

## 2001 AG Opinions

Date	Description
December 21, 2001	<b>No. I01-024 (R01-044)</b> Re: Tax Exemption for Cemetary Property
December 20, 2001	<b>No. I01-023 (R01-033)</b> Re: Water Infrastructure Finance Authority Loans to Indian Tribes
December 11, 2001	<b>No. I01-022 (R01-036)</b> Re: Appointing Receivers for Residential Rental Property
November 28, 2001	<b>No. I01-021 (R01-037)</b> Re: Emergency Expenditures
November 12, 2001	<b>No. I01-020 (R01-048)</b> Re: Proposition 301 Increases in Education Funding
September 24, 2001	<b>No. I01-019 (R01-034)</b> Re: Legislative Term Limits I
August 1, 2001	<b>No. I01-018 (R00-056)</b> Re: Retirees in the Corrections Officer Retirement Plan
July 24, 2001	<b>No. I01-017 (R01-029)</b> Re: School District Discretion Regarding Teacher Base Salary Increases from Classroom Site Fund
July 20, 2001	<b>No. I01-016 (R01-025)</b> Re: Impact of Legislation Regarding Military Airports on Schools
June 29, 2001	<b>No. I01-015 (R00-082)</b> Re: Workforce Development Account as Local Revenues to Community Colleges
June 21, 2001	<b>No. I01-014 (R01-020)</b> Re: Definition of Teacher under A.R.S. § 15-977
May 21, 2001	<b>No. I01-013 (R01-002)</b> Re: Fire District Annexations
May 21, 2001	<b>No. I01-012 (R00-081)</b> Re: County Authority to Enact Ordinances
May 14, 2001	<b>No. I01-011 (R00-053)</b> Re: Authority to Prohibit State Employees from Possessing Weapons While on Duty
May 14, 2001	<b>No. I01-010 (R01-016)</b> Re: Exemptions from State Merit System
March 8, 2001	<b>No. I01-009 (R01-001)</b> Re: Board Member Conflict of Interest
March 6, 2001	<b>No. I01-008 (R00-072)</b> Re: Proposition 204
February 21, 2001	<b>No. I01-007 (R00-085)</b> Re: Classroom Site Fund
February 15, 2001	<b>No. I01-006 (R00-062)</b> Re: Application of Proposition 203 to Schools Serving the Navajo Nation
February 1, 2001	<b>No. I01-005 (R00-061)</b> Re: Approval for Clean Elections Funding

January 23, 2001	<b>No. I01-004 (R00-043)</b> Re: Employer Early Retirement Program Benefits
January 16, 2001	<b>No. I01-003 (R00-076)</b> Re: Implementation Time Line for Proposition 203
January 3, 2001	<b>No. I01-002 (R00-075)</b> Re: Building Renewal Fund
January 2, 2001	<b>No. I01-001 (R00-071)</b> Re: Corporation Commission Membership

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

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ATTORNEY GENERAL OPINION  by  JANET NAPOLITANO ATTORNEY GENERAL  December 21, 2001	No. I01-024 (R01-044)  Re: Tax Exemption for Cemetery Property
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TO: The Honorable Lori Daniels  
State Senate

**Question Presented**

You have asked whether Proposition 105, a recent constitutional amendment allowing a tax exemption for cemetery property, applies to personal as well as to real property.

**Summary Answer**

Although Proposition 105 would allow an exemption from ad valorem taxation for personal property owned by cemeteries and used to inter human beings, the implementing statute adopted by the Legislature limited the exemption to real property.

**Background**

At the 2000 general election, Arizona voters approved Proposition 105, an amendment to the Arizona Constitution to permit a tax exemption for the property of cemeteries. The Legislature referred this constitutional amendment to the ballot for the voters' consideration. *See* S. Con. Res. 1010, 44th Legis. 2d Reg. Sess (2000). Proposition 105 provided: "The Legislature may exempt

the property of cemeteries that are set apart and used to inter deceased human beings from taxation in a manner provided by law." Ariz. Const. art. IX, § 2(7) (as amended by Proposition 105, approved by voters November 7, 2000).

The tax exemption for cemetery for property in Proposition 105 was not self-executing. To implement the constitutional amendment, the Legislature amended A.R.S. § 42-11110 (conditioned upon voter approval of Proposition 105) to provide that "[c]emeteries as defined in § 32-2101 that are set apart and used to inter deceased human beings are exempt from taxation." 2000 Ariz. Sess. Laws ch. 258, § 1. Section 32-2101(10) defines "cemetery or cemetery property" as:

any one, or a combination of more than one, of the following, in a place used, or intended to be used, and dedicated for cemetery purposes:

- (a) A burial park, for earth interments.
- (b) A mausoleum, for crypt or vault entombments.
- (c) A crematory, or a crematory and columbarium, for cinerary interments.
- (d) A cemetery plot, including interment rights, mausoleum crypts, niches and burial spaces.

A.R.S. § 32-2101(10).<sup>1</sup>

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<sup>1</sup>This definition is in the statutes governing the real estate department and its regulatory responsibilities. *See generally*, A.R.S. §§ 32-2101 to -2198.

### Analysis

All property, unless specifically exempt under the laws of the United States or under the provisions of the Constitution of the State of Arizona, is subject to taxation. Ariz. Const. Art. IX, § 2 (13). The Legislature cannot exempt from ad valorem taxation any property or class of property not specified in the Constitution. *Kunes v. Samaritan Health Service*, 121 Ariz. 413, 415, 590 P.2d 1359, 1361 (1979). Moreover, exemptions from taxation are not favored and laws are strictly construed against them. If any doubt arises as to an exemption, that doubt must be resolved against the exemption. *Id.*

Proposition 105 permits the Legislature to exempt the "property of" cemeteries, but it did not define "property." Generally, words in the constitution are interpreted according to their plain and ordinary meaning. *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 406, 18 P.3d 713, 717 (App. 2001). Webster's defines property as "something that is or may be owned or possessed." *Webster's Third Int'l Dictionary* 1818 (1993). This definition includes real as well as personal property. In addition, the statutory definition of property expressly includes both real and personal property. A.R.S. § 1-215(33). Finally, other exemptions in Article IX, § 2 that use the term "property of" include personal property. For example, the exemption for "[p]roperty of educational, charitable and religious associations or institutions not used or held for profit" extends to personal property. Ariz. Const. Art. IX § 2 (2); *Cf. Kunes*, 121 Ariz. at 415-16, 590 P.2d at 1361-62 (equipment would have qualified for exemption if it was owned and used by a charitable institution). For these reasons, the term "property of " cemeteries in Proposition 105 includes real and personal property.

To determine the scope of the tax exemption for cemeteries, however, the implementing legislation must also be examined. In analyzing a similar constitutional provision concerning tax exemptions for certain property of charitable and religious associations or institutions, the Arizona Supreme Court established that the Legislature cannot exempt more property than the constitution permits, but may exempt less. *See Kunes*, 121 Ariz. at 415, 490 P.2d at 1361 (citing *Conrad v. Maricopa County*, 40 Ariz. 390, 393, 12 P.2d 613, 614 (1932)). This principle applies equally to the tax exemption for cemetery property permitted by Proposition 105 because that proposition merely provides that "[t]he Legislature may exempt the property of cemeteries" from taxation. The Proposition does not require the Legislature to do so, nor does it require the Legislature to exempt *all* cemetery property from taxation.

The legislation implementing Proposition 105 amended A.R.S. § 42-11110 to exempt from taxation "cemeteries as defined in § 32-2101(10) that are set apart and used to inter deceased human beings." Section 32-2101(10) contains a list of property that includes a burial park for earth interments, a mausoleum for crypt or vault entombments, a crematory, or a crematory and columbarium for cinerary interments, and a cemetery plot, including interment rights, mausoleum crypts, niches and burial spaces. A "burial park" for earth interments would consist of land. A "mausoleum" is "a magnificent tomb," "a tomb for more than one person," or a large gloomy and usually ornate building, room, or structure." *Webster's Third Int'l Dictionary* 1395 (1993). A "crematory" is "a furnace for cremating the bodies of the dead," or "a building containing such a furnace." *Id.* at 534. A "columbarium" is "a structure of vaults lined with recesses for cinerary urns." *Id.* at 450. A "plot" is a "small portion of land in a cemetery usually containing two or more graves." *Id.* at 1742.

Personal property, for the purposes of the property tax statutes, includes "property of every kind, both tangible and intangible, not included in the term real estate." A.R.S. § 42-11001(7). Real estate is defined as including "the ownership of, claim to, possessions of or right of possession to lands or patented mines." A.R.S. § 42-11001(10). Real estate includes buildings and other fixtures to the property. *See Gilbert v. State ex rel. Morrison*, 85 Ariz. 321, 338 P.2d 787 (1959) (holding that certain buildings were real estate rather than "personalty"); *Murray v. Zerbel*, 159 Ariz. 99, 764 P.2d 1158 (App. 1988) (describing test to determine whether item is a fixture to real property). The list in A.R.S. 32-1101(10) that defines cemeteries includes real property and property affixed to the land, but nothing in the list is clearly personal property. Therefore, the exemption in A.R.S. § 42-11110 for "cemeteries as defined by § 32-2101(10)" includes real, but not personal, property.<sup>2</sup> This conclusion is supported by the statutory language and by the principle that exemptions are strictly construed. *See Kunes*, 121 Ariz. at 415, 590 P.2d at 1361 (presumption that tax exemptions not favored).

### **Conclusion**

The statute implementing Proposition 105 does not clearly designate personal property of a cemetery as being exempt from ad valorem taxation. The definition of cemeteries or cemetery

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<sup>2</sup>The Supreme Court of Appeals in West Virginia reached a similar conclusion, holding that personal property of cemeteries was not exempt under a statute providing for an exemption for "cemeteries." *In re Hillcrest Memorial Gardens, Inc.*, 119 S.E.2d 753 (W. Va. 1961). The court noted that unlike other exemptions, the statute did not include the language "property of" or "property belonging to" cemeteries. *Id. at 757*. The court concluded that the word "cemeteries" standing alone denotes real estate only, as distinguished from personal property.

property contains a list of real property or fixed improvements only, and gives no examples of personal property. Therefore, the exemption does not extend to personal property of a cemetery.

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Janet Napolitano  
Attorney General

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

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>JANET NAPOLITANO ATTORNEY GENERAL</p> <p>December 20, 2001</p>	<p>No. I01-023 (R01-033)</p> <p>Re: Water Infrastructure Finance Authority Loans to Indian Tribes</p>
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TO: Greg Swartz, Executive Director  
Water Infrastructure Finance Authority of Arizona

**Questions Presented**

You have asked the following questions regarding the requirements in Arizona Revised Statutes (“A.R.S.”) §§ 49-1225(B)(4) and -1245(B)(4) for loans to Indian tribes from the Water Infrastructure Finance Authority (“WIFA”):<sup>1</sup>

(1) The statutes provide that an Indian tribe or tribal entity with control over a revenue source dedicated to repayment of the loan from WIFA must be “subject to suit by the attorney general to enforce the loan contract.” Does this requirement mandate that such entities be subject to suit in state court, or does it permit them to be subject to suit in federal or tribal court instead?

(2) Alternatively, the statutes require that assets used to secure a loan to Indian tribes be

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<sup>1</sup> Because the provisions in A.R.S. § 49-1225(B)(4) and -1245(B)(4) are identical, this Opinion will refer to them collectively as “the statutes.”

“subject to execution by the attorney general” in the event of the tribe’s default “without the waiver

of any claim of sovereign immunity by the tribe.” Does this alternative require that the State hold any assets used to secure the loan in a custodial account that the State controls, or does it permit any third party that is mutually agreeable to WIFA and the tribe to hold the assets?

### **Summary Answer**

(1) The statutes do not require that an Indian tribe or tribal entity be subject to suit in a particular court. The Attorney General has the authority to sue a tribe or tribal entity in federal, state, or tribal court to enforce a loan contract as long as the tribe or tribal entity has waived its immunity from suit.

(2) The statutes permit an Indian tribe to obtain a loan from WIFA without waiving its immunity from suit if the Attorney General is able to sue someone other than the tribe, if necessary, to obtain the assets used to secure the loan in the event of the tribe’s default. Under this alternative, any third party that is mutually agreeable to WIFA and the tribe may hold the assets, as long as the assets are irrevocably placed with the third party and the third party is subject to suit by the Attorney General to obtain the assets in the event of the tribe’s default.

### **Background**

WIFA administers the clean water and the drinking water revolving funds. *See* A.R.S. §§ 49-1203(B), -1222(A), -1242(A). These funds were established in accordance with the federal Water Pollution Control and Safe Drinking Water Acts, which provide the states with grants to assist them in initiating and administering such funds. *See* 33 U.S.C. § 1381; 42 U.S.C. § 300j-12; A.R.S. § 49-1201(4), (10). Political subdivisions of the State and Indian tribes may apply to WIFA for loans from the funds to finance water quality facilities and projects. A.R.S. §§ 49-1224(A), -1243(A)(1). The Attorney General has the authority to take the actions necessary to enforce the loan

contracts and to achieve repayment of the loans that WIFA makes. A.R.S. §§ 49-1226, -1246. Loans from both funds to Indian tribes must be structured in one of two ways pursuant to A.R.S. §§ 49-1225(B)(4) and -1245(B)(4):

A loan under this section:

.....

To an Indian tribe shall either be conditioned on the establishment of a dedicated revenue source under the control of a tribally chartered corporation, or any other tribal entity that is subject to suit by the attorney general to enforce the loan contract, *or* be secured by assets that, in the event of default of the loan contract, are subject to execution by the attorney general without the waiver of any claim of sovereign immunity by the tribe.

(Emphasis added.)

This provision implicitly recognizes that Indian tribes possess sovereign immunity as a matter of federal law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). While Congress can diminish this immunity, the states cannot. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890-91 (1986) (recognizing that Indian tribes possess a “quasi-sovereign” status that is subject to plenary federal control and definition, but is not subject to diminution by the states). Consequently, an Indian tribe is subject to suit only if Congress has authorized the suit or the tribe has waived its immunity. *Mfg. Techs.*, 523 U.S. at 754. Absent such a congressional authorization or tribal waiver, Arizona’s Attorney General cannot sue a tribe or tribal entity in any court—state, federal, or tribal. *See Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 560, 703 P.2d 502, 504 (App. 1985) (recognizing that since one of the primary purposes of tribal sovereign immunity “is to protect tribal trust property from encumbrances, it must necessarily mean freedom from suit regardless of where the suit is brought”) (citation omitted). Congress did not abrogate tribal sovereign immunity in connection with either the Water Pollution Control or the

Safe Drinking Water Act. *See* 33 U.S.C. §§ 1251-1387; 42 U.S.C. §§ 300f through 300j-26. Any discussion of a tribe or tribal entity being subject to suit by the Attorney General under A.R.S. §§ 49-1225(B)(4) or -1245(B)(4) therefore presupposes that the tribe or tribal entity has waived its immunity from suit.

### Analysis

I. Sections 49-1225(B)(4) and -1245(B)(4) Do Not Require that Tribes or Tribal Entities Be Subject to Suit by the Attorney General in State Court.

A. The Legislature Did Not Intend the Identically Worded Predecessor of A.R.S. §§ 49-1225(B)(4) and -1245(B)(4) to Require that Tribes or Tribal Entities Be Subject to Suit by the Attorney General in State Court.

The primary goal of statutory construction is to give effect to the Legislature’s intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). A statute’s language is the best indicator of that intent. *Hosp. Corp. of Northwest, Inc. v. Ariz. Dep’t of Health Servs.*, 195 Ariz. 383, 384, 988 P.2d 168, 169 (App. 1999). The Legislature specified that a tribe or tribal entity with control over a revenue source dedicated to repayment of the loan must be “subject to suit by the attorney general” to enforce the loan contract. A.R.S. §§ 49-1225(B)(4), -1245(B)(4). The Legislature did not specify whether the tribe or tribal entity must be subject to suit in state court.

If a statute’s language does not disclose the Legislature’s intent with respect to a particular question, other factors—including the statute’s context, history, subject matter, effects, and purpose—may be examined to ascertain legislative intent. *Blum v. State*, 171 Ariz. 201, 205, 829 P.2d 1247, 1251 (App. 1992). An examination of a predecessor statute may also provide information that, while not controlling, may be helpful in determining the originally intended scope of a statutory provision. *Reber v. Chandler High Sch. Dist. No. 202*, 13 Ariz. App. 133, 138, 474 P.2d 852, 857 (1970). Such a predecessor statute exists here.

In 1989, the Legislature enacted A.R.S. §§ 49-371 through -381, which established the wastewater treatment revolving fund. 1989 Ariz. Sess. Laws ch. 280, § 5. This statutory scheme was the predecessor to the scheme that currently governs the clean water and the drinking water revolving funds. As originally enacted, political subdivisions of the State could apply for loans to finance wastewater treatment projects. *See id.* The Legislature amended the statutes in 1991 to permit Indian tribes to apply for such loans as well. *See* 1991 Ariz. Sess. Laws ch. 161, §§ 1-4. In doing so, it added former A.R.S. § 49-375(E)(6).<sup>2</sup> *See id.* § 4. The wording of that provision was identical to the current wording of A.R.S. §§ 49-1225(B)(4) and -1245(B)(4).

The Legislature arrived at the wording of former A.R.S. § 49-375(E)(6) after it rejected the language originally proposed because representatives of Indian tribes objected to it. The revision process provides helpful insight into the Legislature’s intent in enacting the provision’s “subject to suit by the attorney general” clause. *See State v. Barnard*, 126 Ariz. 110, 112, 612 P.2d 1073, 1075 (App. 1980) (“Successive drafts of the same act are instructive in determining the intent of the legislature, as the substitution or elimination of provisions necessarily involves an element of intent by the drafters.”). As introduced in House Bill 2243, the provision read:

A loan under this section:

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In the case of a loan to an Indian tribe, shall be secured by a first lien on property, a guaranty, a bond or such other security enforceable *in the courts of this State* as the board [of directors of the wastewater management authority] deems sufficient to ensure repayment of the loan. This paragraph shall not be construed to require an Indian tribe to waive any claim of sovereign immunity, provided that adequate security is otherwise provided.

HB 2243, 40th Legis., 1st Reg. Sess. (1991) (as introduced) (emphasis added).

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<sup>2</sup>In 1995, this paragraph was renumbered as 49-375(E)(5). *See* 1995 Ariz. Sess. Laws Ch. 8, § 7.

During the Senate’s consideration of the bill, representatives of Indian tribes objected to the requirement that disputes be resolved “in the courts of this State” on the ground that it infringed upon the tribes’ sovereignty. *Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 4 (March 27, 1991). In accordance with their request that any disputes between a tribe and the State concerning a wastewater treatment loan agreement be resolved in a neutral forum, the bill’s sponsor proposed an amendment that substituted “the United States District Court for the District of Arizona” for “the courts of this State.” *Id.* The Legislature did not pass that amendment, but instead passed one that replaced the entire provision with language identical to the current language of A.R.S. §§ 49-1225(B)(4) and -1245(B)(4). *See* 1991 Ariz. Sess. Laws ch. 161, § 4 (adding former A.R.S. § 49-375(E)(6)). That language, which did not require that a tribe or tribal entity be “subject to suit by the attorney general” in any specific court, was described as being acceptable to the Inter-Tribal Council of Arizona and other tribal representatives.<sup>3</sup> *Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 2 (April 3, 1991). Thus, the Legislature did not intend to require tribes or tribal entities to submit to state court jurisdiction as a condition of receiving wastewater treatment loans. Although the Legislature altered the prior scheme’s scope in many ways, it did not alter the provision that currently appears at A.R.S. §§ 49-1225(B)(4) and -1245(B)(4). Consequently, the statutory requirement that a tribe or tribal entity be “subject to suit

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<sup>3</sup> In 1997, the Legislature established the Greater Arizona Development Authority Revolving Fund. 1997 Ariz. Sess. Laws ch. 208, § 1. In doing so, it enacted a provision that is essentially identical to former A.R.S. § 49-375(E)(6). *Id.* The Senator who proposed the provision, which became A.R.S. § 41-1554.06(D)(6)(b), noted that it was modeled after former A.R.S. § 49-375(E)(6). *Minutes of Senate Committee on Commerce and Economic Development*, 43rd Legis., 1st Reg. Sess. 3 (January 23, 1997). In 1998, the Legislature included an identical provision, A.R.S. § 28-7676(H)(6), in the statutes that established the highway expansion and extension loan program fund. 1998 Ariz. Sess. Laws ch. 263, § 7 (codified as A.R.S. § 28-7676(H)(6)).

by the attorney general” will be satisfied as long as the tribe or tribal entity is subject to suit in *some* court—be it federal, state, or tribal.

B. The Attorney General Has the Authority to Sue a Tribe or Tribal Entity in Federal or Tribal Court to Enforce a WIFA Loan Contract.

The statutes that govern the Attorney General’s authority do not require a different conclusion. In addition to broad general authority to initiate proceedings the Attorney General deems necessary and appropriate to collect debts owed to the State, A.R.S. § 41-191.04, the Attorney General has specific authority to enforce the loan contracts and to achieve repayment of the loans made by WIFA, A.R.S. §§ 49-1226, -1246. The Attorney General also has specific authority to represent the State in any action in a federal court, A.R.S. § 41-193(A)(3), as well as the authority to retain counsel to collect any debt owed to the State. A.R.S. § 41-191(E). These statutes permit the Attorney General to sue a tribe or tribal entity in federal or tribal court to enforce a WIFA loan contract.<sup>4</sup>

C. Jurisdictional Factors May Prevent the Attorney General from Suing Tribes or Tribal Entities in Federal or Tribal Court.

Although the Attorney General has the authority to sue a tribe or tribal entity in federal or tribal court to enforce a WIFA loan contract, jurisdictional factors may prevent the Attorney General from doing so. This is true even where the tribe or tribal entity has waived its immunity from suit. Parties cannot confer subject matter jurisdiction on a court by consent. *Lamb v. Superior Court*, 127 Ariz. 400, 403, 621 P.2d 906, 909 (1980). In most cases, a federal court would not have diversity jurisdiction under 28 U.S.C. § 1332 over a suit by the State of Arizona against an Arizona tribe or

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<sup>4</sup>Of course, the Attorney General has the discretion to determine what legal action is appropriate to collect a debt owed to the State in any specific situation. See A.R.S. § 41-191.04 (Attorney General authority to bring actions to collect debts).

tribal entity. *See Gaines v. Ski Apache*, 8 F.3d 726, 729-30 (10th Cir. 1993). Moreover, most suits arising out of loan agreements between the State and a tribe or tribal entity would not present a federal question basis for federal court jurisdiction under 28 U.S.C. § 1331. *See Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980). Jurisdictional barriers might also hamper the Attorney General from suing a tribe or tribal entity in some tribal courts. Therefore, in entering into a WIFA loan contract with a tribe or tribal entity, care must be taken to ensure that the designated court actually has jurisdiction to enforce the contract.<sup>5</sup> These jurisdictional issues should be assessed for each transaction.

