lack the authority to tamper with political signs that support or oppose a candidate or ballot measure and exist in a public right-of-way as long as the sign:
  - a. does not present a public hazard, obstruct vision, or interfere with the Americans with Disabilities Act;
  - b. meets maximum size limitations; and
  - c. contains contact information for the candidate or campaign committee.
2. Allowing a local government to relocate signs deemed to be placed in a manner constituting an emergency, subject to certain requirements.
3. Limiting the liability of a public employee who does not remove or relocate a sign pursuant to the “emergency” provision.
4. As to the provisions in number 1, exempting “commercial tourism, commercial resort and hotel sign free zones as those zones are designated by municipalities” and setting restrictions for such zones.
5. Allowing local governments to prohibit the installation of signs on government structures.
6. Limiting the prohibitions described in number 1 above from 60 days before a primary to 15 days after a general election, in most cases.
7. Clarifying that the section “does not apply to state highways or routes, or overpasses over those state highways or routes.”

A.R.S. § 16-1019. Acting under the authority of point four, municipalities have adopted ordinances creating tourism zones. *See, e.g.*, Fountain Hills Resolution No. 2012-31 (adopted

November 15, 2012); Paradise Valley Resolution No. 1241 (adopted October 13, 2011). These ordinances allow municipalities to remove political signs from the designated zones.

In June 2015, the United States Supreme Court decided *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), clarifying the constitutional standard applicable to laws that restrict or limit speech based on its content. Specifically, the Court more clearly defined which laws are considered content-based and thus subject to strict scrutiny. A law subject to strict scrutiny is unconstitutional unless the government defending it can demonstrate that the law serves a compelling government interest and does so in the least restrictive manner possible.

### **Analysis**

The *Reed* decision explicitly confirmed that *any* content-based government restriction of speech will be subject to the most rigorous level of review. *Id.* at 2227. Such restrictions will therefore most likely be found unconstitutional. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, (2015) (noting that only in “rare cases” will “a speech restriction withstand[] strict scrutiny”). While the Court has long required content-based restrictions to meet this very high bar, determining when a regulation is or is not content-neutral remained open until *Reed* resolved the question by classifying any differential treatment based on “topic” as content-based:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

135 S. Ct. at 2227 (internal citations omitted). Under this standard, courts must apply strict scrutiny to special restrictions for political signs. *Reed* did not, however, restrict the permissibility of traditional time, place, and manner restrictions.

There are only three state laws regulating political signs in Arizona. Two of them, A.R.S. §§ 33-1261 and 33-1808, limit the ability of homeowners associations to restrict placement of political signs. A.R.S. §§ 33-1261(E), 1808(H), (I). The third statute, A.R.S. § 16-1019, imposes criminal penalties for interfering with political materials, including signs, and incorporates the exceptions described above, which allow a local government to adopt regulations relating to political signs.

Because this statute explicitly references political signs, one might suppose that it runs afoul of the First Amendment based on *Reed* because it references a particular category of speech identified by its content. To the contrary, *Reed* does not invalidate Section 16-1019. *Reed* clarified the analytical framework applicable to sign regulations that *restrict speech* and thus present “the danger of censorship” at the heart of First Amendment concerns. *Reed*, 135 S. Ct. at 2229. But nothing in Section 16-1019 restricts speech or compels the regulation of signs. Instead, it establishes the limits—under Arizona law—of what local governments may do as *they* limit or regulate signs. For example, subsection (F) recognizes that municipalities may designate certain sign-free zones within which the municipality may remove political signs. While such local laws might fall within the scope of *Reed*’s definition of content-based regulation, Section 16-1019 itself does not constitute content-based regulation.<sup>1</sup>

A municipality desiring to enact rules specifically targeting political signs in violation of *Reed* cannot rely on Section 16-1019(F) to inoculate such rules against a First Amendment

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<sup>1</sup> Justice Alito’s concurring opinion in *Reed* provides a number of examples of rules that are not content-based. 135 S. Ct. at 2334 (listing, *inter alia*, restrictions on size, illumination, off-premises placement, and number of signs).

challenge. The state law must now be read in light of *Reed*, and should thus be read as permitting municipalities to engage in sign regulation through the designation of tourism zones only to the extent that they do so in a content-neutral manner. In other words, such zones may not solely target political signs, but must employ generally-applicable time, place, and manner restrictions. That reconciliation with *Reed* does not affect the validity of Section 16-1019.