## II. The Assets Used to Secure a Tribe’s WIFA Loan Need Not Be Placed in a Custodial Account that the State Controls.

The statutes also permit a loan from WIFA to an Indian tribe to be “secured by assets, that in the event of default of the loan contract, are subject to execution by the attorney general without the waiver of any claim of sovereign immunity by the tribe.” A.R.S. §§ 49-1225(B)(4), -1245 (B)(4). The Legislature did not specify that the secured assets must be held in a custodial account that is under the State’s control. As previously noted, the legislative history of former A.R.S. § 49-375(E)(5), while not controlling, may be helpful in ascertaining the Legislature’s original intent concerning the provision’s scope.

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<sup>5</sup> Other complex issues that need to be considered in entering into loan agreements with Indian tribes are beyond this Opinion’s scope. The following authorities may provide useful information. Mark A. Jarboe, *The Gaming Industry on American Indian Lands: Financing and Development Issues*, Practising Law Institute, Corporate Law and Practice Course Handbook Series (1994); Heidi L. McNeil, *Doing Business in Indian Country*, Practising Law Institute, Corporate Law and Practice Course Handbook Series (1994); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 Hamline L. Rev. 417 (1994); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 Wm. & Mary L. Rev. 539 (1997); William V. Vetter, *Doing Business With Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169 (1994); David B. Jordan, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Their Relationships With Indian Tribes After Kiowa Tribe v. Manufacturing Technologies, Inc.*, 52 Okla. L. Rev. 489 (1999); Michael O’Connell, *Business Transactions With Tribal Governments in Arizona*, Ariz. Att’y, January, 1998, at 27.

As originally proposed, the provision only established one method of securing wastewater treatment loans to tribes: such loans were to be “secured by a first lien on property, a guaranty, a bond or such other security enforceable in the courts of this State as the board [of directors of the wastewater management authority] deems sufficient to ensure repayment of the loan.” H.B 2243, 40th Legis., 1st Reg. Sess. (1991) (as introduced). The proposed language also stated that an Indian tribe would not be required to waive its immunity, “provided that adequate security [was] otherwise provided.” *Id.* Although the Legislature totally revised the proposed language, the two concerns that the language reflected—that the tribes not be required to waive their sovereign rights to obtain loans and that the loans be adequately secured in the event of default—remained constant throughout the revision process. *See Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 4-6 (March 27, 1991); *Minutes of Senate Committee on Environment*, 40th Legis., 1st Reg. Sess. 2 (April 3, 1991); Arizona State Senate Staff, 40th Legis., 1st Reg. Sess., Revised Fact Sheet for HB 2243 (April 8, 1991) (noting that the legislation required that loans to tribes be sufficiently secured to cover any default and that it did not require tribes to waive any claim of sovereign immunity as long as they provided adequate security).

The Legislature ultimately established two alternative methods for securing loans to tribes. As discussed above, the first of these methods required that the tribal entity controlling the revenue source dedicated to repaying the loan be “subject to suit”—that is, to waive any claim of immunity. The second method did not require it to do so. *See* 1991 Ariz. Sess. Laws ch. 161, § 4 (adding former A.R.S. § 49-375(E)(6)). The second method required only that a tribe secure its loan with assets that were “subject to execution by the attorney general without the waiver any claim of sovereign immunity by the tribe.” *Id.* Thus, the Legislature did not intend to require tribes to waive

their immunity from suit to satisfy this provision. By requiring that the assets be “subject to execution,” however, the Legislature demonstrated that it did intend to require the tribes to create security arrangements that, if the tribes defaulted, would permit the Attorney General to sue *someone* to obtain a judgment and a writ of execution if that was necessary to reach the secured assets.<sup>6</sup>

Therefore, any security arrangement that irrevocably places the assets securing the tribe’s WIFA loan with a third party and permits the Attorney General to sue the third party if that becomes necessary to reach the assets in the event of the tribe’s default will satisfy the provision. Any third party that is mutually agreeable to WIFA and the tribe may hold the assets used to secure the tribe’s WIFA loan as long as the arrangement under which the party holds the assets irrevocably places the assets with the third party and permits the Attorney General to sue the party instead of the tribe to reach the assets in the event of the tribe’s default.<sup>7</sup>

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<sup>6</sup>A writ of execution is a form of judicial process that a court issues to enforce a judgment. *See* A.R.S. § 12-1551(A). The writ directs a sheriff or other county officer to seize a judgment debtor’s property and to deliver it or the proceeds of its sale to the judgment creditor to satisfy the judgment debt. *See* A.R.S. § 12-1552. The entry of a valid judgment is a prerequisite to the issuance of a writ of execution. *See* A.R.S. § 12-1551(A); *Jackson v. Sears, Roebuck & Co.*, 83 Ariz. 20, 315 P.2d 871 (1957).

<sup>7</sup>For example, a tribe could obtain a letter of credit. To do so, the tribe would irrevocably present a bank or other issuer of a letter of credit with assets sufficient to secure repayment of its WIFA loan in the event of its default. The issuer would agree to pay the Attorney General upon presentation of a demand. *See* A.R.S. § 47-5102. The issuer would become primarily liable to pay upon demand, and its liability would not depend upon a determination that the tribe actually was in default. *See* A.R.S. § 47-5103(D) and accompanying Uniform Commercial Code cmt. If the issuer wrongfully dishonored its obligation to pay upon presentation of a demand, the Attorney General could sue the issuer without suing the tribe. A.R.S. § 47-5111(A). An escrow arrangement could also be used. The tribe could irrevocably place assets sufficient to secure repayment of its WIFA loan with an escrow agent with instructions that the assets be turned over to the Attorney General in the event that the tribe defaulted on its loan payments. *See* A.R.S. § 6-801(4) (defining an “escrow”). An escrow agent has a fiduciary duty to act in strict accordance with the escrow agreement’s terms and is liable for any damages caused by his or her failure to do so. *Tucson Title Ins. Co. v. D’Ascoli*, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963). If the escrow agent failed to turn the escrowed assets over to the Attorney General after the tribe defaulted upon its WIFA loan, the Attorney General could sue the agent. *See id.*

### **Conclusion**

Pursuant to A.R.S. §§ 49-1225(B)(4) and -1245(B)(4), an Indian tribe or tribal entity with control over a revenue source dedicated to repayment of a WIFA loan must be subject to suit by the Attorney General in some court. Alternatively, a tribe and WIFA may have a third party that is mutually agreeable to WIFA and the tribe hold assets used to secure the WIFA loan. Under this alternative, the assets must be irrevocably placed with the third party, and the third party must be subject to suit by the Attorney General to obtain the assets in the event of the tribe's default.

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Janet Napolitano  
Attorney General

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

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ATTORNEY GENERAL OPINION  by  JANET NAPOLITANO ATTORNEY GENERAL  December 11, 2001	No. I01-022 (R01-036)  Re: Appointing Receivers for Residential Rental Property
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TO: The Honorable Marion Lee Pickens  
State Representative

**Question Presented**

If the owner of a residential rental property has complied with the registration requirements in Arizona Revised Statutes ("A.R.S.") § 33-1902, may a city, town or county apply to the superior court for the appointment of a temporary receiver to manage residential rental property pursuant to A.R.S. § 33-1903 if the property has been designated a slum property?

**Summary Answer**

No. A city, town or county may apply for the appointment of a temporary receiver under A.R.S. § 33-1903 only if the landlord has failed to register in compliance with A.R.S. § 33-1902 and the property has also been designated as slum property.

**Background**

In 1999, the Legislature enacted a comprehensive act to address problems contributing to the deterioration of neighborhoods. 1999 Ariz. Sess. Laws ch. 4 ("the Act"); see *Minutes of Senate*

*Judiciary Comm.*, 44th Legis., 1st Reg. Sess. (Feb. 9, 1999) (discussing SB 1278). A major part of the Act is a registration requirement for residential rental property.<sup>1</sup> A.R.S. § 33-1902. This process helps enable local officials to contact property owners to resolve problems that may arise. *Minutes of Senate Comm. on Gov't & Env't'l Stewardship*, 44th Legis., 1st Reg. Sess. (Feb. 15, 1999) (discussing SB 1278).

Section 33-1902, A.R.S., requires an owner of residential rental property to maintain certain information with the assessor in the county where the property is located. The information includes the address of the property; the year any buildings were built; the name, address and telephone number of the property owner; and information identifying certain responsible individuals for property owned by corporations, partnerships and other entities. A.R.S. § 33-1902(A) (1) - (4). Owners of residential rental property who reside out of state must also designate a statutory agent who lives in Arizona and who will accept legal service on behalf of the owner. A.R.S. § 33-1902(B). Residential rental property cannot be occupied until this information is provided to the county assessor. A.R.S. § 33-1902(C). In addition, property owners who fail to provide the necessary information are subject to civil penalties. A.R.S. § 33-1902(E). Property that does not comply with A.R.S. § 33-1902 is also subject to inspection by a city, town, county, or the State, and the property owner is responsible for the costs of such an inspection. A.R.S. § 33-1904(A)(1), (B).

The Act also provides for the appointment of a temporary receiver under certain circumstances. A.R.S. § 33-1903. The State or a city, town or county "may apply to the superior court for the appointment of a temporary receiver to manage a property that is not in compliance

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<sup>1</sup>Residential rental property is "property that is used solely as leased or rented property for residential purposes." A.R.S. § 33-1901(2).

with § 33-1902 and that is designated as a slum property by a city, town or county or the state." *Id.*<sup>2</sup> A "slum property" is "residential rental property that has deteriorated or is in a state of disrepair and that manifests one or more . . . [specified] conditions that are a danger to the health or safety of the public."<sup>3</sup> A.R.S. § 33-1901(3). "If the court determines that the appointment of a temporary receiver of residential rental property is necessary to remedy the condition for which the property is registered or to cause the owner to register the property, the court may order the appointment of a temporary receiver." A.R.S. § 33-1903(B). The appointment may be in effect "for as long as the court deems necessary," but not "for a term of more than one year." *Id.*

### Analysis

Under A.R.S. § 33-1903(A), "[t]his state or a city, town, or county of this state may apply to the superior court for the appointment of a temporary receiver to manage a property that is not in compliance with the provisions of section 33-1902 *and* that is designated as a slum property." (Emphasis added.) Generally, the best indication of a statute's meaning is its language. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). Thus, under A.R.S. § 33-1903 two requirements must be met before a city, town, county or the State may apply for the appointment of a temporary receiver: (1) the property must not comply with A.R.S. § 33-1902, which requires that certain information be provided to the county assessor regarding the property and its owner; and (2) the property must be designated a slum property.

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<sup>2</sup>Section 33-1903 is one of two provisions in the Act regarding the appointment of a temporary receiver. The other provision concerns the appointment of a temporary receiver for property declared a nuisance because it is regularly used in the commission of a crime. A.R.S. §§ 12-991, -996.

<sup>3</sup>The conditions that are a danger to the health or safety of the public include: (a) structurally unsound exterior surfaces, roof, walls, doors, floors, stairwells, porches or railings; (b) lack of potable water, adequate sanitation facilities, adequate water or waste pipe connections; (c) hazardous electrical systems or gas connections; (d) lack of safe, rapid egress; (e) accumulation of human or animal waste, medical or biological waste, gaseous or combustible materials, dangerous or corrosive liquids, flammable or explosive materials or drug paraphernalia. A.R.S. § 33-1901(3)(a) - (e).

The language in A.R.S. § 33-1903(B) is, to some extent, inconsistent with the language in subsection A of the same statute and with A.R.S. § 33-1902. Under A.R.S. § 33-1903(B), "[i]f the court determines that the appointment of a temporary receiver is necessary to remedy the condition for which the property is registered *or* to cause the owner to register the property, the court may order the appointment of a temporary receiver." (Emphasis added.) The statute's reference to remedying "the condition for which the property is registered" is inconsistent with the language in A.R.S. § 33-1902 which requires that *all* residential rental property owners file certain information with the county assessor. The registration requirement in A.R.S. § 33-1902 is not related to any particular "condition" on the property.

Statutes should be read as a whole, giving meaningful operation to all of their provisions. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). When language is unclear, courts examine a statute's historical background, effects and consequences, and spirit and purpose. *Id.* Here, the legislative history helps explain the apparent incongruity between A.R.S. § 33-1903(B) and other parts of the statutory scheme governing residential rental property. *See State v. Barnard*, 126 Ariz. 110, 112, 612 P.2d 1073, 1075 (App. 1980) ("Successive drafts of the same act are instructive in determining the intent of the legislature."). As introduced, SB 1278 required that owners of residential rental property register with the Secretary of State if the property was declared a slum property, if there were certain violations of ordinances or laws relating to the maintenance or health and safety of the property, or if there were documented reports of certain criminal activity on the property. SB 1278, 44th Legis., 1st Reg. Sess. (introduced version). That version of the bill permitted a city, town, county or the State to apply for the appointment of a temporary receiver "to manage a property that is subject to registration under section 33-1902 and that has not been

registered." *Id.* at A.R.S. § 33-1903(B). The court could appoint a temporary receiver if it determined that such action "is necessary to remedy the condition for which the property is registered or to cause the owner to register the property." *Id.* The legislative history documents a change from a registration system at the state level that encompassed only certain "problem" rental properties to a system of collecting information about all residential rental properties at the county level. The receivership provisions also changed to allow a city, town, county or the State to apply for the appointment of a receiver if the property is not registered and it is a slum property. The result is that the language in A.R.S. § 33-1903(B), which gives courts authority to appoint a temporary receiver to remedy a condition for which the property is registered, is a remnant of earlier versions of the bill that had a more limited registration requirement.

The ambiguity within subsection B, which governs judicial determinations of whether to appoint a receiver, however, does not alter the plain language of subsection A, which governs when a city or county may apply for the appointment of a receiver. The answer to your question about the authority of a city or county is governed by subsection A. Under that subsection, a city or county may apply for the appointment of a receiver if both of the following are true: (1) the property is designated as a slum property; and (2) the property owner has not provided the information to the county recorder as required by A.R.S. § 33-1902.

### **Conclusion**

Under A.R.S. § 33-1903(A), a city, town or county or the State may apply for the appointment of a temporary receiver for residential rental property if the property is designated as

a slum property and if the property owner has failed to provide the required information to the county assessor as required by A.R.S. § 33-1902.

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Janet Napolitano  
Attorney General

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

ATTORNEY GENERAL OPINION  by  JANET NAPOLITANO ATTORNEY GENERAL  November 28, 2001	No. I01-021 (R01-037)  Re: Emergency Expenditures
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To: Michael P. Austin, Director  
Arizona Division of Emergency Management

**Questions Presented**

Section 35-192 of the Arizona Revised Statutes ("A.R.S.") authorizes the Governor to declare emergencies and to authorize expenditures related to those emergencies. You have asked whether, pursuant to A.R.S. § 35-192, expenditures for an emergency may be authorized only in the fiscal year in which the emergency is declared.

**Summary Answer**

Pursuant to A.R.S. § 35-192, expenditures may be authorized for an emergency in a fiscal year after that emergency is declared, provided that expenditures authorized for that subsequent fiscal year do not exceed \$4 million and otherwise comply with applicable statutes and rules.

## Background

Section 35-192, A.R.S., enables the Governor to declare emergencies and incur liabilities related to those emergencies.<sup>1</sup> When the Governor declares an emergency, "specific liabilities and expenses . . . are authorized to be incurred and to be paid against the State from unrestricted monies from the general fund ." A.R.S. § 35-192(B). The types of emergencies covered by A.R.S. § 35-192 include: (1) invasions, hostile attacks, riots or insurrections; (2) epidemics of disease or plagues of insects; (3) floods or floodwaters; (4) acts of God or any major disaster; and (5) wild land fires, but only after all necessary authorizations under A.R.S. § 37-623.02 are exhausted. A.R.S. § 35-192(B).

There are limits on the Governor's ability to authorize expenditures for emergencies pursuant to A.R.S. § 35-192. Liabilities of more than two hundred thousand dollars for a single disaster require the consent of a majority of the members of the State Emergency Council.<sup>2</sup> A.R.S. § 35-192(F)(2). Funds are also available under A.R.S. § 35-192 only if (1) no appropriation or other authorization is available; (2) an appropriation is insufficient to meet the contingency or emergency; or (3) federal monies available for . . . [the] contingency or emergency require the use of state or other public monies. A.R.S. § 35-192(F)(4). In addition, "[t]he aggregate amount of all liabilities incurred . . . shall not exceed four million dollars for any fiscal year." A.R.S. § 35-192(F)(3).

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<sup>1</sup>The Adjutant General or director of the division of emergency management at the Department of Emergency and Military Affairs may, under certain circumstances, authorize expenditures for emergencies. *See* A.R.S. §§ 26-302 (delegations from Governor), -303(H) (authority of adjutant general in emergencies); 35-192(B) (referring to authority under A.R.S. § 26-303(H)).

<sup>2</sup>The State Emergency Council is established by A.R.S. § 26-304. Its members include the Governor, Secretary of State, Attorney General, Adjutant General, the director of the emergency management division and directors of other specified State agencies, or their designees.

The Department of Emergency and Military Affairs ("DEMA") coordinates the State's emergency management responsibilities and attempts to mitigate the impact of disasters or emergencies. A.R.S. § 26-305(B), (C). The director of the division of emergency management within DEMA is responsible for developing rules governing the administration of expenditures for emergencies pursuant to A.R.S. § 35-192. A.R.S. § 35-192(G).

### **Analysis**

Your question concerns the Governor's ability to authorize expenditures in a fiscal year after the one in which a disaster is initially declared. When interpreting a statute, the first consideration is the statute's language. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). Section 35-192(B) provides:

When the Governor . . . determines that a contingency or disaster so justifies and declares an emergency, specific liabilities and expenses provided for in this section are authorized to be incurred against and to be paid as claims against the state from unrestricted monies from the general fund.

In addition, "[n]o liability shall be incurred against the monies authorized without the approval of the Governor" or, in some circumstances, the Adjutant General. A.R.S. § 35-192(F)(1). DEMA rules further provide that "[t]he Governor shall prescribe in the Governor's proclamation the maximum amount for which the state will be liable for the emergency that is the subject of the proclamation." Ariz. Admin. Code ("A.A.C.") R8-2-306(C). In addition, an "[e]xpenditure . . . as a result of a particular proclamation shall not exceed the amount authorized in the proclamation unless an additional amount is authorized by the [state emergency] council." A.A.C. R8-2-308.

The statute and the related rules do not require a single authorization of expenditures for a particular emergency. Moreover, nothing in the pertinent statute or rules suggests that all authorizations for expenditures must occur in the same fiscal year that the Governor declares the

emergency. The Legislature's failure to require that all authorizations occur in the same fiscal year in which the disaster is declared suggests that the Legislature did not intend to impose such a restriction. *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (there is a presumption that what the Legislature means it will say).

Statutes are also to be interpreted "in a manner consistent with the Legislature's apparent purpose." *Boomer v. Frank*, 196 Ariz. 55, 59, 993 P.2d 456, 460 (App. 1999). Subject to certain limits, Section 35-192 enables the Governor to authorize expenditures of general fund monies to address emergency situations. As your opinion request notes, "large scale disasters frequently span fiscal years or occur near the end of a fiscal year" when it is not possible "to estimate or authorize adequate funding to responsibly mitigate the event." This Office also previously noted that declarations of emergency commonly cover more than one fiscal year. Ariz. Att'y Gen. Op. I97-009. Reading the statute to permit authorizations for expenditures in fiscal years after the Governor declares an emergency is consistent with language as well as the purpose of A.R.S. § 35-192.

Any authorization for expenditures, however, must comply with the \$4 million limit and the other requirements in statute and rule. *See generally* A.R.S. § 35-192, A.A.C. R8-2-301 to R8-2-612. Because of recent amendments, some explanation of the \$4 million limit may be useful. In a 1998 amendment to the applicable statutes, the Legislature made clear that the \$4 million limit is calculated based on the year the expenditure is authorized, regardless of when the monies are actually spent: "Monies authorized for disasters and emergencies in prior fiscal years, and expended in subsequent fiscal years . . . apply toward the four million dollar liability limit for the fiscal year in which they were authorized." A.R.S. § 35-192(F)(3); *see* 1998 Ariz. Sess. Laws ch.134, § 3. The 1998 amendments also changed the language from a limit on liabilities "*in any fiscal year*" to a limit

on liabilities "*for any fiscal year.*" 1998 Ariz. Sess. Laws ch. 134, § 3 (emphasis added). These changes were made in response to a 1997 Attorney General's Opinion, Ariz. Att'y Gen. Op. I97-009, which concluded that the statutory language in effect at that time limited DEMA expenditures under A.R.S. § 35-192 to \$4 million in any fiscal year. *See Hearing on SB 1123 Before the House Committee on Appropriations, 43rd Legis., 2nd Reg. Sess. 2 (April, 14, 1998) (testimony of Michael Austin, Director of DEMA).* As amended in 1998, A.R.S. § 35-192(F)(3) permits actual *expenditures* under that statute to exceed \$4 million in a particular fiscal year if some of the expenditures were authorized in earlier fiscal years, but the total *authorizations* for a fiscal year cannot exceed \$4 million. *See A.R.S. § 35-192(F)(3); 1998 Ariz. Sess. Laws. ch. 134, § 3.*

### **Conclusion**

The statutes do not require that all authorizations for expenditures relating to emergencies pursuant to A.R.S. § 35-192 be made in the same fiscal year that the Governor declares the emergency. Any authorizations must comply with the \$4 million limit for the fiscal year in which the funds were authorized and the other requirements in statute and rule.

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Janet Napolitano  
Attorney General

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

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ATTORNEY GENERAL OPINION  by  JANET NAPOLITANO ATTORNEY GENERAL  November 12, 2001	No. I01-020 (R01-048)  Re: Proposition 301 Increases in Education Funding
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TO: The Honorable Ramón O. Valadez  
Arizona State Senate

**Questions Presented**

You have asked the following questions regarding Proposition 301, a ballot measure approved by the voters at the 2000 general election that increased funding to public education:

1. A constitutional amendment approved in 1998, Proposition 105, limited the Legislature's ability to alter a voter-approved initiative or referendum. Do the limitations in Proposition 105 apply to Proposition 301?

2. Proposition 301 added Arizona Revised Statutes ("A.R.S.") § 15-901.01, which requires annual inflation increases to the State's funding for public schools, and included language in A.R.S. § 42-5029(E) that prohibits using the additional revenue generated by the sales tax increase in Proposition 301 to supplant other funding for public education. If the limitations of Proposition 105 apply to Proposition 301, does Proposition 301 require that per pupil State funding for kindergarten through twelfth grade ("K-12") equal or exceed the level set for 2000-2001 based on the statutory formula?

3. Section 15-901.01, A.R.S., requires that the Legislature "increase the base level or other components of the revenue control limit by two percent" for fiscal years 2001-2002 through 2005-2006 and in subsequent fiscal years by two percent or the change in the gross domestic price deflator, whichever is less. Because the statute says "base level *or* other components of the revenue control limit," may the Legislature comply with this statute by increasing only one or more components of the revenue control limit rather than increasing the base level?

### **Summary Answers**

1. Because Proposition 301 is a referendum, the constitutional restrictions adopted in Proposition 105 apply, permitting legislative changes only if those changes further the purpose of Proposition 301 and receive the approval of three-fourths of the House of Representatives and Senate.

2. Proposition 301 mandates an increase in the base level beginning in 2001-2002 and prevents the State from decreasing per pupil funding through the equalization assistance formula below the level established for 2001-2002.

3. The mandatory inflation adjustment to State aid to public schools should extend to the base level and other components of the revenue control limit despite the use of the word "or" in A.R.S. § 15-901.01. This interpretation is most consistent with the school finance formula, the information provided to the voters, and the legislative history.

### **Background**

**Proposition 301.** In a special session in June of 2000, the Legislature approved S.B. 1007, which included various funding increases for public schools, community colleges and universities, as well as other changes directed at "financial and academic accountability . . . [of] Arizona's K-12 system." 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1 ("S.B. 1007"). This measure included a

proposed .6% increase in the transaction privilege tax, A.R.S. § 42-5010(G), and directed the monies from that tax increase to public education, A.R.S. § 42-5029.

The Legislature directed the Secretary of State to place certain portions of S.B. 1007 on the 2000 general election ballot. S.B. 1007, § 64. The provisions in S.B. 1007 that the Legislature referred to the ballot included:

- increases in the transaction privilege tax and use tax;
- distribution of revenues from the new taxes to education programs;
- inflation adjustments "in the state aid to education base level and other components of the revenue control limit;"
- termination of the exemption from the revenue control limit for excess utility costs;
- limitation on school district qualifying tax rates and county equalization assistance for education; and
- establishment of a State income tax credit to mitigate increased transaction privilege and use taxes authorized by S.B. 1007.

*Id.* Nothing in the bill took effect unless the voters approved the increase in the state transaction privilege tax rates at the 2000 general election. S.B. 1007, § 67. The provisions in S.B. 1007 appeared on the 2000 general election ballot as Proposition 301. Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000, General Election at 169 ("2000 Publicity Pamphlet"). Arizona voters approved this measure.

**Proposition 105.** In 1998, Arizona voters approved a citizens' initiative that amended the Arizona Constitution to limit the Legislature's ability to alter voter-approved initiatives and referenda ("Proposition 105"). Ariz. Const. art. IV, pt. 1, § 1(6), (14); Ariz. Secretary of State, 1998 Ballot Propositions for the General Election of Nov. 3, 1998 at 43 ("1998 Publicity Pamphlet").

Proposition 105 prohibited the Legislature from:

- repealing an initiative approved by the voters or a "referendum measure decided by a majority of the votes cast thereon," Ariz. Const. art. IV, pt. 1, § 1(6)(B);
- amending an initiative or referendum "unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each House of the Legislature . . . vote to amend such measure." Ariz. Const. art. IV, pt. 1, § 1(6)(C);
- appropriating or diverting "funds created or allocated to a specific purpose by . . . [an initiative or referendum] unless the appropriation or diversion of funds furthers the purposes of such measure and at least three-fourths of the members of each House of the Legislature . . . vote to appropriate or divert such funds." Ariz. Const. art. IV, pt. 1 § 1(6)(D).
- "adopt[ing] any measure that supersedes, in whole or in part, [any initiative or referendum] unless the superseding measure furthers the purposes of the initiative or referendum measure and at least three-fourths of the members of each House of the Legislature . . . vote to supersede such initiative or referendum measure." Ariz. Const. art. IV, pt. 1, § 1(14).

These restrictions apply "to all initiative and referendum measures decided by the voters at and after the November 1998 general election."<sup>1</sup> Proposition 105, § 2. Labeled by supporters as the "Voter Protection Act," Proposition 105 aimed to protect the will of the voters by limiting legislative changes to voter-approved measures. 1998 Publicity Pamphlet at 47-49.

### Analysis

#### **A. Proposition 301 Is a Legislative Referendum Subject to the Restrictions Against Legislative Changes.**

Proposition 105's restrictions on the Legislature's ability to alter voter-approved measures applies to "an initiative measure approved by a majority of the votes cast thereon" and to "a referendum measure decided by a majority of the votes cast thereon." Ariz. Const. art. IV, pt. 1 §

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<sup>1</sup>Before Proposition 105 was approved, the Constitution prohibited the Legislature from amending or repealing a referendum or initiative only if it was approved by a majority of all qualified electors in the State, rather than simply a majority of the qualified electors voting on the measure. *See Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952).

1 (6), (14). Under Arizona's Constitution, initiative and referendum measures are "reserved powers" of the people "to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls." Ariz. Const. art. IV, pt. 1, § 1(1).

In an initiative, citizens propose a change in law that is submitted to the voters for approval. Ariz. Const. art. IV, pt. 1, § 1(2). In contrast, a referendum is a legislative enactment that is referred to the voters for approval by either the Legislature itself or as a result of petitions signed by five percent of the qualified electors. Ariz. Const. art. IV, pt. 1, § 1(3); *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428-29, 814 P.2d 767, 769-70 (1991) (describing initiative and referendum processes). In a legislative referendum, the Legislature "asks the voters to ratify its measures." *Ariz. Legislative Council v. Howe*, 192 Ariz. 378, 383, 965 P.2d 770, 775 (1998). Because Proposition 105 applies to any "referendum measure," it applies to a referendum on the ballot as a result of a referral by the Legislature or as a result of citizens petitioning to refer a legislative enactment to the voters.

In Proposition 301, voters were asked to approve or reject specific statutory changes included in S.B. 1007 that were placed on the ballot at the direction of the Legislature. S.B. 1007, § 64. The statutory changes referred to the voters did not become effective unless the voters approved them. S.B. 1007, § 67. Because Proposition 301 consisted of statutory amendments that the Legislature referred to the voters, it is a referendum as described by Article IV, part 1, section 1(3) of the Arizona Constitution.<sup>2</sup>

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<sup>2</sup>The Legislature's use of a bill rather than a concurrent resolution to refer these changes to the ballot for voter approval does not change this analysis. The Legislature's drafting conventions direct the use of concurrent resolutions, rather than bills, to refer matters to the ballot. Arizona Legislative Council, Arizona Legislative Bill Drafting Manual, §§ 2.1 (appropriate use of bills), 3.1 (appropriate use of concurrent resolutions). Unlike bills, which are presented to the governor for approval or veto pursuant to Article V, Section 7 of the Arizona Constitution, concurrent resolutions are not presented to the governor for approval but go to the Secretary of State to be placed on the ballot. Although concurrent resolutions may be the preferred form for a referendum, this does not change the fact that in S.B. 1007 the Legislature referred statutory changes to the ballot for voter approval.

Because Proposition 301 was a referendum, it is protected from legislative modification by Proposition 105. Any legislative changes to Proposition 301 must "further the purposes" of Proposition 301 and be approved by three-fourths of the House of Representatives and the Senate. Ariz. Const. art. IV, pt. 1 § 1(6)(C). Similarly, the Legislature cannot "appropriate or divert funds created or allocated to a specific purpose" by Proposition 301 unless the appropriation or diversion of funds "further the purposes of" Proposition 301 and receives approval of three-fourths of the House and Senate. *Id.* at (6)(D). The same requirements apply to any measure that "supersedes, in whole or in part" Proposition 301. *Id.* at (14) Proposition 105 does not, however, restrict the Legislature's ability to refer legislation that modifies the provisions of Proposition 301 to the ballot for the approval of voters. *See* Ariz. Const. art. IV, pt. 1 § 1(15).

**B. A.R.S. § 15-901.01 Prohibits Reducing the Base Level of Education Funding for Fiscal Year 2001-2002.**

The provisions the Legislature referred to the ballot in Proposition 301 included a mandatory inflation increase for state funding for public schools:

If approved by the qualified electors voting at a statewide general election, for fiscal years 2001-2002 through 2005-2006, the Legislature shall increase the base level or other components of the revenue control limit by two per cent. For fiscal year 2006-2007 and each fiscal year thereafter, the Legislature shall increase the base level or other components of the revenue control limit by a minimum growth rate of either two percent or the change in the GDP price deflator, as defined in section 41-563, from the second preceding calendar year to the calendar year immediately preceding the budget year, whichever is less, except that *the base level shall never be reduced below the base level established for fiscal year 2001-2002.*

A.R.S. § 15-901.01 (added by Proposition 301) (emphasis added). This statute addresses inflation increases to the formula pursuant to which the State provides equalization assistance to school districts. *See* A.R.S. § 15-971 (equalization assistance for education). The "base level" is a fixed dollar amount that is multiplied by a weighted student count and other factors to determine the "base support level" for school districts and charter schools. A.R.S. § 15-943. The Legislature established

the "base level" for fiscal year 2001-2002 as \$2,687.32 per pupil. A.R.S. 15-901(B)(2) (as amended by 2001 Ariz. Sess. Laws. ch. 233). The requirement that "the base level shall never be reduced below the base level established for fiscal year 2001-2002" indicates that once the Legislature sets the base level for fiscal year 2001-2002, the base level cannot drop below that figure. A.R.S. § 15-901.01.

Proposition 301 also included language making clear that the monies raised by the sales tax increase are to be used to increase funding to public education and not to replace existing funding sources:

The monies distributed pursuant to this subsection are in addition to any other appropriation, transfer or other allocation of public or private monies from any other source and shall not supplant, replace or cause a reduction in other school district, charter school, university or community college funding sources.

A.R.S. § 42-5029(E). This language prohibits the State from using Proposition 301 monies to replace or supplant other school funding.

Because Proposition 105 applies to the provisions of Proposition 301, the Legislature cannot amend, supersede or make other changes to this statutory prohibition unless the changes further the purpose of the proposition and receive the approval of three fourths of the members of the House and Senate. *See* Ariz. Const. art. IV, pt. 1 § 1 (6), (14). Although Arizona courts have not addressed the requirements of Proposition 105, California courts have addressed similar issues and provide some useful guidance. To determine the purpose of a measure, a court is "guided by, but . . . not limited to [the measure's] general statement of purpose." *Amwest Surety Ins. Co. v. Wilson*, 906 P.2d 1112, 1120 (Cal. 1995). Courts will also consider the historical context of the amendment, ballot arguments, and the language of the measure as a whole. *Id.* The focus of the inquiry is not whether the legislation furthers "the public good," but whether it furthers the purposes of the ballot measure affected by the legislative change. *Id.* at 1126.

A clear and undisputable purpose of Proposition 301 was to increase funding to public education. 2000 Publicity Pamphlet at 172-79 (arguments supporting Proposition 301). The Governor's statement supporting Proposition 301 argued that it was time "to lift Arizona up and recommit to our children's education" and noted that Arizona had fallen behind other states in education funding. *Id.* at 172.<sup>3</sup> The Legislative Council informed voters in its analysis included in the publicity pamphlet that the measure would increase the sales tax and that the new revenues would be dedicated to education. *Id.* The Legislative Council's ballot analysis also made it clear that Proposition 301 would require an increase in general fund expenditures for education. Specifically, the ballot analysis stated that Proposition 301 would increase state general fund expenditures an additional \$94.5 million in 2002, that this amount would increase annually thereafter, and that "[t]hese additional expenditures would not be paid for from the increase in the sales tax." *Id.* Most of these increased costs were attributable to the inflation adjustments that A.R.S. § 15-901.01 mandated. *Minutes of Legislative Council 7* (July 6, 2001).

A decrease in per pupil funding through the formula is therefore directly contrary to the Proposition's purpose of increasing such funding. It is also inconsistent with the language in A.R.S. § 15-901.01 mandating annual funding increases and prohibiting the base level from falling below the level set for 2001-2002. The protections of Proposition 105, therefore, limit the Legislature's ability to lower per pupil funding through the State aid formula below the level set for 2001-2002.

**C. The Base Level for Fiscal Year 2001-2002 Should Receive the Mandatory Inflation Adjustment in A.R.S. § 15-901.01.**

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<sup>3</sup>Courts often refer to the publicity pamphlet when interpreting ballot measures. *See, e.g., Calik v. Kongable*, 195 Ariz. 496, 500, 990 P.2d 1055, 1059 (1999).

You have also asked whether the Legislature can comply with A.R.S. § 15-901.01 without increasing the base level because the language requires only that "the Legislature shall increase the base level *or* other components of the revenue control limit by two percent" in fiscal years 2001-2002 through 2005-2006. (Emphasis added.)

Because the Legislature used the word "or", the statutory language suggests that the Legislature could comply with A.R.S. § 15-901.01 either by increasing the base level or by adjusting other components of the revenue control limit ("RCL"). The word "or" is generally "used to express an alternative or to give a choice of one among two or more things." *State v. Pinto*, 179 Ariz. 593, 880 P.2d 1139 (App. 1994). In some circumstances, however, "or" is interpreted in the conjunctive rather than in the disjunctive. *See Hurt v. Superior Court*, 124 Ariz. 45, 50, 601 P.2d 1329, 1334 (1979) (phrase "children or parents" interpreted as conjunctive based on evidence of legislative intent); *State v. Pinto*, 179 Ariz. at 596, 880 P.2d at 1142 (strict interpretation of disjunctive terms in restitution statute would frustrate legislative intent and is inconsistent with Arizona's constitution). Courts will adopt the interpretation "most harmonious with the statutory scheme and legislative purpose." *State v. Pinto*, 179 Ariz. at 596, 880 P.2d at 1142.

Although A.R.S. § 15-901.01 says that the Legislature shall adjust the base level *or* other components of the RCL annually for inflation, other portions of S.B. 1007 give a different description of the inflation adjustment. The language directing the Secretary to place issues on the ballot described this provision as follows: "Inflation adjustments in the state aid to education base level *and* other components of the [RCL] pursuant to section 15-901.01." S.B. 1007, § 64(A)(2) (emphasis added). The Legislature also required the ballot to explain to voters that a "yes" vote on Proposition 301 had the effect of approving "inflation adjustments in state aid for education." *Id.* at § (C)(3); 2000 Publicity Pamphlet at 183. The Senate Fact Sheet referred to "adjusting state aid

to education base levels for inflation." Corrected, Final Revised Senate Fact Sheet: S.B. 1007, 5th Spec. Sess., 44th Legis., at 2,15 (July 19, 2000). The minutes of legislative hearings discussing the legislation simply refer to an "inflation adjustment" or "inflation factor." *Minutes of Senate Education Comm.*: S.B. 1007, 44th Legis., 5th Spec. Sess. 13 (June 12, 2000); *Minutes of House Appropriations Comm.*: SCR 1003, 44th Legis., 5th Spec. Sess. 2 (June 20, 2000).

In construing statutes, the primary purpose "is to effectuate the intent of those who framed the provision and, in the case of an [initiative], the intent of the electorate that adopted it." *Calik v. Kongable*, 195 at 498, 990 P.2d at 1057. Courts determine legislative intent from the statute's language, "the general purpose of the act in which it appears, and the language of the act as a whole." *No Ins. Section v. Indus. Comm'n*, 187 Ariz. 131, 132, 927 P.2d 791, 792 (App. 1996). The inflation adjustment in A.R.S. § 15-901.01 is part of Arizona's school finance system, and it should be construed in context with these related provisions and in light of its role in that statutory scheme. *See State v. Wilhite*, 160 Ariz. 228, 230, 772 P.3d 582, 584 (App. 1989) (statutory provisions are to be construed in context with related provisions and in light of their place in the statutory scheme). The proper interpretation of the inflation adjustment, therefore, requires some basic understanding of the formula through which the State provides assistance to public schools.

School districts receive state funding through a complex statutory formula. *See Roosevelt Elem. Sch. Dist. v. Bishop*, 179 Ariz. 233, 237, 877 P.2d 806, 810 (1994). That funding, known as "equalization assistance," has four basic components: base support level, transportation, capital outlay revenue limit and soft capital. A.R.S. § 15-971(A).<sup>4</sup> Because equalization assistance is intended to provide equal funding to school districts for their maintenance and operations needs, the

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<sup>4</sup>Instead of referring separately to the base support level and transportation, A.R.S. § 15-971(A) refers to "[t]he lesser of a school districts [RCL] or district support level." Those calculations consist of the base support level and transportation. *See* A.R.S. § 15-947(A), (B).

formula deducts an amount based on the statutory qualifying tax rate to determine the amount of equalization assistance districts will receive. A.R.S. § 15-971(B).

The inflation adjustment in A.R.S. § 15-901.01 refers to the "base level" and "other components of the [RCL]." As explained above, the base level is a specified dollar amount. A.R.S. § 15-901(B). For fiscal year, 2001-2002, the Legislature has set the base level at \$2,687.32 per pupil. A.R.S. § 15-901(B)(2) (as amended by 2001 Ariz. Sess. Laws ch. 233). This includes an increase of two percent over the 2000-2001 base level. Joint Legislative Comm. Fiscal Year 2002 and 2003 Appropriations Report at 197 - 98.

The RCL includes two parts of the equalization formula: base support level and transportation.<sup>5</sup> It does not include soft capital or the capital outlay revenue limit. A.R.S. §§ 15-961 (soft capital), -962 (capital outlay revenue limit). To calculate the base support level, the student count is weighted based on a number of factors. A.R.S. § 15-943. That weighted student count is multiplied by the base level and by the teacher experience index or 1.0 (whichever is greater). The calculation of the transportation assistance is based primarily on the number of students, daily miles and a specified dollar amount per "route mile." A.R.S. §§ 15-945, -946. Thus, the only "components" of the RCL that might be adjusted for inflation, other than the base level, are the dollar amounts in the transportation assistance calculation. This interpretation is supported by language in the definition of base level and in the transportation support statutes that describe adjustments by

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<sup>5</sup>The RCL is defined as the base revenue control limit plus the transportation revenue control limit. A.R.S. § 15-901(A)(13); A.R.S. § 15-947(A). The base revenue control limit is the same as the base support level. A.R.S. § 15-944(E).

"the growth rate prescribed by law." A.R.S. §§ 15-901(B)(2) (base level), -945(F) (state support level for approved route miles).<sup>6</sup>

The Legislative Council Analysis, which was provided to voters in the publicity pamphlet, supports the conclusion that the Legislature intended the inflation adjustment to apply to the base level and the other components of the RCL. The ballot analysis is to "assist voters in rationally assessing an initiative proposal by providing a fair, neutral explanation of the proposal's contents and the changes it would make if adopted." *Fairness & Accountability In Ins. Reform v. Greene*, 180 Ariz. 582, 590, 886 P.2d 1338, 1346 (1994). The Legislative Council ballot analysis of Proposition 301 advised voters: "If Proposition 301 passes, state general fund expenditures would be an additional \$94.5 million in 2002, increasing annually thereafter. These additional expenditures would not be paid from the increase in the sales tax." 2000 Publicity Pamphlet at 172 (analysis of Proposition 301 by Legislative Council). It also said that Proposition 301 provided for "[A]utomatic inflation adjustments in the state aid to education base level or other components of a school district's revenue control limit." *Id.*

The information regarding the increased general fund expenditures that would not be covered by the tax increases was discussed extensively at the Legislative Council meeting at which the analysis was adopted. The Legislative Council, which consists of seven members of the House and seven members of the Senate, adopted the ballot description July 6, 2000 — the week after the Legislature approved S.B. 1007. At that meeting, staff of the Joint Legislative Budget Committee testified that based on a fiscal analysis done during the recent special session, the general fund cost

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<sup>6</sup>The term RCL does not apply to charter schools. They too, however, receive assistance through a statutory formula. For charter schools sponsored by the State Board of Education or the State Board for Charter Schools, state aid is the base support level plus a dollar amount labeled "additional assistance." A.R.S. § 15-185(B). The base support level calculation uses the same base level as is used for school districts. Consequently, an inflation adjustment to the base level pursuant to A.R.S. § 15-901.01 extends to school districts as well as charter schools.

of S.B. 1007 in 2002 would be approximately \$94 million above what the tax increases in the measure would fund. The biggest portion of this cost "is the two percent adjustment," which accounted for \$66.8 million of the \$94 million increase.<sup>7</sup> *Id.* The Legislative Council did not advise voters that the inflation adjustment (and therefore the overall general fund impact of the measure) could vary substantially depending on whether the Legislature chose to increase the base level or merely increase the transportation mileage rate. Instead, the Legislative Council provided information to voters based on an increase to the base level and other components of the RCL.

The interpretation that Proposition 301 mandated an increase to the base level as well as other components of the RCL carried through to the 2001-2002 and 2002-2003 budgets. When the Legislature completed the budget for 2001-2002, it applied the two percent adjustment to the base level and, the transportation support level, as well as to additional assistance for charter schools. Joint Legislative Budget Comm., Fiscal Year 2002 and 2003 Appropriations Report at 197-98 (discussing 2% deflator). These inflation adjustments equaled \$62.8 million. *Id.* Of this amount, \$58.8 million was for an increase in the base level; \$1.4 million was for charter school additional assistance; and \$2.6 was for transportation mileage increases.<sup>8</sup> *Id.* The JLBC Appropriations Report notes that "Proposition 301 mandates the 2% deflator but does not provide specific funding for it.

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<sup>7</sup>Other costs that would impact the general fund included the costs of income tax credits, expanded school district audits and expanded tuition and credits. *Legislative Council Minutes 7* (July 6, 2000); see also Joint Legislative Budget Comm., Fiscal Year 2002 and 2003 Appropriations Report at 183 (describing projected general fund costs of Proposition 301 not funded by sales tax).

<sup>8</sup>The Legislature did not adjust for inflation the field trip allocation in the transportation assistance calculation. See A.R.S. § 15-945(B). This is consistent with A.R.S. § 15-945(F), which refers only to an adjustment in the state support level for approved route miles.

Proposition 301 requires the Legislature to increase the base level or other components of the [RCL] by 2% each year through FY 2006." *Id.* at 198.<sup>9</sup>

The application of the inflation adjustment to the base level is also consistent with the historical treatment of inflation adjustments to State aid to schools. Until 1995, a statute required the Legislature to prescribe a growth rate for the base level or, if this was not set by March 1, the growth rate was to be the percentage growth in the GNP price deflator in the prior year. A.R.S. § 15-901(B)(2)(f) (language deleted in 1995 Ariz. Sess Laws ch. 191, § 8).

In A.R.S. § 15-901.01 the Legislature intended to mandate an annual inflation adjustment to the State aid formula. This is what the Legislature told voters a "yes" vote on Proposition 301 would do. S.B. 1007 § 64 (c)(3). Based on the information the Legislative Council provided to voters about the impact of Proposition 301, the Legislature's interpretation of Proposition 301 to date, and the mechanics of the State aid formula, this language mandates an increase to the base level. For these reasons, although the language of A.R.S. § 15-901.01 refers to an increase in the base level *or* other components of the RCL, in context, this should be read to require an adjustment to the base level *and* other components of the RCL. As a practical matter, the only other component of the RCL requiring adjustment appears to be the State support level for approved route miles. A.R.S. § 15-945(F).