### **Conclusion**

Arizona state statutes referencing political signs do not restrict speech, so *Reed* does not have implications for our state statutes. Because Section 16-1019 does not itself restrict speech, it does not implicate the First Amendment and *Reed* does not, therefore, invalidate this state law. There is no need to amend Section 16-1019 because of the *Reed* decision.

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Mark Brnovich  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>December 2, 2015</p>	<p>No. I15-012 (R15-015)</p> <p>Re: Are chiropractors, their profession or any other profession or individual exempt from the title and term protection granted to physical therapists under A.R.S. § 32-2042(C)(D)</p>
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To: Dennis Wells, Ombudsman  
Arizona Ombudsman-Citizens' Aide Office  
(on behalf of Linda Duke, President of Arizona Physical Therapy Association)

**Questions Presented**

You have asked whether chiropractors and others are prohibited from using the word “physiotherapy” and other terms that are restricted to services provided by or under the direction of a licensed physical therapist pursuant to Arizona Revised Statutes (“A.R.S.”) § 32-2042 (C) and (D).

**Summary Answer**

Everyone in Arizona, including chiropractors, is subject to the prohibition in Section 32-2042 on the use of the word “physiotherapy” and other words, abbreviations or insignia indicating or implying directly or indirectly that physical therapy is provided or supplied, including the billing of services labeled as physical therapy, unless those services are provided by or under the direction of a licensed physical therapist.

## Background

In 1997, the Federation of State Boards of Physical Therapy published *The Model Practice Act for Physical Therapy: A Tool for Public Protection and Legislative Change* (“Model Practice Act”) as a tool for revising, modernizing, and creating greater uniformity in physical therapy practice acts across the nation. See *The Model Practice Act for Physical Therapy: A Tool for Public Protection and Legislative Change*, Fifth Edition (2011). In 1998, the Legislature rewrote Arizona’s Physical Therapy Practice Act (Title 32, Ch. 19),<sup>1</sup> adopting a majority of the Model Practice Act. 1998 Ariz. Sess. Laws, 43d Leg., 2nd Reg. Sess, ch. 253 (H.B. 2399). To protect and avoid misleading the public, and consistent with Section 4.02 of the Model Practice Act, A.R.S. § 32-2042 restricts the use of terms associated with licensed physical therapists:

C. A person or business entity or its employees, agents or representatives shall not use in connection with that person’s name or the name or activity of the business the words “physical therapy”, “physical therapist”, “physiotherapy”, “physiotherapist” or “registered physical therapist”, the letters “PT”, “LPT”, “RPT”, “MPT”, “DScPT” or “DPT” or any other words, abbreviations or insignia indicating or implying directly or indirectly that physical therapy is provided or supplied, including the billing of services labeled as physical therapy, unless these services are provided by or under the direction of a physical therapist who is licensed pursuant to this chapter. A person or entity that violates this subsection is guilty of a class 1 misdemeanor.<sup>2</sup>

D. A person or business entity shall not advertise, bill or otherwise promote a person who is not licensed pursuant to this chapter as being a physical therapist or offering physical therapy services.

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<sup>1</sup> The regulations implementing the Arizona act are set forth at Arizona Administrative Code (“A.A.C.”) R4-24-101 to -506.

<sup>2</sup> A.R.S. § 32-2048 authorizes the Board of Physical Therapy to investigate the unlawful practice of physical therapy, including violations of A.R.S. § 32-2042, and to seek criminal and civil penalties, as well as injunctive relief.

Arizona's Physical Therapy Practice Act does not restrict a person who is licensed under any other law of this state from engaging in the profession or practice for which that person is licensed if that person does not claim to be a physical therapist or a provider of physical therapy. *See* A.R.S. § 32-2021(A).