### **Conclusion**

Proposition 301 mandated an increase in funding for education. Because it was a referendum, Proposition 301 is protected from legislative changes by Proposition 105. Proposition 301's mandate that the base level cannot fall below the base level set for 2001-2002 limits the

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<sup>9</sup>Although the adjustment to charter school additional assistance may fall outside A.R.S. § 15-901.01, that adjustment is consistent with the approach in Proposition 301 to increase funding to both school districts and to charter schools. *See, e.g.*, A.R.S. § 15-977 (classroom site fund).

Legislature's ability to decrease per pupil spending through the State aid formula. In addition, the inflation increases required by A.R.S. § 15-901.01 for the 2001 - 2002 fiscal year should be applied to the base level and the state support level for approved route miles.

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Janet Napolitano  
Attorney General

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

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>JANET NAPOLITANO ATTORNEY GENERAL</p> <p>September 24, 2001</p>	<p>No. I01-019 (R01-034)</p> <p>Re: Legislative Term Limits</p>
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TO: The Honorable Betsey Bayless  
Arizona Secretary of State

**Questions Presented**

You have asked the following questions regarding the impact of redistricting on legislative term limits:

- (i) if the Independent Redistricting Commission assigns a different number to a term-limited state legislator's district, may that legislator run for election in the district because it has a new number;
- (ii) if the Independent Redistricting Commission changes the boundaries of a term-limited state legislator's district, may that legislator run for election in the district because it has different boundaries;
- (iii) if the Independent Redistricting Commission excludes a term-limited legislator's residence from the district he or she had represented may the legislator move into the newly-created district and run in that district;
- (iv) may a term-limited legislator move to another part of the county to a district

which contains no portion of the legislator's former district and run in that district.

You have also asked whether the Secretary of State has the responsibility or authority to reject a candidate's nomination papers if the candidate has served the maximum number of consecutive terms permitted by the State constitution.

### **Summary Answer**

The Arizona Constitution prohibits a legislator who has served four consecutive terms in either the State House of Representatives or the State Senate from serving an additional consecutive term in the same chamber of the Legislature. Ariz. Const. art. IV, pt. 2, § 21. Accordingly, a legislator who has served four consecutive terms in the House or the Senate may not run for a fifth consecutive term. This four consecutive term limit applies regardless of whether the legislator's residence is in a district with a different number or with different geographic boundaries as a result of redistricting or whether the legislator has moved to a different district.

The Secretary of State performs a ministerial function when accepting candidate nomination papers, and the Legislature has not given the Secretary of State the statutory responsibility or authority to reject a candidate's nomination papers if the candidate will exceed the constitutional term limit requirement. Absent a legislative change authorizing the Secretary of State to reject nomination papers on these grounds, a court challenge is necessary to bar a candidate's name from appearing on the ballot if his or her candidacy violates the term limit requirement.

## **Background**

In 1992, the Arizona voters approved Proposition 107, which amended the Arizona Constitution to impose term limits on legislative and executive office-holders, as well as the Corporation Commission. ARIZONA SECRETARY OF STATE, PUBLICITY PAMPHLET FOR THE GENERAL ELECTION OF NOV. 3, 1992, 46-52 (Proposition 107). With regard to legislators, Proposition 107 prohibited members of the Arizona State Senate and Arizona House of Representatives from serving more than four consecutive terms. Ariz. Const. art. IV, pt. 2, § 21. The relevant language provides:

No state Senator shall serve more than four consecutive terms in that office, nor shall any state Representative serve more than four consecutive terms in that office. This limitation on the number of terms of consecutive service shall apply to terms of office beginning on or after January 1, 1993. No Legislator, after serving the maximum number of terms, which shall include any part of a term served, may serve in the same office until he has been out of office for no less than one full term.

*Id.*

At the time the voters established the term limit law in 1992, the Legislature was responsible for establishing legislative districts, and for redrawing the district boundaries every ten years. See Ariz. Const. art. IV, pt. 2, § 1 (before passage of Proposition 106 in 2000); see also *Goddard v. Babbitt*, 536 F. Supp 538 (D. Ariz. 1982) (court challenge to redistricting plan approved by Legislature.) In 2000, Arizona voters removed redistricting authority from the Legislature and created the Independent Redistricting Commission ("Commission") to take on that responsibility. Ariz. Const. art. IV, pt. 2, § 1 (14). The Commission may not consider the places of residence of incumbents or candidates when drawing the new legislative boundaries. Ariz. Const. art. IV, pt. 2, §1(15).

## Analysis

A. Changes Resulting From Redistricting Do No Enable a Legislator Who Has Served Four Consecutive Terms To Serve An Additional Consecutive Term.

Arizona's Constitution provides: "No state Senator shall serve more than four consecutive terms in that office, nor shall any state Representative serve more than four consecutive terms in that office." Art. IV, pt. 2, § 21. Constitutions must be construed to give effect to the intent and purpose of the framers and the people who adopted them. *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953). In addition, the meaning ascribed to words in a constitutional provision is that which is generally understood and used by the people. *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982).

Applying these principles to legislative term limits, Arizona's Constitution establishes a limit of four consecutive terms that applies to the office of State Senator and a separate four consecutive term limit that applies to the office of State Representative. The language is clear on its face and makes no exception for terms served in a particular district or within particular geographic boundaries.

The information about the term limits proposal provided to voters in the publicity pamphlet supports this conclusion.<sup>1</sup> *Ruiz v. Hull*, 191 Ariz. 441, 450, 957 P.2d 984, 993 (1998) (when construing constitutional language created by an initiative, the courts will consider ballot materials and publicity pamphlets circulated in support of the measure). The

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<sup>1</sup>The Secretary of State is required to prepare a publicity pamphlet for distribution to Arizona voters prior to elections in which an initiative or referendum is on the ballot. A.R.S. § 19-123(A). The publicity pamphlet contains an analysis by Legislative Council of each ballot proposal. A.R.S. § 19-124(B)(the Council "shall prepare and file ... an impartial analysis of the provisions of each ballot proposal of a measure or proposed amendment"). The purpose of the analysis is to "assist voters in rationally assessing an initiative proposal by providing a fair, neutral explanation of the proposal's contents and the changes it would make if adopted." *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 590, 886 P.2d 1338, 1346 (1994).

Legislative Council informed the voters that Proposition 107 would "amend the Arizona Constitution to limit the number of terms that a person may serve in . . . state elective offices." ARIZONA SECRETARY OF STATE, PUBLICITY PAMPHLET FOR THE GENERAL ELECTION OF NOV. 3, 1992, 48 (Proposition 107). It described the legislative term limit as follows: "a maximum of four consecutive terms in the Arizona State Senate, which is eight years, and a maximum of four consecutive terms in the Arizona House of Representatives, which is eight years." *Id.* at 48-49. The Legislative Council's analysis reflects the intent to limit the consecutive terms served by a particular legislator, in either the House or the Senate, regardless of the geographic boundary or number of the districts represented by that legislator.

Reading Article IV, Part 2, § 1(3) (establishing the Independent Redistricting Commission) and Article IV, Part 2, § 21 (establishing term limits for legislators) together further bolsters the conclusion that the voters did not intend to allow a legislator to serve a fifth consecutive term in office. See *State v. Osborne*, 14 Ariz. 185, 204, 125 P. 884, 892 (1912) (Constitution must be construed as a whole in order that its intent and general purpose may be ascertained). Both citizen initiatives reflect, in part, efforts to curtail the advantages gained by incumbency. See ARIZONA SECRETARY OF STATE, PUBLICITY PAMPHLET FOR THE GENERAL ELECTION OF NOV. 7, 2000, 54, 56 (Proposition 106 - Arguments "For" Proposition 106); ARIZONA SECRETARY OF STATE, PUBLICITY PAMPHLET FOR THE GENERAL ELECTION OF NOV. 3, 1992, 50-51 (Arguments for Proposition 107). This purpose is hindered if a legislator serving four consecutive terms is able to run for a fifth consecutive term by virtue of the redistricting process.

Moreover, any other interpretation leads to absurd results that undermine the four consecutive term limit. If redistricting could affect term limits, incumbent legislators could serve five to eight consecutive terms depending on how many terms they served before redistricting. With that interpretation, the four-consecutive-term limit would have little meaning because term limits for incumbent legislators would begin anew based on the renumbering and boundary changes that necessarily result from the redistricting process. This clearly was not the intent of the Arizona voters when they adopted a four-consecutive-term limit for members of the House and Senate.

In an analogous case, the California Court of Appeals held that a member of the California Assembly who had served two terms and part of a third term in two different districts was prohibited from running for an additional term under California's term limit law. *Schweisinger v. Jones*, 68 Cal. App. 4<sup>th</sup> 1320, 1323, 81 Cal. Rptr. 2d 183, 184 (1998). California's term limit law provides that "[n]o member of the Assembly may serve more than three terms." Cal. Const. art. IV, § 2(a). There, the candidate had served one term as the representative of the 71st Assembly District and then was elected twice to represent the 67th District. *Jones*, 68 Cal. App. 4<sup>th</sup> at 1323, 81 Cal. Rptr. 2d at 184. The court held that the time served by the Assembly person during the term in which she was recalled qualified as her third "term" in office and therefore she could not run for an additional term. *Id.* at 1325, 81 Cal. Rptr. 2d at 185. In its analysis, the court counted each term toward the three-term limit even though she had represented districts with different numbers, a change that was "apparently as a result of redistricting." *Id.* at 1323, 81 Cal. Rptr. 2d at 184.

B. A Legislator Cannot Avoid the Limit of Four Consecutive Terms by Moving.

The same analysis applies to your questions about legislators who move from one legislative district to another. You specifically asked about two scenarios: (1) a term-limited

legislator who, after redistricting, moves to a district that includes a portion of the legislator's former district but does not include the legislator's former residence; and (2) a term-limited legislator who, following redistricting, moves to another part of the county to a district which contains no part of the legislator's former district. In both situations, the legislator does not avoid the impact of term limits by moving. As described above, the term limit applies to consecutive terms in the House or Senate, regardless of the number or the geographic boundaries of the legislative district.<sup>2</sup>

C. The Secretary of State May Not Reject the Nomination Papers Of an Incumbent Legislative Candidate Who Is Ineligible To Run For An Additional Term Because of the Term Limit Provision in the Arizona Constitution.

The Secretary of State's duties are generally prescribed by statute. See Ariz. Const. art. V, § 9 ("powers and duties of Secretary of State . . . shall be as prescribed by law"). Ariz. Atty' Gen. Op. 189-026 (Secretary of State's authority to collect certain fees is governed by statute). The Secretary of State's role when accepting nomination papers by candidates is largely ministerial. See *Sims Printing Co. v. Frohmiller*, 47 Ariz. 561, 572, 58 P.2d 518, 522 (1936). When a candidate's papers on their face substantially comply with the terms of the statute, their validity is not for the ministerial officer to decide, but for the court. *Id.*

The nomination paper must include information such as the candidate's name and actual address or description of place of residence and post office address. A.R.S. §§ 16-311 (nomination papers for persons desiring to become a candidate at a primary election for a political party); -312 (write-in candidates); -341 (nomination other than by primary). The

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<sup>2</sup>Moreover, if that legislator moves out of the district he or she was elected to represent before the expiration of that legislator's fourth consecutive term, the legislator will be deemed to have vacated his or her office. A.R.S. § 38-291(5) (a legislator who ceases to be a resident of the district for which he or she was elected is deemed to have vacated office); *State v. Oakley*, 180 Ariz. 34, 35, 881 P.2d 366, 367 (App. 1994) (community college board member vacated his office by moving out of the district from which he was elected). That office would then be filled in accordance with the statutory procedure for filling legislative vacancies. See A.R.S. §§ 41-1201, -1202.

Secretary of State must accept nomination papers unless they fail to substantially comply with these statutory requirements. *See Hunt v. Superior Court*, 64 Ariz. 325, 328, 170 P.2d 293, 295 (1946) (responsibility of board of supervisors regarding candidate filing); Ariz. Att'y Gen. Op. 184-096 (Secretary of State not authorized to refuse to accept a filing for candidacy on the grounds that the candidate did not meet the residency requirements). The Secretary of State may also refuse to accept nomination papers or petitions if they are not filed within the time frame established by statute. *Adams v. Bolin*, 77 Ariz. 316, 322, 271 P.2d 472, 476 (1954) (Secretary of State not required to accept petitions filed too early).

There is no statutory requirement that the candidate state on the nomination paper that he or she is eligible to run under the term limit provision of the Arizona Constitution. Based on the principle that the Secretary of State performs a ministerial function when accepting nomination papers, the Secretary of State has no authority to reject a candidate's filing based on term limits. In specific circumstances, the Legislature has directed the Secretary of State to reject candidate filings. For example, when a person is barred from seeking public office for five years because of campaign finance violations, the statute provides that this "is grounds for . . . [the] filing officer to refuse the candidates nomination paper." A.R.S. § 16-918(F); *see also* A.R.S. § 16-312(D) (circumstances in which candidates may not file as a write in candidate). There is no similar directive with regard to term limits. Consequently, as long as the nomination papers are in substantial compliance with the statutes, the Secretary of State must accept the nomination paper, even if the person may be ineligible to serve because of term limits. If the candidate is precluded from running because of term limits, any qualified elector could then challenge the candidacy in accordance with A.R.S. § 16-351.

## **Conclusion**

The term limit provision in the State Constitution prohibits a legislator who has served four consecutive terms in the House or Senate from running for a fifth consecutive term regardless of the impact of the redistricting process on the district that legislator had been elected to represent. Similarly, a legislator who has served four consecutive terms in the House or Senate and who moves following redistricting may not seek a fifth consecutive term. Finally, the statutes governing the duties of the Secretary of State do not authorize that office to reject a candidate's nomination papers on the grounds that the candidate is ineligible because of term limits; however, the candidate's eligibility is subject to challenge in court.

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Janet Napolitano  
Attorney General

To: J.C. Keeney, Acting Local Board Chair  
Corrections Officer Retirement Plan

August 1, 2001

Re: Retirees in the Corrections Officer  
Retirement Plan  
101-018 (R00-056)

### **Questions Presented**

Your predecessor asked whether: (1) retired correctional officers who return to work in designated positions covered by the Corrections Officer Retirement Plan (CORP) are required to participate in the Arizona State Retirement System (ASRS); and (2) retired correctional officers who return to work in CORP-designated positions may elect not to participate in any retirement system.

### **Summary Answer**

Based on the 2001 amendments to the statutes governing the ASRS, retired correctional officers who return to work in CORP-designated positions must participate in ASRS.

### **Background**

For the most part, State employees are members of the ASRS. See A.R.S. § 38-711 to -794. The Legislature has also established other retirement programs for particular groups of State officers or employees, such as the Elected Officials Retirement Plan, A.R.S. §§ 38-801 to -820, the Public Safety Personnel Retirement System, A.R.S. §§ 38-841 to -859, and the CORP, A.R.S. §§ 38-881 to -908.

CORP, a state retirement system for employees who work in the field of corrections, was created by the Legislature in 1986 in response to the high turnover rate in corrections personnel. See *Corrections Officers Retirement Plan: Minutes of Meeting on H.B. 2310 Before the House Comm. on Government Operations*, 37<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. 3 (March 11, 1986). See 1986 Ariz. Sess. Laws ch. 325 (codified at Arizona Revised Statutes §§ 38-881 through -903). "[CORP] was established in order to provide a uniform, consistent and equitable statewide program for . . . eligible corrections officers." A.R.S. § 38-900.01(B).

Employees are eligible to participate in CORP if they are employed in designated positions within correctional facilities. A.R.S. § 38-881(7). A "designated position" under CORP includes county, city, or town detention officers, certain employees of county sheriffs, and certain employees of the Department of Corrections and the Department of Juvenile Corrections. *Id.* The system also establishes local boards charged with administering CORP. A.R.S. § 38-893. Subject to some limitations, the local boards determine eligibility, service credits, and benefits under CORP. A.R.S. § 38-893(D)(1).

### **Analysis**

Except in certain circumstances set forth in statute, membership in ASRS is mandatory for all employees or officers of the State. A.R.S. § 38-727(1). State employees participating in CORP are among those exempt from ASRS participation. The Legislature made this exemption explicit in an amendment approved in the 2001 regular session which provides that

membership in ASRS is not mandatory for "any employee or officer who is eligible to participate and who participates in the Elected Officials' Retirement Plan. . . , the Public Safety Personnel Retirement System. . . , or the Corrections Officer Retirement Plan." 2001 Ariz. Sess. Laws ch. 136, § 7 (codified at A.R.S. § 38-727(1)(e)).<sup>(1)</sup>

Your questions are limited to CORP members who have retired and who have chosen to return to work in CORP-designated positions. In that situation, the statutes expressly prohibit the CORP retiree from contributing to the CORP fund or from accruing credited service while working in a CORP-designated position. A.R.S. § 38-884(J). In addition, the retiree's CORP pension is suspended "until the retired member again ceases to be an employee [in a CORP designated position]." A.R.S. § 38-884(J)(1). Thus, the retired CORP member who returns to work in a CORP-designated position is not eligible to participate in CORP while he or she is so employed.

Consequently, although State employees eligible for and participating in CORP are exempt from ASRS, CORP retirees who return to work in CORP-designated positions are not. See A.R.S. § 38-727(1)(e). Because they are not eligible to participate in CORP and are not otherwise exempt from the requirement that State employees participate in the ASRS, retired CORP members returning to work in CORP-designated positions must participate in ASRS. See A.R.S. § 38-727(1). They are not authorized to participate in any other retirement system. In addition, they are not authorized to elect not to participate in ASRS. See *id.*

### **Conclusion**

Retired correctional officers who return to work in CORP-designated positions are required to participate in ASRS.

Janet Napolitano  
Attorney General

1. 2001 Ariz. Sess. Laws ch. 136 is effective August 9, 2001, the general effective date for legislation approved in the 45th Legislature's first regular session. The analysis in this Opinion is based on the law amended by the Legislature in 2001.

To: Susan Plimpton Segal  
Executive Director, Legal Services  
Deer Valley Unified School District No. 97

July 24, 2001

Re: School District Discretion Regarding  
Teacher Base Salary Increases from  
Classroom Site Fund  
101-017 (R01-029)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an opinion you prepared for the Superintendent of Deer Valley Unified School District No. 97 regarding teacher base salary increases from the Classroom Site Fund ("CSF") established by A.R.S. § 15-977. This Office concurs with your conclusion and issues this Opinion to provide guidance to other school districts and charter schools on this issue.

### Questions Presented

You have asked (1) whether the portion of money in the CSF to be used for teacher base salary increases must be distributed to all eligible teachers and, if so, (2) whether that money must be distributed in equal amounts.

### Summary Answer

Under A.R.S. § 15-977(A), school districts and charter schools must use twenty percent of the monies in the CSF for "teacher base salary increases and employment related expenses." Districts and charter schools have discretion with respect to which teachers receive a base salary increase and in what amount.

### Background

In June of 2000, the Legislature approved S.B. 1007 which created the CSF and made other changes intended to improve public schools in Arizona. See 2000 Ariz. Sess Laws, 5th Spec. Sess. ch. 1. The measure became effective after the voters approved Proposition 301 at the 2000 general election.

The Department of Education administers and allocates CSF funds to school districts and charter schools. A.R.S. § 15-977(A). Districts and charter schools receiving CSF funds must then spend the money at school sites according to the following statutory requirements:

.40% of the funds must be used "for teacher compensation increases based on performance";

.40% of the funds must be used "for maintenance and operations purposes" which are defined in A.R.S. § 15-977(C) to include: class size reduction, teacher compensation increases, AIMS intervention programs, teacher development, dropout prevention programs, and teacher liability insurance premiums; and

.20% of the funds must be used "for teacher base salary increases and employment related expenses." *Id.*

This Office has previously addressed the discretion of school districts and charter schools with regard to the teacher compensation increases based on performance and the expenditures for maintenance and operations purposes. See Ariz. Att'y Gen. Op. 101-007. This Office also determined that the term "teacher" in the CSF includes not only traditional classroom teachers, but also other school employees who "provide instruction to students on matters related to the school's educational mission." Ariz. Att'y Gen. Op. 101-014.

## Analysis

The pertinent statute states: "Each school district or charter school shall allocate . . . twenty percent of the monies [in the CSF] for teacher base salary increases and employment related expenses." A.R.S. § 15-977(A). The issue is whether this provision requires school districts and charter schools to give salary increases to all teachers in the same amounts, or if school districts and charter schools have discretion in determining base salary increases.

The central principle in statutory interpretation is to ascertain the intent of the Legislature by following the plain meaning of the statute's language. *Peck v. Bd. of Educ. of Yuma Union High Sch. Dist.*, 126 Ariz. 113, 115, 612 P.2d 1076, 1078 (App. 1980). The plain language of A.R.S. § 15-977 limits the base salary increase to "teachers" but does not expressly require that *all* teachers receive an increase or that all teachers receive the same increase. Consequently, although 20% of the CSF must be spent for "teacher base salary increases and employment related expenses," the allocation of such monies among teachers is left to the discretion of governing boards of school districts and charter schools. A.R.S. § 15-977(A).

The discretion local governing boards have when allocating base salary increases from the CSF is consistent with the discretion boards generally have to determine salaries and benefits of employees. See A.R.S. § 15-502(A) (governing boards establish employee salaries and fringe benefits). It is also consistent with the discretion governing boards have under A.R.S. § 15-977 to allocate the increases to teachers based on performance and the monies dedicated to other maintenance and operations purposes. See Ariz. Att'y Gen. Op. I01-007.

A comparison of the language in A.R.S. § 15-977(A) with language in recent legislation allocating State employee pay increases supports the conclusion that schools have discretion with regard to the base salary increases for teachers under A.R.S. § 15-977. The legislation for State employees specifically directed that "[t]he department of administration shall allocate to each agency or department an amount sufficient to increase the annual salary level of *each* employee by the greater of \$1,500 or five per cent . . ." 2001 Ariz. Sess. Laws, ch. 236 § 109 (emphasis added). In contrast, A.R.S. § 15-977 does not require that the base salary increase be given to *each* teacher. Similarly, §15-977 does not require that the base salary increase be given in equal amounts across the board.

## Conclusion

School governing boards and charter schools have discretion under A.R.S. § 15-977(A) in deciding to whom and in what proportion to distribute base salary increases.

Janet Napolitano  
Attorney General

1. This Opinion analyzes the impact of SB 1525 on school districts. It does not analyze the legislation's impact on other types of schools, such as private schools, that may be subject to different legal requirements.
2. All statutes cited herein include the amendments in 2001 Ariz. Sess. Laws ch. 23 (SB 1525).