Amendments made to the statutes governing the profession of chiropractic are consistent with the term use restrictions set forth in A.R.S. § 32-2042. A.R.S. § 32-922.02 governs the certification of chiropractic specialties and, prior to 2010, subsection C provided for a certification to perform "physiotherapy." In 2010, the Legislature amended A.R.S. § 32-922.02 and related statutes<sup>3</sup> by replacing the term "physiotherapy" with the terms "physical medicine modalities" and "therapeutic procedures." 2010 Ariz. Sess. Laws, 49th Leg., 2nd Reg. Sess, ch. 26 (H.B. 2025). The legislative history for H.B. 2025 indicates that the Legislature made this change to update and clarify technical terms and to conform statutes relating to the profession of chiropractic with what chiropractors are licensed to do. *See* S. Fact Sheet for H.B. 2025, 49th Leg., 2d Reg. Sess. (Mar. 19, 2010); *see also* Minutes of H. Comm. on Health and Human Servs., 49th Legis., 2nd Reg. Sess. (Jan. 20, 2010); S. Comm. on Health & Med. Liability Reform Hr'g, 49th Legis., 2d Reg. Sess. (Mar. 24, 2010) (Testimony of Barry Aarons, Arizona Association of Chiropractors)<sup>4</sup>; H. Health and Human Servs. Comm. Hr'g, 49th Legis., 2d Reg. Sess. (Jan. 20, 2010) (Testimony of Barry Aarons, Arizona Association of Chiropractors).<sup>5</sup> Chiropractors who received a certification in physiotherapy prior to the effective date of the amendment are now deemed to be certified in physical medicine modalities and therapeutic procedures pursuant to A.R.S. § 32-922.02(F).

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<sup>3</sup> A.R.S. § 32-924(A)(19) and A.R.S. § 32-925.

<sup>4</sup> *See* [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=720](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=720) at 46:26-47:27.

<sup>5</sup> *See* [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=64161](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=64161) at 29:22-30:00.

## Analysis

No Arizona court has determined the scope of the prohibition of the use of the terms set forth in A.R.S. § 32-2042 (C) and (D). “Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). “In determining the legislature’s intent, we initially look to the language of the statute itself.” *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003). If the statute’s language is clear, we apply it “unless application of the plain meaning would lead to impossible or absurd results.” *Id.*

The language of A.R.S. § 32-2042(C) and (D) is clear. The Legislature unambiguously prohibited any person or business entity from directly or indirectly using the specified terms unless the services are provided by or under the direction of an Arizona licensed physical therapist. This legislative intent is bolstered by its 2010 amendments to A.R.S. § 32-922.02 and related chiropractic care statutes which deleted all references to the restricted term “physiotherapy,” consistent with A.R.S. § 32-2042 (C) and (D).

While no Arizona court has addressed this issue, other states that have addressed it have come to the same conclusion. Specifically, in *Bureau of Prof'l and Occupational Affairs v. State Board of Physical Therapy*, 728 A.2d 340 (Pa. 1999), chiropractors challenged a term use restriction statute substantially similar to A.R.S. § 32-2042 on the basis that it violated their constitutional freedom of expression by restricting them from advertising physical therapy services that they were allowed to perform. The Pennsylvania Supreme Court disagreed:

The factor that makes restriction of the chiropractors’ advertisements of physical therapy not a violation of their constitutional freedom of expression is that their services do not amount to what is commonly understood to be the practice of physical therapy. Since the enactment of the [Pennsylvania] PT Act in 1975, the practice of physical therapy has been a regulated and licensed profession. No longer is physical therapy understood to be merely a generic term for physical treatment. Rather, it

consists of a statutorily defined set of activities. Because chiropractors are not licensed to perform the full range of those activities, it would mislead the public if chiropractors were permitted to advertise that they offer physical therapy, where, as occurred here, the advertisements did not indicate the very limited scope of therapy that they offer. When the public encounters an advertisement for physical therapy, its rightful expectation is that the therapy consists of services that physical therapists are licensed to perform, and that the services will in fact be performed in a lawful manner by one who is licensed to provide such services. . . . Allowing chiropractors to advertise that they perform “physical therapy” would mislead the public into believing that chiropractors are actually licensed and able to perform the full range of such therapy. The legislative ban on such advertising protects the public from deceptive commercial speech and is, therefore, constitutionally sound.

*Id.* at 343-44. Likewise, the Delaware Attorney General has opined that Delaware’s term use restriction statute, which is substantially similar to A.R.S. § 32-2042, prohibited chiropractors who are not licensed as physical therapists from using the restricted terms. Del. Op. Atty. Gen. 87-I013.

### **Conclusion**

A.R.S. § 32-2042(C) and (D) clearly prohibit any person or business entity from using terms that are restricted thereunder unless physical therapy services are provided by or under the direction of a licensed physical therapist.

Mark Brnovich  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>December 21, 2015</p>	<p>No. I15-013 (R15-017)</p> <p>Re: The authority of a County Board of Supervisors regarding the County Assessor's Office.</p>
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To: **Sheila Polk**  
**Yavapai County Attorney**

**Questions Presented**

- A. Does the Yavapai County Board of Supervisors ("BOS") have the authority to withdraw consent for previously approved cartography and property title personnel positions within the County Assessor's office and assign those positions to a newly formed department that reports to the BOS?
- B. Does the BOS usurp the County Assessor's authority in the following situations?
  1. By transferring cartography functions previously performed by the County Assessor to a county department that reports to the BOS?
    - a. May the County Assessor rely upon cartography services provided by a county department to fulfill her statutory duties or is the Assessor required to perform her own cartography functions or otherwise supervise those functions?
    - b. Does the assignment of assessor parcel numbers to parcels of property pursuant to the Arizona Department of Revenue ("ADOR") guidelines by a county department, usurp the authority of the County Assessor?
    - c. Does the assignment of tax area codes to parcels of property by a county department, usurp the authority of the Assessor?

2. By transferring property title functions previously performed by the County Assessor to a county department that reports to the BOS?
  - a. May the County Assessor rely upon property title functions provided by a county department to fulfill her statutory duties or is the Assessor required to perform her own property title functions or otherwise supervise those functions?
  - b. May a county department enter affidavit of value information into the County Assessor's database without usurping the County Assessor's statutory duties, when such entry is a verbatim account of the affidavit information?
  - c. Is there a usurpation of authority when affidavit of value information has been interpreted, adjusted or classified by the county department prior to entry into the County Assessor's database? Is there a usurpation if such data entry is done with the input of the County Assessor?
  - d. May a county department that reports to the BOS determine title and ownership of real property parcels or process splits and combination of parcels without usurping the Assessor's statutory duties?
3. If a[n] usurpation of authority has been found in numbers 1 or 2 above, does the County Assessor's ultimate ability to review and override any data entered into the Assessor's database by a county department change the analysis?

#### **I. Summary Answers**

The various questions articulated provide for a detailed review of what is, essentially, a singular primary question: Did the BOS act beyond its authority and usurp the County Assessor's authority when the BOS removed certain personnel from the County Assessor's control? The summary answer to that overriding question is yes, the BOS exceeded its authority.

The BOS does not have the authority to withdraw cartography and title personnel from the control of the Yavapai County Assessor ("Assessor") given that the functions of those personnel are necessary for an assessor to perform its statutory duties. Among other duties, an assessor is required to identify, by diligent inquiry, all real property in the county that is subject to taxation, to maintain uniform maps and records with assistance from ADOR, to report detailed property information on the tax roll, to account for all property in a county, and to supply

geographical information to various county taxing districts. Cartography and title functions are necessary to an assessor's performance of these and many other statutory duties.

## **II. Background**

### **A. County Assessor Enabling Authority**

Article 12, Sections 3 and 4 of the Arizona Constitution provide that county assessors are elected officials whose duties and powers are those "as prescribed by law." Arizona Revised Statutes ("A.R.S.") 11-541 similarly provides that county assessors "shall have the powers and perform the duties prescribed by law." Every assessor must hold an assessor's certificate issued or recognized by ADOR, which demonstrates that ADOR recognizes the assessor's competency. A.R.S. § 42-13006. Moreover, a county assessor is "liable for all taxes on taxable property within the county which, through the neglect of the assessor, remains unassessed." A.R.S. § 11-543. Thus, county assessors must perform, must be competent to perform, and must have the power and resources to perform their constitutional and statutory duties.