To: The Honorable Mary Hartley  
Arizona State Senate

July 20, 2001

Re: Impact of legislation regarding military  
airports on schools  
I01-016 (R01-025)

### **Questions Presented**

You have asked whether Senate Bill 1525 (2001 Ariz. Sess. Laws ch. 23): (i) precludes the construction of new schools near, but not in, high noise or accident potential zones by military airports; (ii) precludes operation, improvement, or expansion of existing schools either within, or near, high noise or accident potential zones; or (iii) extends new civil liability for operating or expanding an existing school within or near a high noise or accident potential zone. <sup>(1)</sup>

### **Summary Answer**

SB 1525 does not preclude the construction of new schools near a high noise or accident potential zone or the operation, improvement, or expansion of existing schools either in, or near, a high noise or accident potential zone. The legislation also does not, by its terms, impose any new civil liability for the operation or expansion of an existing school in or near high noise or accident potential zones. Whether the statutes might otherwise affect liability in any particular situation requires the analysis of specific facts and is not addressed in this formal legal Opinion.

### **Background**

The Arizona Legislature has enacted legislation to help ensure that development near a military airport is consistent with the airport's continued existence. *See generally*, Arizona Revised Statutes ("A.R.S.") §§ 28-8481, -8482. <sup>(2)</sup> To that end, political subdivisions must adopt plans and enforce zoning regulations to "assure development compatible with the high noise and accident potential generated by military airport operations." A.R.S. § 28-8481(A). Political subdivisions must also incorporate sound attenuation standards into their building codes and adopt ordinances requiring noise level reductions for certain construction within the vicinity of military airports. A.R.S. § 28-8482. For the purposes of A.R.S. §§ 28-8481 and 8482, a "political subdivision" is "a city, town, or county." A.R.S. § 28-8461(12). The Attorney General is charged with determining whether the political subdivisions are in compliance with A.R.S. §§ 28-8481 and 8482 based on annual reports submitted by political subdivisions concerning planning and zoning activities in specified areas. A.R.S. § 28-8481(H), (K), (S).

During the 2001 legislative session, the statutes affecting development near military airports were amended in SB 1525. Political subdivisions are now required to assure that development within certain newly-defined zones is compatible with military airports in the vicinity. A.R.S. § 28-8481. Those zones are referred to as "high noise and accident potential zones" and are defined in A.R.S. § 28-8461(8). The legislation incorporates a chart of uses that are compatible with certain areas within the zones. A.R.S. § 28-8481(K). The chart is to be used to determine compliance with the statute. *Id.*

The 2001 legislation also requires the School Facilities Board (SFB) to give notice to military airports of proposals involving the construction of new school facilities in the vicinity of the airport. The military airport may then submit comments concerning compatibility of the proposed facility with the high noise or accident potential of the airport "that may have an adverse effect on public health and safety." A.R.S. § 15-2041(J). The SFB must analyze and consider these concerns before making a decision on the project. *Id.*

### **Analysis**

#### **A. SB 1525 Does Not Preclude the Construction of New Schools or the Expansion of Existing Schools in Certain Areas Near Military Airports.**

The planning, zoning, and reporting requirements in A.R.S. § 28-8481 apply to "political subdivisions." Although school districts are generally regarded as political subdivisions of the State, *Amphitheater Unified Sch. Dist. v. Harte*, 128 Ariz. 233, 235, 624 P.2d 1281, 1283 (1981), a school district is not a "political subdivision" for the purposes of A.R.S. § 28-8481. For that statute, the Legislature has specifically defined "political subdivision" as a "city, town or county." A.R.S. § 28-8461(12). Therefore, its requirements do not apply to school districts. *See Pima County v. Sch. Dist. No. One*, 78 Ariz. 250, 252, 278 P.2d 430, 431 (1954) ("[w]here a statute expressly defines certain words and terms used in the statute the court is bound by the legislative definition"). Because the statute is targeted at planning and zoning activities, the definition is confined to those political subdivisions that typically engage in such activities and excludes others, like school districts, that do not.

School districts are also generally not subject to the planning and zoning directives of political subdivisions subject to 28-8481. As political subdivisions of the State with the authority and responsibility to perform a governmental function, school districts are not subject to local zoning requirements. *See City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962) (municipal government not subject to zoning requirements of other local government); Ariz. Att'y Gen. Op. 190-018 (local road surfacing ordinances not applicable on school district property). Any planning or zoning decisions made pursuant to A.R.S. § 28-8481, therefore, do not apply to school districts.

Although school districts are not affected by the zoning and planning decisions under A.R.S. § 28-8481, they are affected by the sound attenuation standards or noise level reductions required by the building code of the local jurisdiction pursuant to A.R.S. § 28-8482. State law requires that public buildings be built in compliance with the relevant local jurisdiction's building code. A.R.S. § 34-461. "Public buildings" for purposes of that statute, include "new construction of school district buildings." Ariz. Att'y Gen. Op. 186-033.

SB 1525's notice requirements for certain new school construction facilities also do not preclude school construction near military airports. *See* A.R.S. §§ 15-2002(C)(9) -2041(J). The SFB must give notice of any application for funds for new school facilities to any military airport that might be affected by the project. A.R.S. § 15-2002(C)(9). This notice and comment procedure applies only to the applications to the SFB for monies from the New School Facilities Fund. A.R.S. §§ 15-2002(C)(9), -2041(J). These projects may include the construction of new facilities or additions to existing facilities, based on the parameters applicable to that Fund. The notice and comment procedure does not apply to other funds administered by the SFB, such as the Deficiencies Correction Fund. A.R.S. § 15-2021. It also does not apply to school construction projects that may be funded with local revenues. If the military airport provides comments concerning the project's compatibility with the airport

operations, the SFB must consider and analyze the issues raised by the military airport before making a final determination regarding the application for funds. A.R.S. § 15-2041(J). The statute does not, however, mandate that the SFB deny the application if a military airport has concerns about the project; the SFB retains discretion to make the final decision.

### B. SB 1525 Does Not Address Liability for Operating or Expanding Schools in or Near High Noise or Accident Potential Zones.

Nothing in SB 1525 addresses civil liability for operating or expanding a school in or near high noise or accident potential zones. As described earlier, the legislation does not prohibit a school from operating or expanding in those areas. The bill also does not assign any new responsibilities to school district governing boards. The new responsibilities relating to school construction are assigned only to the SFB, which must give notice to and consider input from military airports before approving certain new school construction.

An analysis of potential liability requires a review of immunities that may apply. Absent gross negligence or intentional misconduct, school board members are immune from civil liability "for the consequences of adoption and implementation of policies and procedures." A.R.S. 15-341(E). In addition, public entities, which include school districts and the SFB, are not liable for "[t]he exercise of an administrative function involving the determination of fundamental governmental policy." A.R.S. § 12-820.01. See also A.R.S. § 12-820(6) (definition of "public entity"). This includes "the exercise of discretion" and "[a] determination of whether to seek or whether to provide the resources necessary for . . . [t]he construction or maintenance of facilities, [and a] determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel." A.R.S. § 12-820.01(B).

Although, by its terms, the legislation does not create civil liability for operating or expanding schools in certain areas near military airports, questions of civil liability generally cannot be analyzed in the abstract. These issues require an analysis of specific facts to determine whether the schools have fulfilled their statutory and common law duties and whether certain immunities apply under the circumstances. *Cf., e.g., Schabel v. Deer Valley Unified Sch. Dist.*, 186 Ariz. 161, 920 P.2d 41 (App. 1996) (general discussion of school district duty of care and immunity).

### **Conclusion**

Nothing in SB 1525 precludes the construction of new schools near high noise or accident potential zones nor the operation, improvement or expansion of existing schools either within a high noise or accident potential zone or near such a zone. By its terms, the statute does not create civil liability for operating or expanding schools in certain areas by military airports. In addition, the statutes do not by their terms create civil liability for operating or expanding schools near to military airports. Whether the statutes might otherwise affect liability in any particular situation requires the analysis of specific facts and is not addressed in this formal legal Opinion.

Janet Napolitano  
Attorney General

private schools, that may be subject to different legal requirements.

2. All statutes cited herein include the amendments in 2001 Ariz. Sess. Laws ch. 23 (SB 1525).

Re: Workforce Development Account as  
Local Revenues to Community Colleges  
101-015 (R00-082)

### Question Presented

Is Arizona Revised Statutes ("A.R.S.") § 15-1472(F) unconstitutional because it improperly amends or redefines the expenditure limit for community colleges in Article IX, § 21(1) of the Arizona Constitution?

### Summary Answer

Article IX, § 21(1) of the Arizona Constitution prohibits the governing board of any community college district from authorizing expenditures of local revenues in excess of a prescribed limitation, except in the manner provided by law. Section 15-1472(F), A.R.S., which states that monies in community college district workforce development accounts shall not be considered local revenues, is within the Legislature's express power under § 21(1). Therefore, 15-1472(F) is not unconstitutional.

### Background

#### A. Workforce Development Accounts.

Section 15-1472, A.R.S., establishes a workforce development account in each community college district. Districts are to use monies in the account for "workforce development and job training purposes," which may include:

- (1) partnerships with businesses and educational institutions;
- (2) [a]dditional faculty for improved and expanded classroom instruction and course offerings;
- (3) [t]echnology, equipment, and technology infrastructure for advanced teaching and learning in classrooms or laboratories;
- (4) [s]tudent services such as assessment, advisement, and counseling for new and expanded job opportunities; and
- (5) [t]he purchase, lease or lease-purchase of real property, for new construction, remodeling or repair of buildings or facilities on real property.

A.R.S. § 15-1472(B). This statute was part of a broad measure addressing public education in this State, parts of which were referred to the voters as Proposition 301 in the 2000 general election. *Id.* See 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1.

The work force development account receives its monies from the 0.6% increase in the transaction privilege tax rate approved in Proposition 301. Section 15-1472(F) specifically states that: "[m]onies received under this section shall not be considered to be local revenues for purposes of Article IX, § 21, Constitution of Arizona." A.R.S. § 15-1472(F). Similar language was included in A.R.S. § 42-5010(G), which Arizona voters approved in Proposition 301: "The rates imposed pursuant to this subsection shall not be considered local revenues for purposes of Article IX, section 21, Constitution of Arizona."

## B. Constitutional Expenditure Limits.

Article IX, § 21 of the Arizona Constitution prescribes the procedure for determining limits on expenditures of "local revenues" by school districts and community college districts. Paragraph 1 of § 21 provides that "[t]he governing board of any community college district shall not authorize expenditures of local revenues in excess of the limitation prescribed in this section, except in the manner provided by law." Ariz. Const. art. IX, § 21(1). "Local revenues" are defined as "all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school or community college district or any of its agencies, departments, offices, boards, commissions, authorities, councils and institutions . . ." Ariz. Const. art. IX, § 21(4)(c). The Constitution lists twelve categories of revenues that are specifically excluded from the definition of "local revenues." *Id.* at § 21(4)(c)(i) to (xii).

Arizona voters adopted Article IX, § 21 at a special election on June 3, 1980, and it became effective June 28, 1980. It was referred to the voters by the Legislature as one of several constitutional provisions to establish or amend limitations to expenditures and tax levies of the State and political subdivisions. See Ariz. Const. art. IX, § 17 (state expenditure limitation); *id.* §§ 18 and 19 (ad valorem tax limits); *id.* § 20 (county, city, and town expenditure limits); *id.* § 21 (community college and school district expenditure limits).

The expenditure limits generally sought "to limit expenditures of political subdivisions to fiscal year 1979-80 levels modified by annual adjustments to reflect changes in population and the cost of living." *La Paz County v. Yuma County*, 153 Ariz. 162, 167, 735 P.2d 772, 777 (1987). Section 21 furthers this purpose by prohibiting expenditures of local revenues in excess of the constitutional limit, which is calculated annually by the Economic Estimates Commission. See Ariz. Const. art. IX, § 17 (establishing economic estimates commission); A.R.S. § 41-563 (prescribing methodology for determining expenditure limits).

### Analysis

In A.R.S. § 15-1472(F), the Legislature specifically excluded the workforce development account monies from "local revenues" under Article IX, § 21. You have asked whether this statute is constitutional. Because the question concerns the constitutionality of A.R.S. § 15-1472(F), the analysis is based on a presumption that all legislative enactments are constitutional. *State v. Cook*, 139 Ariz. 406, 408, 678 P.2d 987, 989 (App. 1984). Any doubts will be resolved in favor of constitutionality. *State v. Arnett*, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978).

The expenditure limit for community colleges provides that expenditures in excess of the constitutional limitation may be authorized in a "manner provided by law." Ariz. Const. art. IX, § 21(1) ("The governing board of any community college district shall not authorize expenditures of local revenues in excess of the limitation prescribed in this section, except in the manner provided by law."). This provision authorizes the Legislature to make exceptions from the community college district expenditure limit set out in Art. IX, § 21. The broad grant of authority to the Legislature is not limited by the language of § 21 itself. Under its power to authorize expenditures in excess of the expenditure limit, the Legislature could, therefore, exclude monies from "local revenues" as it did in A.R.S. § 15-1472(F).

This conclusion is supported by contrasting the Legislature's authority regarding the community college expenditure limit with other expenditure limits in the Constitution. For example, the aggregate school district limitation, also in Art. IX, § 21, includes a much more limited legislative authorization. "The aggregate expenditures of local revenues for all school districts shall not exceed the limitation prescribed in this section, except as provided in subsection (3) of this section." Ariz. Const., art. IX, § 21(2). Subsection (3) provides that the limitation for school districts may be authorized for a single fiscal year upon affirmative vote of two-thirds of the membership of each house of the legislature. Similarly, the expenditure limitation applicable to counties, cities and towns provides: "The governing board of any political subdivision shall not authorize expenditures of local revenues in excess of the limitation prescribed in this section, except as provided in

subsections (2), (6) and (9) of this section." Ariz. Const., art. IX, § 20(1). Subsections (2), (6) and (9) allow excess expenditures under certain specified circumstances, but none give the Legislature the broad authority contained in § 21(1) which governs community college districts.

A comparison of the community college provision with the state expenditure limitation is also instructive. Article IX, § 17 provides that the Legislature cannot appropriate for any fiscal year state revenues in excess of seven per cent of the total personal income of the State for that fiscal year. As originally adopted in 1978, § 17 stated that "[f]or purposes of this section, 'state tax revenues' shall be defined by law." Laws 1978, S.Con.Res. No. 1002, § 1. This Office concluded this language "delegates to the Legislature the authority to define 'State tax revenue' for purposes of the [state expenditure] limitation." Ariz. Att'y Gen. Op. 178-283. In 1980, at the same special election at which voters approved the expenditure limitation for community colleges, § 17 was amended to specifically define "state revenues" and delete the Legislature's authority to define the term. Laws 1980, 2nd Spec.Sess., S.Con.Res. 1001, § 6. In contrast, § 21 gave the Legislature express authority to permit community college districts to exceed the expenditure limit. The differences between the various expenditure limits show that the drafters knew how to restrict the Legislature's power but chose to give the Legislature discretion to make exceptions affecting the expenditure limits for community college districts.

It might be argued that, although the Constitution authorizes the Legislature to allow excess expenditures of local revenues, this authorization does not permit the Legislature to exclude certain monies from the definition of local revenues as it did in A.R.S. § 15-1472(F). This interpretation would unduly restrict the Legislature's broad constitutional authority to permit community college districts to exceed the expenditure limit. Constitutional provisions should be interpreted "to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). The Constitution plainly left the Legislature discretion regarding expenditure limits for community college districts. The Legislature's decision to exercise this discretion by excluding the workforce development account from "local revenues" is within its power under Art. IX, § 21(1).

Article II, § 32 of the Arizona Constitution does not require a different conclusion. That section states: "[T]he provisions of this constitution are mandatory, unless by express words they are declared to be otherwise." The express words of Art. IX, § 21 give the Legislature the authority to allow community college district expenditures in excess of the calculated limitation.

### Conclusion

Section 15-1472(F), A.R.S., which states that monies in community college district workforce development accounts shall not be considered local revenues, is not unconstitutional under Art. IX, § 21.

To: Susan Plimpton Segal  
Executive Director, Legal Services  
Deer Valley Unified School District No. 97

June 21, 2001

Re: Definition of Teacher Under ARS § 15-  
977  
I01-014 (R01-020)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an opinion you prepared for Deer Valley Unified School District No. 97. This Office concurs with your conclusion regarding the definition of "teacher" for the purposes of A.R.S. § 15-977, and issues this Opinion to provide guidance to others concerning this subject. See Ariz. Att'y Gen. Op. I98-006, at 2 n.2 (review may be granted when facts have "broad statewide applicability").

### **Question Presented**

The Classroom Site Fund ("CSF") in A.R.S. § 15-977 provides funds for various increases in "teacher" compensation. Are these compensation increases limited to traditional classroom teachers or are other school district or charter school employees who provide instruction to students also eligible?

### **Summary Answer**

The teacher compensation increases through the CSF are not limited to traditional classroom teachers. Certificated teachers, certified teachers, and others employed to provide instruction to students on matters related to the school's educational mission are eligible for the increases in compensation.

### **Background**

During the 5<sup>th</sup> Special Legislative Session of 2000, the Legislature passed S.B.1007, which created the CSF to provide funding to school districts and charter schools. A.R.S. § 15-977. The bill's provisions were contingent upon voter approval of Proposition 301, which was passed on November 8, 2000, and certified by the Governor on December 7, 2000. Proposition 301 increased the state transaction privilege tax rate by 0.6% to fund specific education programs, including the CSF.

A school district governing board or charter school must spend monies distributed to it from the CSF "for use at the school site" and "may not supplant existing school site funding with revenues from the Fund." A.R.S. § 15-977(A). Each school district or charter school must allocate funding from the CSF as follows:

1. 40% must be used for "teacher compensation increases based on performance";
2. 20% must be used for "teacher base salary increases"; and
3. 40% must be used for "maintenance and operations purposes," which may include

teacher compensation increases.

A.R.S. §15-977(A), (C).

### **Analysis**

The statute governing the CSF allocates monies for various teacher compensation increases, but it does not define the category of employees who qualify as "teachers." See A.R.S. § 15-977. Your opinion to Deer Valley correctly concluded that the phrase "teacher" is not limited to traditional classroom teachers.

For the purposes of this Opinion, the phrase "traditional classroom teachers" means a teacher responsible for academic instruction for an entire grade (e.g., a first-grade teacher) or a teacher generally responsible for teaching a particular academic subject (e.g., a high school history teacher). The legislation creating the CSF does not itself use the phrase "traditional classroom teacher." Determining if only such teachers are eligible for the compensation increases under the CSF thus turns on the meaning of the term "teacher" as used in A.R.S. § 15-977.

When terms are undefined, courts look to the plain meaning of the terms used in the statute. See, e.g., *Mail Boxes v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). Webster's Dictionary defines "teacher" simply as "one who teaches or instructs; one whose occupation is to instruct." Webster's Third New International Dictionary 2346 (1995). This definition is not limited to traditional classroom teachers.

Other language in A.R.S. § 15-977 indicates that the teacher compensation increases funded by the CSF are not limited to traditional classroom teachers. One subsection of that statute defining "class size reduction" refers specifically to "classroom teachers." See A.R.S. § 15-977(G). If the Legislature had wanted to limit increases in teacher compensation to traditional classroom teachers, it could have used the term "classroom teacher" in the sections outlining teacher compensation. It chose not to do so. "When the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read into the statute the term that was excluded." *Luchanski v. Congrove*, 193 Ariz. 176, 179, 971 P.2d 636, 639 (App. 1998).

The legislative history further supports the conclusion that "teacher" in A.R.S. § 15-977 is not limited to traditional classroom teachers. A House Appropriations Committee amendment to the bill would have limited the category of teachers eligible for compensation increases to traditional full- or part-time classroom teachers. See House Appropriations Committee Amendment to S.B. 1007, 44th Leg., 5<sup>th</sup> Spec. Sess. (Ariz. 2000). The Legislature, however, did not include that provision in the final version of the bill, and it did not otherwise limit or define the term "teacher." Cf. Ariz. Att'y Gen. Op. 101-007 (where provision requiring State Board approval of teacher performance compensation plans was not included in final version of bill, implication was that Legislature did not intend to require such approval).

Concluding that "teacher" is not limited to traditional classroom teachers does not, however, identify which employees are eligible for the compensation increases through the CSF. The statute establishing the CSF should be construed to serve its purpose. See e.g., *City of Phoenix v. Superior Court*, 144 Ariz. 172, 175-76, 696 P.2d 724, 727-28 (App. 1985). The CSF was one part of a measure that broadly aimed to improve education in Arizona. See generally 2000 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1. The Legislature established a clear guideline for CSF funds: all monies from the CSF "are intended for use at the school site."

A.R.S. § 15-977(A). In addition, the statute directs the district governing boards and charter schools to use the CSF to "maximize classroom opportunities." A.R.S. § 15-977(D). Thus, the additional funding is targeted to expenditures that increase student achievement, and the term "teacher" should be read in a way that furthers this goal. *Cf. Wheeler v. Yuma Sch. Dist. No. One*, 156 Ariz. 102, 107, 750 P.2d 860, 865 (1988) (statutory reference to "classroom performance" does not define "where the activity in question occurs" but may broadly include "professional activities that enhance or detract from the instructional process").

Although the Legislature has not defined "teacher," it has defined "certified teacher" and "certificated teacher." A "certified teacher" is someone certified as a teacher who "renders direct and personal services to school children in the form of instruction related to the school district's educational course of study and who is paid from the maintenance and operation section of the budget." A.R.S. § 15-901(B)(5). A "certificated teacher" is someone who holds a certificate issued by the Arizona State Board of Education allowing him or her "to work" in Arizona schools and who is employed under contract in a "position which requires certification," except that it does not include any psychologist or administrator who devotes less than 50% of his or her time to "classroom teaching." A.R.S. § 15-501(2).<sup>(1)</sup> Thus, under Arizona law, certain school employees, such as librarians or counselors, can be "certified teachers" or "certificated teachers" without being traditional classroom teachers.

The analysis does not end here, however, because the Legislature did not restrict the compensation increases under § 15-977 to only "certificated teachers" or "certified teachers." Instead it chose the more general term "teacher." The Legislature is presumed to know the state of the law when it amends a statute, *Wareing v. Falk*, 182 Ariz. 495, 500, 897 P.2d 1381, 1386 (App. 1995), and statutes should be interpreted in conjunction with other statutes which relate to the same subject or have the same general purpose. *State v. Thomason*, 162 Ariz. 363, 366, 783 P.2d 809, 812 (App. 1989). Based on these principles, the general term "teacher" automatically encompassed all employees included within the more specific terms "certificated teacher," A.R.S. § 15-501(2) and "certified teacher," A.R.S. § 15-901(B)(5).

Because the Legislature did not limit the compensation increases in A.R.S. § 15-977 to certificated or certified teachers, the term "teacher" is not limited to those employees. The Legislature's choice of the more general term "teacher" in A.R.S. § 15-977 is consistent with the fact that CSF funds may be used to increase compensation for charter school teachers, who are not subject to the state's teacher certification requirements and thus may not be "certified teachers" or "certificated teachers." *Compare* A.R.S. § 15-502(B) ("a teacher shall not be employed if the teacher has not received a certificate for teaching") *with* A.R.S. § 15-183(E)(5) (charter schools are generally exempt "from all statutes and rules relating to schools, governing boards and school districts"). In addition, based on the plain meaning of the word "teacher," and the history and purpose of A.R.S. § 15-977, others employed at public schools to provide instruction to students relating to the school's educational mission are also "teachers" for the purposes of A.R.S. § 15-977. This instruction may cover a wide range of issues including, for example, traditional academic subjects, programs designed for children with special needs, computer research classes, and character education programs.