### **B. County Assessor's Duties**

County assessors are tasked with "truly and fairly determin[ing] the valuation, without favor or partiality, of all the taxable property in [their] county at its full cash value." A.R.S. § 11-542 (assessor oath of office). Section 42-13051 provides:

A. Not later than December 15 of each year *the county assessor shall identify by diligent inquiry and examination all real property in the county that is subject to taxation and that is not otherwise valued by the department as provided by law.*

B. The assessor shall:

1. *Determine the names of all persons who own, claim, possess or control the property, including properties subject to the government property lease excise tax pursuant to chapter 6, article 5 of this title.*

2. *Determine the full cash value of all such property as of January 1 of the next year by using the manuals furnished and procedures prescribed by the department.*

3. List the property with the determined valuation for use on the tax roll and report to the department of education the determined valuations of properties that are subject to the government property lease excise tax pursuant to chapter 6, article 5 of this title.

C. *In identifying property pursuant to this section, the assessor shall use aerial photography, applicable department of revenue records, building permits and other documentary sources and technology.*

(Emphases added.)

With respect to their duty to identify property, county assessors must maintain uniform maps and records for their county with assistance from ADOR. A.R.S. § 42-13002(A)(3). ADOR is tasked with “exercis[ing] general supervision over county assessors in administering the property tax laws to ensure that all property is uniformly valued for property tax purposes.” A.R.S. § 42-13002(A)(1). An assessor must comply with the guidelines and manuals promulgated by ADOR when assessing property. A.R.S. § 42-11054(A)(1). In ADOR’s Assessment Procedures Manual (the “Procedures Manual”), ADOR describes an assessor’s duties as follows:

The County Assessor’s principle [sic] responsibilities include the location, inventorying and appraisal of all locally assessable property within their jurisdictions. The performance of these important functions requires a complete set of maps. Maps aid in determining the location of property, indicate the size and shape of each parcel, and can spatially reveal geographic relationships that contribute either negatively or positively to appraised values. In addition to the Assessors, many other governmental agencies, the general real estate community and the public rely on accurate maps. Computerized or digital mapping provides an accurate and cost effective method to map tax areas, appraisal maintenance areas and appraisal market areas.

Procedures Manual at 6.1.2. In furtherance of these duties the Procedures Manual tasks assessors as follows:

Assessors are responsible for discovering, listing and valuing all locally assessable properties within their jurisdictions. The discovery of real property (i.e., parcels of land and any improvements on them) is accomplished through:

1. Field Surveys.
2. The processing of Conveying Documents (Affidavits of Value, deeds, etc.).
3. The creation and processing of Plat Maps (a.k.a. cadastral maps).
4. Studying aerial and ground-based Photographs.
5. The processing of Building Permits.
6. The analysis of Ownership Status Maps (obtained from the State Land Department, the Bureau of Land Management, etc.).

Procedures Manual at 6.1.2-6.1.3.

As the Manual further explains:

“[A] well maintained cadastral mapping system (showing the extent and ownership of land) is essential to provide a standard, accurate *legal description*, which is needed for the accurate location, identification and inventory of property . . . . Property identification systems were designed and developed to produce a *legal description*, which prevents a specified parcel from being confused with any other parcel.”

Procedures Manual at 6.1.3 (emphasis in original).

Such duties and the resulting information enable county assessors to fulfill their statutory obligations to ensure that all property subject to the jurisdiction of the State is listed on the assessment roll and is cross-indexed. *See* A.R.S. §§ 42-15151 through 15153.

Many other corollary duties of an assessor as set forth throughout Title 42, Arizona Revised Statutes, depend upon or otherwise relate to an assessor's mapping and title duties.<sup>i</sup> Outside of Title 42, a county assessor has many duties that require the correct identification and mapping of property.<sup>ii</sup> Moreover, the assessor is a repository of documents and reports filed by other governmental entities relating to property locations for mapping, split, and ownership purposes, documents and reports that an assessor uses to perform its property valuation and assessment obligations.<sup>iii</sup> Finally, numerous government bodies and individuals rely on the mapping and title records of county assessors to perform their obligations.<sup>iv</sup>

Moreover, ADOR exercises general supervision over the assessors to ensure that all property throughout the State is fairly and uniformly valued. A.R.S. § 42-13002. ADOR has no authority over a county board of supervisors or its departments.

#### C. County Board of Supervisors

While Arizona statutes require a county board of supervisors to levy and equalize tax assessments (A.R.S. § 11-251(12)-(13)), they do not vest a county board with authority to identify property or to perform the mapping and titling functions necessary to assess property taxes. Arizona statutes presume that county boards rely upon the assessor's records when performing their duties. *See, e.g.*, A.R.S. §§ 40-344 (requiring the corporation commission, cities or towns, and board of supervisors to mail out notices to persons regarding the establishment of an underground conversion service area based on the records of the county assessor); 42-18303 (requiring county board of supervisors to rely on their county assessor's records related to common areas when selling property to a contiguous property owner).

### III. Analysis

County assessors are elected officials responsible for identifying, mapping, and assessing all property in their counties for property tax and other purposes. They are also responsible for determining the ownership of property for tax and other purposes. These duties, as detailed above, derive from the Constitution and statutes. Consequently, it is beyond a county board of supervisors' authority to divest a county assessor of those duties.

Consistent with that premise, the Arizona Court of Appeals has recognized under analogous circumstances the inherent limitations on a county board of supervisors' authority. In *Romley v. Daughton*, 225 Ariz. 521 (App. 2010), the Maricopa County Board of Supervisors determined that the Maricopa County Attorney had a conflict of interest that prevented him from adequately representing the Board in most civil matters. The Board established a General Litigation Department to represent the County in most new civil litigation matters in place of the County Attorney, based on cases holding that a county board could hire outside counsel where a county attorney refuses to act, is incapable of acting, or is unavailable for some other reason. The Court of Appeals determined that although the County Board could employ outside counsel in situations in which an ethical conflict existed, the County Attorney still had the power and authority to represent the County in civil litigation matters:

[A] county board of supervisors would exceed its authority in effectively divesting the county attorney of his power to represent the county and its agencies without the requisite determination on a case-by-case basis of unavailability of the county attorney or a lack of harmony between the board and the county attorney.

*Id.* at 526, ¶ 25.

Similarly here, the Yavapai County Assessor must have the ability to identify and map properties and to determine the ownership of properties in order to fulfill her statutory duties relating to the valuation and assessment of property and her statutory obligations to other

governmental agencies. The BOS cannot remove cartography and property title personnel from the assessor's office without unlawfully divesting the assessor of mapping and title functions that she is required to perform under state law. Further, given that ADOR has no authority over a county board of supervisors, in contrast with its general supervisory authority over assessors, transferring these functions to a board of supervisors would obstruct ADOR's supervision of the assessment of property in Yavapai County.

**A. Does the Yavapai County Board of Supervisors ("BOS") have the authority to withdraw consent for previously approved cartography and property title personnel positions within the County Assessor's office and assign those positions to a newly formed department that reports to the BOS?**

No. For the reasons stated above, the BOS cannot preclude the County Assessor from controlling cartography and title departments necessary to the performance of the Assessor's duties. Given that cartography and title functions are necessary to the Assessor's performance of these duties, the Assessor must retain and control those departments.

**B. Does the BOS usurp the County Assessor's authority in the following circumstances?**

**1. By transferring cartography functions previously performed by the County Assessor to a county department that reports to the BOS?**

Yes. The BOS could not transfer cartography functions to a county department that is not controlled by the Assessor without impairing the Assessor's ability to perform her statutory duties, which specifically include maintaining uniform maps and records for the County with the assistance of ADOR. Moreover, ADOR's Procedures Manual, promulgated pursuant to A.R.S. § 42-11054, requires county assessors to create and maintain maps and related documents as part of their duties. Part 6, Procedures Manual, Eff. 3/1/11; *see also* A.R.S. § 42-13002(A)(3)(a) ("The department shall . . . [a]ssist county assessors [i]n maintaining uniform maps and

records.”). Moreover, as noted above, divesting the County Assessor of these tasks also prevents ADOR from overseeing the Assessors’ mapping and related assessment duties.

- a. **May the County Assessor rely upon cartography services provided by a county department to fulfill its statutory duties or is the Assessor required to perform its own cartography functions or otherwise supervise those functions?**

No. As set forth above, mapping properties and performing related cartography functions are duties the Assessor is statutorily obligated to perform in accordance with ADOR’s Procedures Manual. The BOS may not divest an assessor of those functions and of the personnel needed to perform those functions.