Given the possible variations in job descriptions, "there is no necessity to impose a rigid formula to determine whether [an employee] should be considered a teacher" when an employee spends "a substantial portion of . . . time with students or involved in student-related matters." *Hillhouse v. Rice Sch. Dist. No. 20*, 151 Ariz. 348, 350, 727 P.2d 843, 845 (App. 1986) (holding that counselor is a teacher for purposes of the Teacher Tenure Act); see

*also* Ariz. Att'y Gen. Op. 184-065 ("[A] determination of whether a particular employee . . . [is a teacher] would depend upon that employee's specific duties and should be judged on a case-by-case basis."). Instead, school districts and charter schools should apply the general principles set forth in this Opinion to particular situations based on their specific facts.

### **Conclusion**

Under A.R.S. § 15-977, funds are provided for increases in "teacher" compensation. Based on the statutory language, purpose, and history, this Office concludes that traditional classroom teachers are not the only persons eligible for compensation increases. School districts and charter schools may use such funds for compensation increases for certified or certificated teachers and others employed to provide instruction to students related to the school's educational mission.

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Janet Napolitano  
Attorney General

1. The statute authorizing the State Board of Education to certify teachers provides that the Board shall:

[s]upervise and control the certification of persons engaged in instructional work directly as any classroom, laboratory or other teacher or indirectly as a supervisory teacher, speech therapist, principal or superintendent in a school district, including school district preschool programs, or any other educational institution below the community college, college or university level. . . .

A.R.S. § 15-203(A)(14). Under this authority, the Board has established rules regarding elementary teaching certificates, Arizona Administrative Code ("A.A.C.") R7-2-608, secondary teaching certificates, A.A.C. R7-2-609, special education teaching certificates, A.A.C. R7-2-610, vocational teaching certificates, A.A.C. R7-2-611, and specialized endorsements for certain subject areas such as bilingual education, English as a Second Language, gifted instruction, and library-media specialists, A.A.C. R7-2-613. There are also administrative certificates for supervisors, principals, and superintendents, A.A.C. R7-2-614, and certificates for counselors and school psychologists, A.A.C. R7-2-615.

### **Question Presented**

May a fire district that is organized as a special taxing district pursuant to Arizona Revised Statutes ("A.R.S.") §§ 48-261 through -271 annex non-contiguous land?

### **Summary Answer**

The statutes governing fire districts generally prohibit the expansion of a fire district's boundaries to non-contiguous land. Any exceptions to the contiguity requirement are specifically established by statute.

### **Analysis**

#### **A. Fire Districts Consist of Contiguous Land.**

Special taxing districts have no powers except those conferred by statute or necessarily implied by those statutes. *Cf. Union Transportes De Nogales v. City of Nogales*, 195 Ariz. 166, 169, 985 P.2d 1025, 1028 (1999) (stating that local governmental entities possess only those powers that are delegated by state law). Thus, fire districts can only act in accordance with the statutes that govern them.

The statutes that govern fire districts and certain other special taxing districts generally require that their area be contiguous.<sup>(1)</sup> Section 48-261, A.R.S., describes the method for creating fire districts, community park maintenance districts, sanitary districts, and hospital districts. That statute specifies that, with an exception that does not apply to fire districts, "the area of a district created pursuant to this section shall be contiguous." A.R.S. § 48-261(F). Similarly, the statute that governs changing the boundaries of fire districts, community park maintenance districts, and sanitary districts requires that the new area include only contiguous property: "Except as provided in subsection C of this section and § 48-2002, no change in the boundaries of a district pursuant to this section shall result in a district which contains area that is not contiguous."<sup>(2)</sup> A.R.S. § 48-262(G).

In its 2001 regular session, the Legislature amended A.R.S. § 48-262(C) to elaborate on the meaning of contiguity and to provide some limited exceptions to the contiguity requirement for fire districts and other special districts subject to that statute.<sup>(3)</sup> See 2001 Ariz. Sess. Laws ch. 248, § 2. (amending A.R.S. § 48-262(C)). First, the 2001 legislation specifies that, with some limitations, additions to a district must be contiguous as prescribed in A.R.S. § 9-471(H), which governs city and town annexations.<sup>(4)</sup> Second, under the 2001 amendments, the expanded district boundaries may not "result in a district that completely surrounds a territory that is in an unincorporated area . . . and that is not included in the district." *Id.* Third, an addition is "deemed contiguous notwithstanding that land owned by or under the . . . United States, this state or any political subdivision, other than an incorporated city, intervenes between the proposed addition and the district boundary." *Id.*

#### **B. Land Annexed Under A.R.S. § 48-262(H) Must Be Contiguous to the Fire District.**

The general process for changing a district's boundaries involves a lengthy, multi-step procedure. See A.R.S. § 48-262(A)(1) through (11). The major steps in the procedure for a boundary change are as follows: the proponent of the change must prepare and submit to the district a boundary change impact statement; the district must hold a hearing to determine whether the proposed change will promote the public health, comfort, convenience, necessity or welfare; if the district makes the required findings, the petitioners may circulate petitions and submit them to the district; the district holds a second hearing at which it must determine whether the signatures are valid and if it determines that the signatures are valid, it must order the change in boundaries. See A.R.S. § 48-262(A)(2), (5), (7), and (11).

In 1997, the Legislature added subsection (H) to A.R.S. § 48-262 to provide a simplified procedure for owners of property "adjacent" to a sanitary district or to a fire district. See 1997 Ariz. Sess. Laws, ch. 11, § 1. Subsection (H) permits owners of adjacent property to simply request in writing that their property be included in the district, and the governing board of the district may approve the request if the board "determines that the inclusion of that property will benefit the district and the property owner."<sup>(5)</sup>

A.R.S. § 48-262(H).

Subsection H does not create an exception from the contiguity requirement. Although "adjacent" and "contiguous" do not always mean the same thing, in this context they do. Absent some specific legislative directive to the contrary, "contiguous" means land that actually touches at some point. See Black's Law Dictionary 315 (7<sup>th</sup> ed. 1999) ("contiguous" means "touching at a point or along a boundary"); Webster's New Third International Dictionary 492 (1993) (contiguous means "touching along boundaries often for considerable distances"). In contrast, "adjacent" may mean "[l]ying near or close to, but not necessarily touching," Black's Law Dictionary 42 (7<sup>th</sup> ed. 1999). "Adjacent" may also mean "relatively near and having nothing of the same kind intervening: having a common border." Webster's Third New International Dictionary 26 (1993). In addition, Webster's notes that a synonym for "adjacent" is "contiguous." *Id.*

In this context, annexations of "adjacent" land under A.R.S. § 48-262(H) must satisfy the contiguity requirement in A.R.S. § 48-262(G). The 1997 legislation that added subsection (H) also added the phrase "[e]xcept as prescribed by subsection H of this section" to subsection (A) of § 48-262, which sets forth the usual boundary-changing procedures. By doing so, the Legislature made it clear that subsection (H) is an alternative to the lengthy boundary-changing procedures in subsection (A). Moreover, when it added the procedure in subsection (H), the Legislature did not amend A.R.S. § 48-261(F) or § 48-262(G), which generally require that special taxing districts consist of contiguous area. The statutes as a whole demonstrate the Legislature's concern that property in special taxing districts be contiguous, with only certain specified exceptions, and subsection (H) is not an exception from this general requirement. See A.R.S. §§ 48-261(F); -262(G). The legislative history of the 1997 amendment also supports the conclusion that it was to provide an alternative, simplified, method for changing the boundaries of a sanitary or fire district, but that the Legislature did not intend to abandon the contiguity requirement. See *Minutes of House Committee on Rural & Native American Affairs*, 43rd Leg. 1st Reg. Sess. (January 22, 1997); *Minutes of House Committee on Gov't Operations*, 43rd Leg. 1st Reg. Sess. (January 29, 1997); *Minutes of Senate Committee on Gov't* 43rd. Leg. 1st Reg. Sess. (February 24, 1997). Thus, annexations to fire districts under either A.R.S. § 48-262(A) or (H) must comply with the contiguity requirement in A.R.S. § 48-262(G).

## Conclusion

A fire district may not annex property that is not contiguous to its existing boundaries, unless a specific statutory exception to the contiguity requirement applies. This applies to annexations under either subsection (A) or (H) of A.R.S. § 48-262.

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Janet Napolitano  
Attorney General

1. Sections 48-802 through -821, A.R.S., govern fire districts' administration, describe their powers and duties, and provide for mergers with other districts and annexation to cities or towns. These sections do not address fire districts' creation or boundary requirements.
2. Section 48-2002, A.R.S., permits non-contiguity in sanitary districts in specified instances.
3. This legislation takes effect August 9, 2001, which is 90 days after the Legislature adjourned. See Ariz. Const. art. IV, pt. 1 § (3).
4. Under A.R.S. § 9-471(H) land is not contiguous unless:
  1. It adjoins the exterior boundary of the annexing city or town for at least . . . [300] feet.
  2. It is, at all points, at least . . . [200] feet in width, excluding rights of way and roadways.
  3. The distance from the existing boundary of the annexing city or town where it adjoins the annexed territory to the furthest point of the annexed territory from such boundary is no more than twice the maximum width of the annexed territory.

Under A.R.S. § 48-262(C), as amended in 2001, fire districts, and other districts subject to that statute, must meet these requirements except that "any whole parcel may be added to the district notwithstanding the provisions of section 9-471(H) regarding minimum size limitations."

5. Subsection H to A.R.S. § 48-262 states:

Notwithstanding subsection A of this section, any property owner whose land is within a county that contains a . . . fire district and whose land is adjacent to the boundaries of the . . . fire district may request in writing that the governing body of the district amend the district boundaries to include that property owner's land. If the governing body determines that the inclusion of that property will benefit the district and the property owner, the boundary change may be made by order of the governing body and is final on the recording of the governing body's order that includes a description of the property that is added to the district. A petition and impact statement are not required for an amendment to a . . . fire district's boundaries made pursuant to this subsection.

To: The Honorable Jake Flake  
Arizona House of Representatives

May 21, 2001

Re: County Authority to Enact Ordinances  
I01-012 (R00-081)

### **Questions Presented**

Pursuant to Arizona Revised Statutes ("A.R.S.") § 11-251.05(A)(1), counties may adopt ordinances "necessary or proper to carry out the duties, responsibilities and functions of the county which are not otherwise specifically limited . . . by § 11-251 or any other law or in conflict with any rule or law of this state." Does this statute give counties the authority to enact ordinances on all matters that are not limited by or in conflict with state laws?

### **Summary Answer**

No. A county may only enact an ordinance that is (1) within the county's "duties, responsibilities and functions" as determined by state law and (2) not limited by or in conflict with state law. Thus, whether or not an ordinance is limited by or in conflict with state law, the ordinance must still be within the county's duties, responsibilities and functions under state law.

### **Background**

Counties are "created by the legislature . . . for the purpose of exercising a certain portion of the general powers of the government in specified localities." *Associated Dairy Prod. Co. v. Page*, 68 Ariz. 393, 396, 206 P.2d 1041, 1043 (1949). The territorial counties, which were fixed by statute when the constitution was adopted, were the counties of Arizona "until changed by law." Ariz. Const. art. XII § 2. The Constitution also specifies certain county officers, including "at least three Supervisors," who must be elected, and directs that "[t]he duties, powers, and qualifications of such officers shall be as prescribed by law." *Id.* at §§ 3, 4. <sup>(1)</sup>

The duties of the county board of supervisors ("board") are set forth in statute. A.R.S. § 11-251. A.R.S. §§11-251 enumerates 60 powers of the board, and other statutes throughout Title 11 (which governs counties) list additional subjects the board may address. *See, e.g.*, A.R.S. §§ 11-251 to -251.11. Some of these statutes authorize ordinances on particular subjects. *See, e.g.*, A.R.S.

§ 11-251(40) (curfews), (37) (licensing of certain businesses located in unincorporated areas). Section 11-251.05(A)(1) addresses ordinances in general by providing that the board may:

[i]n the conduct of county business, adopt, amend and repeal all ordinances necessary or proper to carry out the duties, responsibilities and functions of the county which are not otherwise specifically limited by § 11-251 or any other law or in conflict with any rule or law of this state.

The legislative history of A.R.S. § 11-251.05(A)(1) reflects a desire to expand the ability of counties to address issues that may arise without seeking specific legislative authorization. <sup>(2)</sup> In 1983, a proponent of the legislation that resulted in A.R.S. § 11-251.05(A)(1) noted the measure would cut down on the amount of legislation the counties would require each year from the Legislature. *Minutes of House of Representatives Comm. on Counties and Municipalities, Re: HB 2105, 36th Leg., 1st Reg. Sess. (January 27, 1983)*. *See also, Minutes of House Comm. on Gov't Operations, Re: HB 2105, 36th Leg., 1st Reg. Sess. (March 9, 1983)*. Similarly, when discussing

legislation to further amend that law in 1988, a supporter indicated the measure was intended to "enable counties to pass an ordinance when a problem comes before the county . . . without coming to the Legislature each time to get enabling legislation passed." *Minutes of House Comm. on Counties and Municipalities, Re: HB 2046, 38th Leg., 2nd Reg. Sess.* (February 11, 1988).<sup>(3)</sup>

### **Analysis**

Arizona courts have consistently recognized that "a county has only those powers that have been expressly, or by necessary implication, delegated to it by the legislature or the constitution." *See, e.g., Southwest Gas Corp. v. Mohave County*, 188 Ariz. 506, 508, 937 P.2d 696, 698 (App. 1997) (emphasis in original omitted); *see also* A.R.S. § 11-202(A) ([e]ach county . . . possess[es] all the powers expressly provided in the Constitution or laws of this state and such powers as are necessarily implied therefrom.") "[L]egislative powers of counties are very limited." *Hancock v. McCarroll*, 188 Ariz. 492, 498, 937 P.2d 682, 688 (App. 1996). Courts have also noted that an "absence of a statutory prohibition does not mean the county has inherent authority to engage in certain conduct." *Id.*

In view of these limitations on county authority, A.R.S. § 11-251.05(A)(1) does not authorize counties to adopt *any* ordinance as long as the ordinance is not limited by or in conflict with a state law. The statute has two parts: First, it requires that a county ordinance be "necessary or proper to carry out the duties, responsibilities and functions of the county." *Id.* Second, a county ordinance must not be limited by A.R.S. § 11-251 or otherwise inconsistent with state law. *Id.* The scope of a county's "duties, responsibilities and functions" are not determined by A.R.S. § 11-251.05(A). Instead, other state laws must be examined to determine whether the subject of an ordinance is within the "duties, responsibilities and functions" of the county. Some recent examples of how courts have addressed questions of county authority illustrate this point.

In *Hancock v. McCarroll*, the Court of Appeals addressed whether a citizen could bring an initiative to dissolve a county stadium district formed as a result of an action by the board of supervisors, 188 Ariz. at 497, 937 P.2d at 687. Because a citizen initiative by county electors is only appropriate on issues on which counties have legislative authority, the court addressed whether a county had the authority to repeal a resolution that authorized the formation of a stadium district. *Id.* Citing A.R.S. § 11-251.05(A)(1), the court concluded a county lacks that authority because such a repeal is not "necessary or proper to carry out the duties, responsibilities and functions of the county." *Id.* at 498, 937 P.2d at 688. The court noted that "these duties are set forth in A.R.S. §§ 11-251 to -269.02 (Supp. 1996) and include no authority to conduct the affairs of a stadium district." *Id.*

In 1991, the Supreme Court held that Pima County had the authority to enact an ordinance requiring licensing of "adult amusement establishments." *Marsoner v. Pima County*, 166 Ariz. 486, 489, 803 P.2d 897, 900 (1991). The county ordinance was designed to limit the spread of human immunodeficiency virus. The Supreme Court noted that the powers of the board of supervisors are enumerated in A.R.S. § 11-251 and that statute authorized the board to "[a]dopt provisions necessary to preserve the health of the county, and provide for the expenses thereof." *Id.* Given the broad authority in A.R.S. § 11-251(17) and certain public health statutes, A.R.S. §§ 36-184(B) and -136, the court concluded that Pima County had the authority to adopt its licensing ordinance. *Id.* Although the court did not discuss A.R.S. § 11-251.05(A)(1), its analysis is consistent with the principle that the scope of a county's duties, and responsibilities and functions is determined by a specific statutory analysis. This

case also illustrates that the Legislature's broad grant of authority to a county to address a subject (such as health) may justify a wide range of local ordinances. This, too, is consistent with A.R.S. § 11-251.05(A)(1) which gives counties wide discretion to adopt ordinances if the subject is within the county's "duties, responsibilities and functions" and the ordinance is otherwise consistent with state law.

### Conclusion

Counties may enact ordinances only on subjects within the counties' duties, responsibilities, and functions under state law.

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Janet Napolitano  
Attorney General

1. In addition, in 1992, Arizona voters approved a constitutional amendment referred by the Legislature to authorize the creation of charter counties in counties of more

than 500,000 persons. *See* Ariz. Const. art. 12, §§ 5 to 9. No charter counties currently exist.

2. When enacted in 1983, this statute provided that the board of supervisors may "[w]ith respect to those powers vested in the board of supervisors by section 11-251 that are applicable to the unincorporated areas of the county, adopt, amend, and repeal all ordinances necessary or proper to carry into effect such powers. 1983 Ariz. Sess. Law, ch. 223. The Legislature subsequently amended the statute in 1988 and 1991. *See* 1988 Ariz. Sess. Laws ch. 231 and 1991 Ariz. Sess. Laws ch. 147.

3. The Legislature addressed this issue again in 2001 in a measure vetoed by the Governor. *See* HB 2357, 45th Legis., 1st Reg. Sess. (2001); Letter from Governor Jane Dee Hull to Speaker of the House Jim Weiers (April 23, 2001) (veto message).

To: The Honorable Karen S. Johnson  
State Representative

May 14, 2001

Re: Authority to Prohibit State Employees  
from Possessing Weapons While on Duty  
I01-011 (R00-053)

### Questions Presented

May a State agency promulgate rules or policies barring their employees who hold concealed weapon permits from carrying concealed weapons while on duty?

### Summary Answer

State agencies may promulgate rules or policies barring their employees, including those who have concealed weapon permits, from carrying weapons while on duty.<sup>(1)</sup>

### Analysis

A State agency has broad authority over its employees while they are on duty. A State agency director has the authority to employ personnel and determine the conditions of their employment. *See, e.g.*, A.R.S. §§ 41-703(5) (Department of Administration); -1604(A)(7) (Department of Corrections); -1954(5) (Department of Economic Security). The Department of Administration also has specific authority to "[a]dopt rules relating to personnel and personnel administration." A.R.S. § 41-763(6).

This broad authority includes the ability to discipline employees. Employees covered by the State personnel system may be disciplined or dismissed for many reasons including insubordination, inefficiency, discourteous treatment of the public and conduct causing embarrassment to the State. A.R.S. § 41-770, A.A.C. R2-5-501. At-will employees not covered by the State personnel system may be disciplined or even fired for any reasons not prohibited by law. *Cf., Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d 250 (1986) (describing limits on employment at will doctrine). Concomitantly, a State agency's failure to control an employee's conduct may lead to both direct and vicarious liability. *See generally State Dep't of Admin. v. Schallock*, 189 Ariz. 250, 259, 941 P.2d 1275, 1284 (1997). In addition, courts have required that an employer provide a safe work environment for its employees. *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 68, 574 P.2d 856, 861 (App. 1978). Because of a State agency's authority and responsibility as an employer, a State agency can establish policies or rules concerning the conduct of its employees while on duty.

State agency authority over employee conduct, however, is not unlimited. For example, an employer cannot impose restrictions that violate an employee's constitutionally protected right to free speech. *Cf., Ruiz v. Hull*, 191 Ariz. 441, 456, 957 P.2d 984 (1998), *cert. denied*, 525 U.S. 1093 (1999) (English-only requirement violated First Amendment). In the first amendment context, courts analyze whether the "interest in making . . . [the] statement against the interest of the State, as an

employer, in promoting the efficiency of the public services it performs through its employees." *Rankin v. McPherson*, 483 U.S. 378, 387-88 (1987) (internal quotation and citation omitted). The right to bear arms, which is protected by Article II, section 26 of the Arizona Constitution, does not prevent a State agency from restricting employees from possessing weapons while they are on duty.<sup>(2)</sup> The Arizona Constitution does not grant "an absolute right to bear arms under all situations." *Dano v. Collins*, 166 Ariz. 322, 323, 802 P.2d 1021, 1022 (App. 1990) (addressing Arizona constitutional provision). Courts have consistently upheld reasonable regulations of weapons in order "to promote the safety and welfare of . . . citizens." *Id.* at 324, 802 P.2d at 1023. A State agency could determine that prohibiting employees from possessing weapons while on duty is an appropriate safety measure in light of the agency's responsibilities to its employees and to the public. Such a restriction would not violate article II, section 26.<sup>(3)</sup>

The various criminal laws concerning weapons also do not prevent an agency from establishing more restrictive policies that apply to their employees while they are on duty. For example, it is illegal to enter a "public establishment" with a weapon if the operator of that establishment has followed the specified procedures to prohibit weapons in the facility. <sup>(4)</sup> A.R.S.

§ 13-3102(10). If a State employee works in a "public establishment" and possesses a weapon under circumstances prohibited by this statute, that State employee is subject to criminal penalties, as are members of the public. This criminal statute, however, in no way limits the authority of a State agency to further restrict their employees from possessing firearms while on duty. Any restrictions imposed by the employer are enforced by the employer as a personnel matter rather than through the criminal laws. *Cf.*, *Dallas Area Rapid Transit v. Plummer*, 841 S.W. 2d 870 (Tex. App. 1992) (concerning employee termination for violating policy against weapons).

Given the broad authority over their employees, State agencies may restrict employees from possessing weapons while on duty. One court described a private employer's policy prohibiting employees from possessing weapons at the workplace as a "business judgment" that the court would not "second guess." *Hinton v. Methodist Hosp's., Inc.* 779 F. Supp. 956, 961 (N.D. Ind. 1991) (upholding employee termination for violating company policy). Likewise, State agencies have the authority to make such judgments concerning the conduct of their employees while on duty.

Your opinion request specifically asked about the authority of agencies to restrict the ability of a person holding a concealed weapons permit to possess a weapon while on duty. The Legislature has authorized people who satisfy certain statutory requirements to obtain concealed weapons permits from the Department of Public Safety. See A.R.S. § 13-3112. Only holders of concealed weapons permits may legally carry concealed weapons. A.R.S. § 13-3102(A)(1), (2). The law exempting people with concealed weapons permits from the criminal law against carrying concealed weapons does not expressly or impliedly limit a State agency's authority over its employees. Therefore, a State agency could adopt policies prohibiting employees from possessing weapons while on duty, whether or not the employee has a concealed weapons permit.

### Conclusion

A State agency may establish rules or policies prohibiting its employees from possessing a weapon while on duty, and such rules or policies could apply to an employee who has a concealed weapons permit.

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Janet Napolitano  
Attorney General

1. A State agency includes "any board, commission, department, office or other administrative unit of this State. . . ." A.R.S. § 41-1001(1). The term "agency" refers to the executive branch and does not refer to the Legislature or Judiciary. *Id.* Although this Opinion addresses State agencies, the analysis concerning the authority of agencies over their employees extends to the Legislature and Judiciary.
2. Although the Legislature has not specifically addressed the subject of State employees possessing weapons while on duty, the Legislature has expressly recognized the power of political subdivisions to regulate the use of firearms by their employees and independent contractors. See A.R.S. § 13-3108(C)(4). The Legislature approved this provision in legislation that otherwise generally restricted the ability of political subdivisions to regulate firearms. See 2000 Ariz. Sess. Laws ch. 376.
3. The Second Amendment to the United States Constitution, which also protects the right to bear arms, does not apply to the States. *State v. Swanton*, 129 Ariz. 131, 132, 629 P.2d 98, 99 (App. 1981).
4. A "public establishment" is "a structure, vehicle or craft that is owned, leased or operated by this state or a political subdivision of this state." A.R.S. § 13-3102(K)(1).

To: The Honorable Joe Eddie Lopez  
Arizona State Senate

May 14, 2001

Re: Exemptions from State Merit  
System  
I01-010 (R01-016)

### Questions Presented

1. Are state employees covered by the merit system unless specifically exempted under A.R.S. § 41-771?
2. Does an agency have any authority to "uncover" a position that is not specifically exempted?

### Summary Answers

1. By definition, all employees in "state service" are covered by the merit system. The definition of state service in A.R.S. § 41-762(2) excludes only employees who hold positions within the exemptions in A.R.S. § 41-771.
2. Agencies do not have the authority to "uncover" positions. The Legislature has specified in subsections A and B of A.R.S. § 41-771 which positions are exempt from the merit system. The Department of Administration (DOA) is responsible for determining whether positions fall within AR.S. § 41-771(B).

### Analysis

The Legislature has established a comprehensive state personnel system, sometimes referred to as the merit system or civil service system. See generally A.R.S. § 41-761 to 41-786; Arizona Administrative Code (A.A.C.) R2-5-101 to 2-5-903. An "employee" for the purposes of these laws is "a person holding a position in state service." A.R.S. § 41-762(1). "State service" includes "all offices and positions of employment in state government except offices and positions exempted by the provisions of this article."<sup>(1)</sup> A.R.S. § 41-762(2). As the Arizona Court of Appeals noted, "the Merit System initially encompasses *all* state personnel, and only *then* proceeds to exempt certain classes of employees from its purview." *McLeod v. Chilton*, 132 Ariz. 9, 18, 643 P.2d 712, 721 (App. 1981). Positions covered by the State personnel system or merit system are referred to as "covered positions." A.A.C. R2-5-101(17) (defining "covered position").

The exemptions from the State merit system are set forth in A.R.S. § 41-771(A) and (B). Subsection A provides that "[t]his article and article 6 of this chapter do not apply to:

1. Elected state officers.
2. State officers and members of boards and commissions appointed by the legislature or the governor, the employees of the governor's office, the employees of the Arizona legislative council, and the employees of the supreme court and the court of appeals.
3. State officers and employees appointed or employed by the legislature or either house thereof.
4. The curator, curatorial aids, and tour guides and any other person employed to work in the

state capitol museum.

5. Officers or employees of state universities and personnel of the Arizona state school for the deaf and the blind.
6. Patients or inmates employed in state institutions.
7. Officers and enlisted personnel of the national guard of Arizona.
8. The single administrative or executive director and one deputy director of each state department or agency.
9. Not more than two assistants who serve in the office of an elected state officer, where that elected state officer is the sole elected head of the department.
10. One administrative assistant who serves a board or commission elected to head a state agency, department or division, and one assistant for each elected member of such board or commission.
11. Persons reporting directly to the governor.
12. Employees of the department of emergency and military affairs who occupy Arizona national guard positions identified as mobilization assets.
13. Any other position exempted by law."

A.R.S. § 41-771(A). The inclusion of the category "any other position exempted by law" indicates that other statutes may also exempt particular positions from the merit system. *Cf. McLeod*, 132 Ariz. at 16-17, 743 P.2d at 719-720 (Chief Veterinary Meat Inspector was exempt from merit system since statute provided that he serves "at the pleasure of the [livestock] board").

Subsection B of A.R.S. § 41-771 also exempts from the merit system positions "determined by the director [of DOA] to meet any of the following criteria:

1. Top level positions in a department or agency that determine and publicly advocate substantive program policy. This includes those persons engaged in the direction of line operations if they report directly to the director or deputy director of the agency and in large multi-program agencies those persons who report directly to the head of a primary component of the department or agency.
2. Those persons who are required to maintain a direct confidential working relationship with an exempt official.
3. Persons who provide legal counsel.
4. Positions that are part time.
5. Positions that are temporary, established for the purpose of conducting a special project, study or investigation.
6. Positions that are essentially for rehabilitation purposes.
7. Positions that are determined by the director [of DOA] to be directly or indirectly engaged

in establishing policy or enforcement standards.

8. Directors of all institutions which maintain supervision or care on a twenty-four hour per day basis other than halfway houses or group homes."<sup>(2)</sup>

A.R.S. § 41-771(B).

The Arizona Constitution further limits the reach of the state merit system. The Court of Appeals has determined that employees of the Board of Regents are not subject to the State personnel system administered by DOA because of the Board's constitutional authority. *Board of Regents v. Dep't of Admin.*, 151 Ariz. 450, 451, 728 P.2d 669, 670 (App. 1986).<sup>(3)</sup> Similarly, this Office has previously determined that employees of the State Board of Directors for Community Colleges are exempt from the state personnel system because of the constitutional role of that board. Ariz. Att'y Gen. Op. 188-114; *but see* Ariz. Att'y Gen. Op. 199-014 (employees of the State Department of Education are not exempt from DOA's authority over state personnel system).

### Conclusion

An employee is covered by the State merit system absent a constitutional limitation or unless the employee holds a position that is exempt from the State personnel system under A.R.S. § 41-771(A) or (B). DOA is responsible for determining whether A.R.S. § 41-771(B) applies to particular positions.

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Janet Napolitano  
Attorney General

1. Article 5 of Title 41, Chapter 4.

2. These positions are exempt from article 5 and article 6, except that they are subject to A.R.S. § 41-772(D), (E), and (F), which prohibit people from coercing state employees to participate, or not participate, in certain political activities. A.R.S. § 41-771(B).

3. The Supreme Court determined that a previous civil service system could not extend to University employees because of the constitutional authority of the Board of Regents. *Hernandez v. Frohmiller*, 68 Ariz. 242, 251, 204 P.2d 854, 860 (1949). University employees are now expressly exempt by statute.

To: Charles W. Herf  
Quarles & Brady, Streich, Lang, L.L.P.

March 8, 2001

Re: Board Member Conflict of  
Interest  
101-009 (R01-001)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253, you submitted for this Office's review an opinion for the Mingus Union High School District ("Mingus Union") Governing Board concerning whether certain board members have conflicts of interest on district unification issues. This opinion revises the conclusions regarding those potential conflicts.

### **Questions Presented**

1. Do board members who would no longer reside in Mingus Union if a proposed unification occurs have a conflict of interest that precludes them from voting on the unification issue?
2. If the spouse of a Mingus Union board member is a teacher for a school district that would, under the proposal, unify with Mingus Union, does the Mingus Union board member have a conflict of interest that precludes him or her from voting on the unification issue?

### **Summary Answer**

1. Because a governing board member does not have a pecuniary or proprietary interest in retaining an elected governing board position, board members who would no longer reside in the district after unification do not have a conflict of interest and may therefore vote on the unification issue.
2. A school board member whose spouse works for a school district that may unify with the school board member's district does not have a conflict of interest that precludes the board member from voting on the unification issue.

### **Background**

Mingus Union is considering unifying with the Cottonwood-Oak Creek School District. According to your opinion, the governing board of the Clarkdale-Jerome School District, which is within Mingus Union's current boundaries, voted not to unify with Mingus Union. Consequently, the proposed unification of Mingus Union with Cottonwood-Oak Creek has the potential to change district boundaries so that the Clarkdale-Jerome District is no longer within the Mingus Union boundaries. The decision to unify is made by the district governing boards. A.R.S. §15-448(B).<sup>(1)</sup>

The spouse of one Mingus Union board member is a teacher in the Cottonwood-Oak Creek School District. Two other Mingus Union board members reside in the Clarkdale-Jerome area and, according to your opinion, risk losing their seats on the board if unification proceeds because neither would live within the unified district's new boundaries.<sup>(2)</sup> This Opinion addresses whether State conflict of interest laws prohibit these board members from voting on the unification issue.

### **Analysis**

#### **A. School Board Members Who May Reside Outside the District If Unification Occurs**

## Do Not Have a Conflict of Interest.

Conflict of interest laws establish "an objective standard of conduct." *United States v. Miss. Valley Generating Corp.*, 364 U.S. 520, 549 (1961). These laws recognize that "an impairment of impartial judgment can occur in even the most well-meaning . . . [people] when their personal economic interests are affected by the business they transact on behalf of the Government." *Id.* Conflict of interest laws are based on the principle "that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests." *State ex rel. Smith v. Bohannon*, 101 Ariz. 520, 522, 421 P.2d 877, 879 (1966) (internal quotations and citation omitted).

Under Arizona conflict of interest statutes, a public officer or employee has a conflict of interest if he or she has a "substantial interest" in any decision. A.R.S. § 38-503(A), (B). If a board member has a substantial interest in a decision, the board member must disclose that interest and refrain from voting on the issue. A.R.S. § 38-503(A). A substantial interest is "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). The interest for purposes of disqualification does not include "a mere abstract interest in the general subject or a mere possible contingent interest." *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (1972). It must involve a "pecuniary or proprietary interest, by which a person will gain or lose something as contrasted to general sympathy, feeling or bias." *Id.* Within the conflict of interest laws, "[p]ecuniary means money and proprietary means ownership." *Shephard v. Platt*, 177 Ariz. 63, 65, 865 P.2d 107, 109 (App. 1993).

Governing board members are not paid for their service, so they have no pecuniary interest in holding the position. The issue, then, is whether board members have a proprietary interest in their positions for the purposes of the conflict of interest statutes. Unlike traditional conflict of interest situations, the board members who may reside outside the district if unification proceeds have no *outside* financial or ownership interest that may influence their vote; rather, it is the board position itself that is at stake. *Cf.* Ariz. Att'y Gen. Op. 183-111 (finding a conflict when a school district administrator is also an employee for a corporation that contracts with the district). Board members may vote on issues that affect their duties as board members. *See, e.g.*, A.R.S. § 15-321(D) (board members can prescribe rules for their own governance). Conflict of interest laws also have not precluded elected officials from voting on issues such as redistricting that may affect their political futures. *See George v. City of Cocoa*, 78 F.3d 494, 496-98 (11th Cir. 1996) (concluding Florida conflict of interest laws did not ban participation on city redistricting issue).

School district governing board members are elected officials, who serve only at the will of the public and are subject to recall by the voters. A.R.S. §§ 15-427(B), -428(A); Ariz. Const. art. VIII, pt. 1, § 1. As has been recognized in other contexts, elected officials have no personal property interest in their positions:

[P]ublic offices are public . . . trusts, and the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them. The right, it has been said, is not the right of the incumbent to the place, but of the people to the officer. . . . *The incumbent has no vested right in the office which he holds.*

[P]ublic offices are public . . . trusts, and the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them. The right, it has been said, is not the right of the incumbent to the place, but of the people to the officer. . . . *The incumbent has no vested right in the office which he holds.*

*Mecham v. Gordon*, 156 Ariz. 297, 302, 751 P.2d 957, 962 (1988) (Governor has no due process property right in retaining his position) (internal quotations omitted; emphasis added).

Although Arizona courts have not addressed this issue in the conflict of interest context, the same logic should apply. Board members face the loss of their seats at any time by the will of the voters. Because a board member has no right to retain that elected position, the potential loss of that position is not a proprietary interest within the conflict of interest laws. *Cf.* Ariz. Att'y Gen. Op. 189-067 (public officer may have proprietary interest in voting on freeway alignments when he owns property in the vicinity of the proposed routes). Therefore, Mingus Union board members who may reside outside the district boundaries if unification proceeds do not have a conflict of interest on the unification issue.

### **B. A Board Member Is Not Disqualified from Voting on Unification Issues Because His or Her Spouse Is a Teacher for One of the Other Districts in the Proposed Unification.**

Under A.R.S. § 15-421(D), "[n]o employee of a school district or the spouse of such employee may hold membership on a governing board of a school district by which such employee is employed." This Office has previously recommended that if a board member is married to a district employee, "the Board member's resignation [should] be solicited, but if it is not immediately forthcoming, appropriate action should be taken to remove the Board member from office." Ariz. Att'y Gen. Op. 178-240.

The statutory prohibition in A.R.S. § 15-421 thus affects the ability of a person to serve on the governing board. It does not affect an employee's ability to continue working for a district.<sup>(3)</sup> Therefore, in this situation, if the Mingus Union and Cottonwood Oak Creek districts unify, a Mingus Union board member whose spouse works for the new unified district may not continue to serve as a board member. The statute does not cause the spouse to lose her job.

It might be argued that, although the statutes affect the board member rather than the employee, the employee may give up the district job to enable the board member-spouse to continue serving on the governing board and, therefore, unification could affect the board member's pecuniary interest. But such an interest would appear to be speculative and contingent, because A.R.S. § 15-421 does not require the loss of the spouse's job. The statute instead affects the ability of the board member to serve on the board, and that is the interest relevant to the conflict of interest analysis. As described previously, a board member has no pecuniary or proprietary interest in continuing to serve on the board. Therefore, a board member is not precluded from participating in voting on a unification issue that may disqualify the board member from continuing to serve as a governing board member.<sup>(4)</sup>

### **Conclusion**

Because these board members have no pecuniary or proprietary interest in retaining their positions as board members, they do not have a conflict of interest that precludes them from voting on the unification issue.

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Janet Napolitano  
Attorney General

1. The materials submitted for review suggest that the Mingus Union and Cottonwood-Oak Creek governing boards previously voted to unify, and the issue now whether that unification will proceed.
2. Under A.R.S. § 15-448(D), all governing board members continue to serve until January 1 following the first general election after unification. This provision appears to apply to all board members of the unifying districts, regardless of where they reside. Your opinion notes that Article VII, section 15 of the Arizona Constitution requires that any person elected to an office "be a qualified elector of the political division . . . in which such person shall be elected" and concludes that this constitutional residency requirement prohibits governing board members who reside outside the unified district from remaining on the board as described in A.R.S. § 15-448(D). *See also* A.R.S. § 38-291(5) (office vacant if person ceases to be resident of district for which person elected). This Opinion does not address this issue and instead addresses only the conflict of interest questions.
3. Sections 15-253 and -421, A.R.S., prohibit a governing board from hiring a spouse of a governing board member, but that is not the situation here.
4. Even if the conflict of interest statutes do not mandate recusal in a particular situation, board members may still choose to refrain from participating in a decision to avoid any appearance of impropriety. In situations outside the conflict of interest statutes or related common law or constitutional principles, such decisions are left to the discretion of individual board members.

To: The Honorable Ruth Solomon, The Honorable  
Laura Knaperek - Arizona State Senate House of  
Representatives, The Honorable Andy Nichols -  
Arizona State Senate

March 6, 2001

Re: Proposition 204  
I01-008 (R00-072/R00-084/R01-  
004)

### **Questions Presented**

You have asked the following questions regarding the recently enacted Proposition 204:

1. Before the voters approved Proposition 204, the Legislature had appropriated some of the monies from the tobacco litigation master settlement agreement entered into November 23, 1998 ("tobacco settlement monies"). What is the impact of Proposition 204 on those prior appropriations and must all expenditures of tobacco settlement monies in future fiscal years comply with Proposition 204?
2. Are unexpended tobacco settlement monies the State received before approval of Proposition 204 included in the Tobacco Litigation Settlement Fund ("Fund")?
3. Under Proposition 204, the director of the Arizona Health Care Cost Containment System ("AHCCCS") administers the Fund. May the AHCCCS director withhold payments for the public health programs specified in Arizona Revised Statutes ("A.R.S.") § 36-2901.02(B)(2) if there are monies in the Fund for that fiscal year?
4. Proposition 204 requires the Joint Legislative Budget Committee ("JLBC") annually to compute inflation adjustments for the public health programs funded by the proposition. Because the programs in A.R.S. § 36-2901.02(B)(2) were originally enacted in a 1996 initiative, should the inflation calculation include inflation since 1996, or should the calculation include inflation beginning in fiscal year ("FY") 2000-01?
5. For FY 2000-01, should the amount of funding for the public health programs addressed by Proposition 204 be prorated based on the date on which the initiative was certified by the Governor, or should the funding be equal to the full annual amount?
6. May AHCCCS and other agencies use monies from the Fund to supplant other expenditures?

### **Summary Answers**

1. All future expenditures of tobacco settlement monies must comply with Proposition 204. Consistent with Proposition 204, prior legislative appropriations for future fiscal years may be funded only if the programs specified in Proposition 204 have been fully funded.
2. Proposition 204 requires that all tobacco settlement monies the State receives be deposited into the Fund. All settlement proceeds not expended before the enactment of Proposition 204 must be deposited into the Fund.
3. If monies remain in the Fund for a fiscal year after the AHCCCS expansion mandated by Proposition 204 has been fully funded, the AHCCCS director must use the remaining monies for the programs specified in A.R.S. § 36-2901.02(B)(2).

4. The funding levels for the programs established by the 1996 initiative must be adjusted for inflation every year since 1996, as required by A.R.S. § 5-522(E).
5. Under Proposition 204, the programs that receive Fund monies are eligible for full funding in the current fiscal year, which began July 1, 2000 and ends June 30, 2001.
6. Agencies must use Fund monies as mandated by Proposition 204. Under Proposition 204, Fund monies shall not supplant other AHCCCS appropriations.

### **Background**

Proposition 204, which Arizona voters approved at the 2000 general election, expands eligibility for AHCCCS and allocates the tobacco settlement monies the State receives. <sup>(2)</sup> A.R.S.

§§ 36-2901.01(A); -2901.02(A). Proposition 204, referred to by its proponents as "Healthy Arizona 2," uses tobacco settlement monies to fund programs that voters approved in a similar 1996 initiative, which was referred to as "Healthy Arizona" (the "1996 Initiative"). See Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review For The November 7, 2000 General Election, 161-64 (argument supporting Proposition 204).

Proposition 204 expands AHCCCS eligibility to cover individuals with income levels of up to 100% of the federal poverty guidelines. A.R.S. § 36-2901.01(A) (as amended by Prop. 204). <sup>(3)</sup> Proposition 204 also created the Fund, which contains all tobacco settlement monies the State receives. A.R.S. § 36-2901.02(A). Arizona's share of the tobacco settlement is estimated at \$3.2 billion, payable in yearly installments over the next 25 years. Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the November 7, 2000 General Election at 160.

The AHCCCS director administers the Fund, A.R.S. § 36-2901.02(A), and must use the Fund monies first "to fully implement and fully fund the programs and services required as a result of" the AHCCCS expansion, and then to "fund each of the programs listed in section 5-522 subsection E, as amended pursuant to the initiative measure approved by the voters on November 5, 1996." A.R.S. § 36-2901.02(B)(1), (2). The programs listed in A.R.S. § 5-222(E), and the funding levels specified by statute are:

- . \$5 million to the Arizona Department of Economic Security for the Healthy Families Program, which provides services to prevent child abuse and neglect and to promote child development;
- . \$4 million to the Arizona Board of Regents for the Arizona Health Education System to provide scholarships to medical students who agree to practice in the areas of the State that are currently underserved by health care professionals;
- . \$3 million to the Arizona Department of Health Services ("DHS") for programs to prevent teenage pregnancy;
- . \$2 million to the disease control research fund established by A.R.S. § 36-274
- . \$2 million to DHS for the health start program; and
- . \$1 million to DHS for the federal Women, Infants and Children Food Program.

Under the 1996 Initiative, these programs were to be funded by State lottery proceeds, but the lottery revenues have historically been insufficient to fund the programs.

## Analysis

### A. Prior Legislative Appropriations of Tobacco Settlement Funds for Future Fiscal Years Must Comply with Proposition 204.

Before the voters approved Proposition 204, the Legislature had appropriated some tobacco settlement monies for various purposes in prior and future fiscal years. The Legislature had appropriated tobacco settlement monies in three separate bills:

. **Health Care Group.** In 1999, the Legislature appropriated \$8 million "from the tobacco settlement fund" to AHCCCS in 2000-01 "and each fiscal year thereafter" for certain reimbursements from health care group plans, which is a program administered by AHCCCS. <sup>(4)</sup> 1999 Ariz. Sess. Laws ch. 313, § 39(B).

. **Budget Stabilization Fund.** In 2000, the Legislature approved an emergency measure funding the demolition, renovation, and construction of the Arizona State Hospital ("ASH"). 2000 Ariz. Sess. Laws ch. 1. That measure appropriated \$20 million in FY 1999-2000 through FY 2002-03 from the interest earnings on the Budget Stabilization Fund for the ASH construction. *Id.* at § 4. It also directed the Treasurer to reimburse the Budget Stabilization Fund for those amounts "from the first \$80,000,000 in up-front tobacco settlement monies received by this State." *Id.* at § 3(B). Those payments were to be made in \$20 million installments from FY 1999-2000 through FY 2002-03.

. **Behavioral Health.** In 2000, the Legislature also appropriated monies "from the tobacco litigation settlement account in the State general fund" to the Serious Mental Illness Service Fund and to DHS, including \$50 million for services for the seriously mentally ill and \$20 million for children's behavioral health. 2000 Ariz. Sess. Laws 5th Sp. Sess. ch. 2, § 5(A), (B). The appropriations were for FY 2000-01 and were exempt from the lapsing requirements of A.R.S. § 35-190.

Proposition 204 did not expressly repeal those prior enactments. In the absence of an express repeal, the issue is whether Proposition 204 impliedly repealed the prior legislative appropriations of tobacco settlement monies. Generally, courts are reluctant to conclude that an enactment impliedly repeals a prior enactment. *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 54, 839 P.2d 1093, 1099 (1992). Rather, courts will attempt to harmonize statutes to avoid inconsistencies. Where no reasonable construction can give effect to both statutes, courts find that the later enactment impliedly repealed an earlier enactment. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970).