- b. **Does the assignment of Assessor parcel numbers to parcels of property pursuant to the Arizona Department of Revenue (the “Department”) guidelines by a county department usurp the authority of the County Assessor?**

Yes. Property identification is central to the Assessor’s duties, and numerous statutes require various entities to rely on the Assessor’s parcel number or otherwise address the assessor’s issuance of a parcel number. The Assessor plainly has the power to oversee and control the issuance of parcel numbers, including the execution of parcel splits and consolidations, as required by statute and ADOR’s Procedures Manual. *See, e.g., Premiere RV & Mini Storage LLC v. Maricopa Cnty.*, 222 Ariz. 440, 447 ¶ 29 (App. 2009) (holding that a split occurs, for tax purposes, when the assessor completes the process of identifying and valuing resulting parcels following sale of a portion of a parcel).

- c. **Does the assignment of tax area codes to parcels of property by a county department usurp the authority of the Assessor?**

Yes. Creating a department not controlled by the Assessor to assign tax area codes to parcels of property would directly impair the Assessor’s ability to perform her statutory duties and comply with ADOR’s Procedures Manual.

**2. By transferring property title functions previously performed by the County Assessor to a county department that reports to the BOS?**

Yes. Transferring property title functions to a county department that is not controlled by the Assessor would impair the Assessor's ability to perform her statutorily required duty to identify property and ownership for property tax purposes.

**a. May the County Assessor rely upon property title functions provided by a county department to fulfill its statutory duties or is the Assessor required to perform its own property title functions or otherwise supervise those functions?**

As set forth above, the BOS cannot divest the Assessor of the property title functions that an assessor is obligated to perform by statute and/or in accordance with ADOR's Procedures Manual. This question is thus moot.

**b. May a county department enter affidavit of value information into the County Assessor's database without usurping the County Assessor's statutory duties when such entry is a verbatim account of the affidavit information?**

No. As set forth above, statutes and ADOR's guidelines require the Assessor to maintain and update its database. Consequently, the BOS cannot usurp that function through one of its departments.

**c. Is there a usurpation of authority when affidavit of value information has been interpreted, adjusted or classified by the county department prior to entry into the County Assessor's database? Is there a[n] usurpation if such data entry is done with the input of the County Assessor?**

Yes. The BOS would significantly impair the ability of the Assessor to perform its duties by allowing a county department not controlled by the Assessor to interpret, adjust, or classify affidavit of value data. Divesting the Assessor of those functions would unlawfully usurp the Assessor's authority.

- d. May a county department that reports to the BOS determine title and ownership of real property parcels or process splits and combination of parcels without usurping the Assessor's statutory duties?**

No. The BOS would impair the Assessor's ability to perform its duties by allowing a county department not controlled by the Assessor to determine title and ownership of real property parcels or process splits or combinations of parcels. The Assessor is responsible for determining the names of all persons who own, claim, possess or control property in the County, and for processing parcel splits and combinations. Divesting the Assessor of those functions would unlawfully usurp the Assessor's authority.

- 3. If a[n] usurpation of authority has been found in numbers 1 or 2 above, does the County Assessor's ultimate ability to review and override any data entered into the Assessor's database by a county department change the analysis?**

No. As explained above, the Assessor can only fulfill her statutory duties by controlling the personnel who perform the functions necessary to those duties as well as the processes by which they perform those functions. The BOS would usurp those functions by relegating the Assessor to a "review and override" role. Moreover, by removing mapping and title personnel from the Assessor's authority, the BOS will have removed the Assessor's ability to review and analyze the data entered into the Assessor's database by BOS personnel.

#### **IV. Conclusion**

The BOS would unlawfully usurp the Assessor's statutory authority by eliminating cartography and title personnel positions within the Assessor's Office or by performing the Assessor's cartography and title functions through personnel who report to the BOS.

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Mark Brnovich  
Attorney General

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<sup>i</sup> See, e.g., A.R.S. §§ 42-11009 (maintain public records related to property valuation and assessment); -11054 (follow standard appraisal methods and techniques as outlined by ADOR); -12052 (review assessment information on continuing basis to ensure proper classification of residential buildings and giving authority to assessors to enter into intergovernmental agreements with ADOR to exchange information related to same); -13004 (maintain data processing systems compatible with those of ADOR); -13151 through -13154 (identify and value golf courses); -13201 through 13206 (identify and value shopping centers); -13302 (process splits and consolidations of existing tax parcels); -13351 through -13355 (identify and value manufacturers, assemblers, and fabricators); -13401 through -13404 (identify and value common areas); -15054 (make investigations to ensure all property is included on assessor's property lists); -15151 (prepare the assessment roll in the form and containing the information prescribed by ADOR); -16251 through -16259 (perform administrative review of error claims); -17251 (compile the assessment roll); and -17257 (keep records related to boundaries of local taxing districts and assessment districts).

<sup>ii</sup> See, e.g., A.R.S. §§ 11-802 (requiring county assessor to advise county planning and zoning commissions); 15-442(C) (requiring county assessor and county superintendent to determine whether school district boundaries are in conflict with each other or other intersecting legal boundaries); 48-262(A)(1) (requiring county assessor to provide detailed list of all taxable properties within an area where one seeks a change in the boundaries of a district); 48-1594(B) ("The county assessor of each of the counties shall enter upon the rolls the property in the district assessed and taxed as required by this chapter, a description of such lands subject to assessment by the district, the name of each owner of property and the number of acres of land in each assessment, or if the owners of such lands are unknown, the lands shall be assessed to the unknown owner."); 48-3115 (requiring county assessor to enter on assessment roll a description of the lands of the subject irrigation or water conservation district and the acreage of such land).

<sup>iii</sup> See, e.g., A.R.S. §§ 11-1135 (requiring county recorder to transmit records of deeds to county assessor); 11-321 (requiring board of supervisors to transmit copy of building permits and certificates of occupancy to assessor); 33-1902 (requiring owners of residential rental property to maintain records with the assessor); 37-253 (requiring state land department to report sales of land and a description thereof to county assessor); 37-254 (requiring state land department to notify assessor and tax collector of land that reverts to state so that assessor can cancel assessment of the land); 42-6206 (government lessors to provide assessor with list of development agreements, including locations of properties subject to agreements); 48-815.02(H) (requiring county board of supervisors to submit copy of signature sheets seeking dissolution of fire district to county assessor for verification of persons and property in district); 48-3604 (requiring board of flood control district to file map showing zone and boundary of district with county assessor); see also *Premiere RV & Mini Storage LLC v. Maricopa Cnty.*, 222 Ariz. 440 (App. 2009) (for tax purposes, tax parcel splits occur when Assessor completes the process of identifying and valuing the resulting parcels).

<sup>iv</sup> See, e.g., A.R.S. § 37-1222 (requiring copy of county tax assessor's map for proposed land exchanges with federal government); 40-344 (requiring corporation commission, cities or towns, and board of supervisors to mail out notices to persons regarding establishment of underground

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conversion service area based on the records of the county assessor); 42-18111 (county assessor's parcel number and description of property used for describing real property on delinquent tax list and notice of sale); 42-18202 (notice of intent to file foreclosure must be mailed to property owner of record based on records of county recorder or county assessor); 48-272 ("A special taxing district organized pursuant to this title that is submitting proposed district boundaries after November 1, 2007 shall include only entire parcels of real property within its proposed boundaries as determined by the county assessor and shall not split parcels."); 48-620 (as to improvement districts for underground utilities and cable television, ownership of property shall be determined by records of the county assessor or other public records); 48-1084.01 (assessments for road improvement districts based on each "separate assessor's parcel"); 48-2837 (requiring objections to extent of assessment district to show county assessor's parcel number); 48-3701 (defining "Parcel of member land" to be "any portion of member land for which the tax assessor for the county in which the member land is located has issued a separate county parcel number."); 48-4801 (defining "Parcel of water district member land" to be "any portion of water district member land for which the county assessor for the county in which the water district member land is located has issued a separate tax parcel number."); 49-762.07 (requiring owners or operators of solid waste facilities to submit notice that includes the county assessor's book, map and parcel number); 49-941 (requiring agencies and political subdivisions to send notices regarding hazardous waste to owners of real property as shown on the lists of the county assessor and ADOR).