Proposition 204's requirements cannot be reconciled with prior appropriations that would permit the tobacco settlement monies to be used in a manner inconsistent with Proposition 204 in *future* fiscal years. The language of Proposition 204 sweeps "*all* monies that this State receives" pursuant to the tobacco litigation settlement into the Fund and requires that those monies be used for specifically enumerated purposes. A.R.S. § 36-2901.02 (emphasis added). The Proposition also provides that the Fund "supercedes any tobacco litigation settlement fund previously established by the legislature." Proposition 204 at § 4. Under Proposition 204, the Legislature may appropriate monies that remain in the Fund only after the AHCCCS expansion mandated by the Proposition and the public health programs listed in

A.R.S. § 5-522(E) are fully funded, and all such legislative appropriations must be for "programs that benefit the health of the residents of this State." A.R.S. § 36-2901.02(D).<sup>(5)</sup>

The Legislature's prior appropriations for future fiscal years include an \$8 million annual appropriation to AHCCCS for the Health Care Group and a \$20 million appropriation in FY 2001-02 and FY 2002-03 to reimburse the Budget Stabilization Fund for the ASH construction. The appropriation to AHCCCS for the Health Care Group is a program that benefits the "health of the residents of this State" as Proposition 204 requires of legislative appropriations of tobacco settlement monies. *Cf.* A.R.S. § 36-2901.02(D). The ASH construction project is also related to the health of Arizonans, and, therefore, using tobacco settlement monies to reimburse the Budget Stabilization Fund for that project satisfies Proposition 204's requirement that tobacco settlement monies be appropriated for health-related programs. Under Proposition 204, however, legislative appropriations may receive Fund monies only if the AHCCCS expansion and the public health programs listed in A.R.S. § 5-522(E) are first fully funded.<sup>(6)</sup> See A.R.S. § 36-2901.02(D) (legislative appropriation of the Fund). If there are not sufficient monies in the Fund for the programs specified in Proposition 204, those prior appropriations are ineffective in future fiscal years.<sup>(7)</sup>

Proposition 204 does not affect the validity of *past* legislative appropriations for FY 2001 and earlier fiscal years. Because statutory changes generally apply prospectively, Proposition 204 only governs expenditures of tobacco settlement monies after it becomes law. See A.R.S. § 1-244. It does not require that tobacco settlement money that the Legislature had appropriated for FY

2000-01 or earlier fiscal years be collected (assuming that is even possible) and transferred to the Fund.

### **B. Proposition 204 Requires that All Unexpended Tobacco Settlement Monies Be Credited to the Fund.**

The next question is whether the Fund established by Proposition 204 includes unexpended tobacco settlement monies the State received before approval of Proposition 204. This question concerns whether the balance of approximately \$2.3 million that remained in the general fund account when voters approved Proposition 204 should be transferred to the Fund.<sup>(8)</sup>

Section 36-2901.02(A), A.R.S., provides that "[t]he [Fund] is established consisting of *all* monies that this State receives pursuant to the tobacco litigation master settlement agreement entered into on November 23, 1998, and interest earned on these monies." (Emphasis added.) Thus, Proposition 204 created a special fund separate and apart from the State's general fund, and designated the purposes for which monies in the Fund would be used. See A.R.S. § 35-142(A)(8) (monies designated by law as special State funds are not considered a part of the general fund). Proposition 204 further provided that the Fund "supersedes any tobacco litigation settlement fund previously established by the legislature." Proposition 204, § 4(A). This language thus envisions that all tobacco settlement monies will be transferred to the Fund, even if the Legislature had, before the enactment of Proposition 204, created some other fund for the settlement monies.

Proposition 204 could be read to apply only to monies the State receives after Proposition 204 was enacted. This interpretation would be supported by the Proposition's reference to tobacco settlement monies the State "receives," and the principle that statutory changes

apply prospectively. That interpretation, however, overlooks the broad mandate that "all" tobacco settlement monies the State receives pursuant to the tobacco litigation master settlement agreement entered into on November 23, 1998 and interest earned on those monies be deposited in the Fund. In addition, "a statute is not retroactive in application simply because it may relate to antecedent facts." *Tower Plaza Invs., Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973). In this case, the receipt of the tobacco settlement monies is an "antecedent fact" and the future use of such monies is the action prospectively controlled by Proposition 204.

The language of Proposition 204 suggests it is intended to control the future expenditure of tobacco settlement funds, regardless of when the State received those settlement monies. Thus, any balance remaining in the account within the general fund containing tobacco settlement monies should be transferred into the Fund so that it is used as the Proposition mandates.

### **C. In Administering the Fund, the AHCCCS Director Must Comply with the Requirements of Proposition 204.**

Your next question concerns whether the AHCCCS director may withhold payment to the public health programs specified in A.R.S. § 36-2901.02(B)(2) if money remains in the Fund in a fiscal year after the AHCCCS expansion has been fully funded. The AHCCCS director may wish to withhold such monies to ensure that the AHCCCS expansion will be fully funded in future years.

In Proposition 204, Arizona voters appropriated tobacco settlement monies for a particular purpose. *Cf. Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992) (addressing requirements for appropriations); *see also* Ariz. Att'y Gen. Op. 191-001 (discussing authority to appropriate through initiatives). Although agency directors must operate programs "in a fiscally responsible fashion," once legislation appropriates funds for a particular purpose, executive agencies must implement the law consistent with those priorities. *Cf. Rios*, 172 Ariz. at 12, 833 P.2d at 29 (Governor's orders that agency revert appropriations were improper).

Here, the AHCCCS director's statutory obligation is to "*use fund monies as follows and in the following order*:"

1. Withdraw an amount necessary *in each fiscal year* to fully implement and fully fund the programs and services required as a result of the expanded definition of an eligible person pursuant to section 36-2901.01.
2. Withdraw an amount necessary *in each fiscal year* to fully implement and fully fund each of the programs listed in section 5-522, subsection E."

A.R.S. § 36-2901.02(B) (emphasis added). This statutory language indicates that the AHCCCS director makes the funding determination for *each fiscal year*. Thus, the AHCCCS director must first ensure that the AHCCCS expansion is fully funded for that fiscal year and then, after the AHCCCS component is fully funded for that year, must withdraw monies from the Fund for the public health programs listed in A.R.S. § 5-522(E).

### **D. The Funding Levels for the Programs Listed in A.R.S. § 5-522(E) Must Be Adjusted for Inflation Every Year Since 1996.**

We next address whether the inflation calculation required by Proposition 204 for the funding

levels for the enumerated public health programs must include inflation since 1996, or whether such funding should include inflation beginning in FY 2000-01.

Proposition 204 requires that, after fully funding the expanded AHCCCS eligibility, the AHCCCS director is to use monies in the Fund to "fully fund" the programs "listed in [A.R.S. § 5-522(E)] as amended pursuant to the initiative measure approved by the voters on November 5, 1996, *at funding levels that when annually adjusted for inflation, as provided in said initiative, are equal to or greater than those provided for in that election.*" A.R.S. § 36-2901.02(B)(2) (emphasis added). The clear language of Proposition 204 indicates that the funding levels for the public health programs listed in A.R.S. § 5-522(E) must be adjusted for inflation "*as provided in [the 1996 Initiative].*" Section 5-522(E) expressly provides that "[t]he allocations in this subsection shall be adjusted annually according to changes in the GDP price deflator as defined in § 41-563."<sup>(9)</sup> Thus, although the programs never received funding from the State lottery, those funding levels were nonetheless required to be adjusted each year after the voters approved the statutory amendment in the 1996 Initiative. Proposition 204 explicitly recognizes those adjustments and indicates that monies from the Fund for these programs must equal or exceed the adjusted statutory levels.

#### **E. Proposition 204 Requires that the Programs Listed in A.R.S. § 5-522(E) Be Funded for FY 2000-01 in Its Entirety.**

A related question concerns whether for FY 2000-01, the amount of funding for the public health programs addressed by Proposition 204 should be prorated based on the date when the initiative was certified by the Governor, or whether the funding should be equal to the full annual amount specified by statute.

Section 36-2901.02(B)(2), A.R.S., requires the director of AHCCCS to "[w]ithdraw an amount necessary in each fiscal year to fully implement and fully fund each of the programs listed in Section 5-522." The plain language of Proposition 204, when read together with § 5-522(E), requires the Legislature to transfer an amount equal to or greater than the amounts listed in A.R.S. § 5-522(E) in each fiscal year, including FY 2000-01. There is nothing in the language of A.R.S. § 36-2901.02(B)(2) to suggest that the funding levels be prorated for FY 2000-01.

#### **F. Agencies Must Use Monies from the Fund as Directed by Proposition 204.**

The final issue is whether the AHCCCS director and other agency directors who receive monies from the Fund may use that money to "supplant existing expenditures."

Proposition 204 states that monies in the Fund "shall be used to supplement and not supplant existing and future appropriations to [AHCCCS] for existing and future programs." A.R.S. § 36-2901.02(E)(1). Thus, under the plain statutory language, the AHCCCS director cannot use Fund monies to "supplant" existing monies. AHCCCS must use the Fund monies it receives for the expanded AHCCCS eligibility authorized by Proposition 204. See A.R.S. § 36-2901.02(B)(1) (AHCCCS must use the Fund monies for "the programs and services required as a result of the expanded definition of an eligible person, . . . [for AHCCCS]").

No similar "anti-supplanting" language governs the monies the AHCCCS director distributes to other agencies for the programs in A.R.S. § 5-522(E). Although not subject to the prohibition against supplanting, those agencies are obligated to use those Fund monies for the purposes designated in the Proposition. See A.R.S. § 37-2901.02(B)(2).

This Opinion does not determine whether a specific expenditure complies with the

requirements in Proposition 204. Such a determination requires a fact specific evaluation of the particular expenditure.

## Conclusion

Proposition 204 controls the future uses of tobacco settlement monies the State receives. It applies to any tobacco settlement monies in the general fund at the time voters approved the Proposition and any tobacco settlement monies the State subsequently receives. Agencies must use the monies as mandated by the Proposition. In addition, prior legislative appropriations for future fiscal years are effective only to the extent they comply with the requirements of Proposition 204. Under Proposition 204, the funding levels for the programs set forth in A.R.S. § 5-522(E) must be adjusted to take into account inflation since 1996, and those programs are entitled to full funding in the current fiscal year (2000-01) provided that sufficient monies remain in the Fund after fully funding the AHCCCS expansion.

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Janet Napolitano  
Attorney General

1. This Office received an opinion request from Senator Solomon and Representative Knaperek concerning Proposition 204, as well as opinion requests from Senator Nichols. Because the opinion requests raise related issues, they are addressed in a single Opinion.
2. Another proposition on the 2000 general election ballot, Proposition 200, also proposed to allocate tobacco settlement proceeds. Although the voters also approved Proposition 200, that measure received fewer votes than Proposition 204. *See* Secretary of State, Official Canvass, 2000 General Election. Proposition 200 expressly provided that, except for a section relating to the tobacco tax, its provisions would not become effective if another measure allocating more than 80% of the tobacco settlement money received more votes than Proposition 200. Proposition 200, § 30. Because Proposition 204 allocates more than 80% of the tobacco settlement proceeds and it received more votes than Proposition 200, Proposition 204 controls the disposition of tobacco settlement proceeds. *Id.*; *see also* Ariz. Const. art. IV, pt. 1, § 1 (12) (if voters approve conflicting ballot measures, the measure that receives more votes takes effect).
3. The 1996 Initiative also included a provision that expanded AHCCCS eligibility to 100% of federal poverty, but that change was effective only if the State obtained a federal waiver for the program. A.R.S. § 36-2901.01 (as added by 1996 Initiative). Because the State never received such a waiver, the change approved in 1996 never took effect. The AHCCCS expansion in Proposition 204 had no conditional enactment. After the voters approved Proposition 204, the State received a federal waiver, which will provide some federal monies for the AHCCCS expansion.
4. Prior to Proposition 204, the tobacco settlement monies were separately accounted for as part of the State's general fund.
5. Moreover, the State Constitution restricts the Legislature's ability to enact legislation that uses tobacco settlement monies for purposes other than those designated in Proposition 204. *Cf.* Ariz. Const. art. IV, pt. 1, §1( 6), (14) (amendments from Proposition 105, approved by voters in 1998).
6. These prior appropriations of tobacco settlement monies were not technically appropriations from the Fund because the Fund did not exist when the Legislature made those appropriations. However, because Proposition 204 supercedes any prior tobacco settlement fund, prior appropriations of tobacco settlement monies should be regarded as appropriations from the Fund.
7. Because the appropriation for ASH construction was made from interest on the Budget Stabilization Fund, and not from the tobacco litigation settlement fund, the construction appropriation is not affected by this Opinion. It is the *repayment* of monies to the Budget Stabilization Fund from the tobacco litigation settlement fund that may be ineffective in any fiscal year in which no monies remain following payment for AHCCCS expansion and the programs listed in A.R.S. § 5-522(E).
8. Before the voters approved Proposition 204, the State had received a single tobacco settlement payment of approximately \$120 million. A balance of approximately \$2.3 million remains after the legislative appropriations through FY 2001 were deducted.
9. The GDP price deflator is an average of the four implicit price deflators for the gross domestic product reported by the United States Department of Commerce for the four quarters of the calendar year. A.R.S. § 41-563(E)(2).

To: Thomas W. Pickrell  
General Counsel, Mesa Public Schools

February 21, 2001

Re: Classroom Site Fund

101-007 (R00-085)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an opinion you prepared for the Governing Board of Mesa Public Schools regarding the Classroom Site Fund ("CSF") established by A.R.S. § 15-977. This Office concurs with your conclusion and writes this Opinion to provide guidance to other school districts regarding the new statutory provisions. <sup>(1)</sup>

### **Questions Presented**

1. Must monies allocated from the CSF for "teacher compensation increases based on performance" be limited to increases based solely on individual teacher performance, or may such increases be based at least in part on collective performance goals established for teachers of a school or the district?
2. Must school district governing boards allocate CSF monies strictly according to the priorities established by the principals of schools in the district, or may such funds be allocated according to a plan that is contrary to the priorities of an individual principal if the governing board finds that its allocation includes the collective priorities of its school principals and would maximize classroom opportunities?

### **Summary Answers**

1. School districts may use their teacher performance monies from CSF to increase teacher pay based on individual teacher performance as well as other factors such as school or district performance.
2. Although school district governing boards must ascertain the priorities of school principals and allocate CSF maintenance and operation funds according to those priorities "wherever possible," governing boards need not allocate such funds *solely* in accordance with those priorities if they determine that an alternative allocation would "maximize classroom opportunities."

### **Background**

During a special session in June of 2000, the Legislature approved S.B.1007, which, among other things, created the CSF to provide funding to school districts and charter schools for designated purposes. 2000 Ariz. Sess. Laws, 5th Sp. Sess., ch. 1, § 16 (codified as A.R.S. § 15-977). This measure took effect after the voters approved Proposition 301 at the 2000 general election and will be implemented after May 31, 2001. 2000 Ariz. Sess. Laws, 5th Sp. Sess., ch. 1, §§ 66 (delayed implementation), 67 (conditional enactment). <sup>(2)</sup>

The Department of Education administers the CSF and allocates CSF funds to school districts and charter schools based on student count and other factors specified by statute. A.R.S.

§ 15-977(B). A school district governing board or charter school must spend monies from the CSF "for use at the school site" and "may not supplant existing school site funding with revenues from the fund." A.R.S. § 15-977(A). Each school district or charter school must allocate funding from the CSF according to statutory parameters:

- .40% of the funds must be used "for teacher compensation increases based on performance and employment related expenses;"
- .40% of the funds must be used for "maintenance and operations purposes," which are defined as class size reduction, teacher compensation increases, AIMS intervention programs, teacher development, dropout prevention programs, and teacher liability insurance premiums; and
- .20% of the funds must be used for "teacher base salary increases and employment related expenses."

A.R.S. §15-977(A), (C).

To determine the "maintenance and operations purposes" for which CSF funds will be allocated, school district governing boards and charter schools must "request from the school's principal each school's priority" for such an allocation. A.R.S. §15-977(A). The statute further requires that "[t]he district governing board or charter school shall allocate the [CSF] monies to include, wherever possible, the priorities identified by the principals of the schools while assuring that the funds maximize classroom opportunities and conform to the [allocation levels established by Proposition 301]." A.R.S. § 15-977(D).

### Analysis

#### **A. Teacher Performance Pay Increase Plans May Consider Factors Other than Individual Teacher Performance.**

The fundamental rule of statutory construction is to give effect to the intent of the legislature. *See, e.g., Arizona Sec. Ctr., Inc. v. State*, 142 Ariz. 242, 244, 689 P.2d 185, 187 (App. 1984). Generally, the language of the statute is the best indicator of its meaning. *Id.* Also relevant are the context, subject matter, effects and consequences, reason and spirit of the law. Statutory provisions should be construed in the context of related provisions and in light of their place in the statutory scheme. *City of Phoenix v. Superior Court*, 144 Ariz. 172, 175-76, 696 P.2d 724, 727-28 (App. 1985).

In allocating 40% of the monies from the CSF for teacher compensation increases, A.R.S. § 15-977(A) indicates only that such increases shall be "based on performance."<sup>(3)</sup> The statute does not define the term "performance," nor does it contain any additional guidance concerning the performance measures on which such increases are to be based. Therefore, an examination of the legislative history of the statute, along with related statutory provisions, is essential in determining the legislative intent regarding teacher performance increases.

The Legislature has previously authorized three types of teacher pay plans based on performance. School district governing boards are given the discretion to use any of these pay plans:

- *The Career Ladder Program*, a "performance based compensation system" which bases teacher pay on instructional performance, pupil academic progress, increased levels of instructional responsibility, and other objective measures. *See* A.R.S. §15-918.02(A). That program expressly authorizes school districts to "include additional incentive components in which awards are based upon group, team, school or district performance." A.R.S. § 15-918.02(B).

- *The Optional Performance Incentive Program*, a "performance based compensation system" that is an alternative to the Career Ladder Program and that is based on "principles of effective organizations, teamwork, parental and pupil involvement and support of teachers." A.R.S. § 15-919(E).
- *Performance Pay Component Programs*, which allow school districts that do not use the Career Ladder Program or the Optional Performance Incentive Program to carry forward to the next fiscal year any unspent monies that were budgeted for the component of teachers' salaries related to a "teacher's classroom performance." A.R.S. § 15-920.

Thus, the Legislature has previously provided school districts with alternative systems if they desire to adopt a teacher salary structure that is based on "performance."

In reading the newly-adopted A.R.S. § 15-977(A) in conjunction with these authorized teacher performance-based compensation plans, it appears that the Legislature has recognized that performance increases for teachers may consider various factors in addition to the performance of individual teachers.

The legislative history supports the conclusion that school boards have discretion to determine how to use the CSF funds earmarked for teacher performance increases. As amended by the Senate Education Committee, A.R.S. § 15-977(A) would have required school districts to submit teacher performance compensation plans that used CSF funds to the State Board of Education for its review and approval.<sup>(4)</sup> See S.B.1007, 44th Leg., 5<sup>th</sup> Spec. Sess. (Senate Education Committee Amendment). That provision, however, was not included in the final version of the bill, and school district governing boards were given the sole authority to determine the factors upon which CSF teacher performance increases could be based. See A.R.S. § 15-977 (as enacted in 2000 Ariz. Sess. Laws, 5th Sp. Sess., ch. 1, § 16).

Based on these indications of legislative intent, A.R.S. § 15-977(A) allows (but does not require) school districts to use their teacher performance CSF monies to increase teacher pay based not only on individual teacher performance, but also other factors such as school or district performance.

### **B. School District Governing Boards and Charter Schools Need Not Allocate CSF Monies Solely in Accordance with the Expressed Priorities of School Principals.**

When statutory language is clear and unequivocal, the plain language determines the Legislature's intent and the correct construction of the statute. See *Mercy Healthcare Ariz., Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 97, 887 P.2d 625, 627 (App. 1994). The language of A.R.S. §15-977(D) is clear: The allocation of CSF monies shall "include, wherever possible, the priorities identified by the principals of the schools." In addition to considering those priorities in allocating CSF maintenance and operation monies, school district governing boards and charter schools are also required to use such funds to "maximize classroom opportunities." A.R.S. § 15-977(D). Nothing in the statute indicates that CSF maintenance and operation funds must be allocated *solely* in accordance with the priorities identified by principals. To the contrary, governing boards are required to maximize classroom opportunities, while considering the identified priorities "*wherever possible*." Thus, the plain statutory language indicates that the priorities of school principals alone do not dictate the allocation of CSF monies.<sup>(5)</sup>

### **Conclusion**

Teacher compensation increases under A.R.S. § 15-977 need not be based on individual teacher performance, but may also consider other factors such as school and district performance. In addition, although school district governing boards and charter schools must ascertain the priorities of principals and head teachers regarding the use of CSF maintenance and operation funds, the final allocation of such funds need not mirror those priorities. Instead, school district governing boards and charter schools must take those priorities into account "wherever possible," but must also allocate such funds in a manner that maximizes classroom opportunities and is consistent with the statutory limitations.

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Janet Napolitano  
Attorney General

1. Under A.R.S. § 15-253(B), the Attorney General must "concur, revise or decline to review" opinions of county attorneys relating to school matters submitted for review. Although this provision expressly applies to the opinions of county attorneys, it also applies to the opinions of school districts' private counsel. *See* Ariz. Att'y Gen. Op. I99-006.
2. The Legislature referred some portions of S.B. 1007 to the voters for approval, including the measure's .6% increase in the State transaction privilege tax, which is for specific education programs, including the CSF. *See* 2000 Ariz. Sess. Laws, 5th Sp. Sess., ch. 1, § 64. Those provisions appeared on the general election ballot as Proposition 301. Ariz. Secretary of State, Ballot Propositions & Judicial Performance Review for the General Election of Nov. 7, 2000 at 169 (2000). All of the provisions in S.B. 1007 were contingent upon the voters' approval of Proposition 301. 2000 Ariz. Sess. Laws, 5th Sp. Sess., ch. 1, § 67.
3. Twenty percent of the CSF is allocated for "teacher base salary increases," which are unrelated to teacher performance measures. A.R.S. § 15-977(A).
4. As amended, A.R.S. § 15-977 would have included the following requirement: "[A] school district shall apply to the state board of education for performance pay increases. The state board of education shall establish an application and review procedure of the performance pay system by July 1, 2001." S.B. 1007, 44th Leg., 5<sup>th</sup> Spec. Sess. (Senate Education Committee Amendment).
5. Although an examination of the legislative history of this provision is unnecessary because the statutory language is not ambiguous, that history supports this conclusion. The first version of the bill gave school principals or head teachers sole control over the CSF maintenance and operation monies, but later amendments replaced that statutory language with the current version. *Compare* S.B.1007, 44th Leg., 5<sup>th</sup> Spec. Sess. as introduced (school principal or head teacher "administer[s]" CSF monies pursuant to A.R.S. § 15-977(A)) *with* A.R.S. § 15-977(D) as adopted.

To: The Honorable Jack Jackson  
Chairman, Citizens Clean Elections Commission

February 15, 2001  
Re: Application of  
Proposition 203 to  
Schools Serving the  
Navajo Nation  
101-006 (R00-062)

### **Question Presented**

You have asked whether Proposition 203, which generally prohibits bilingual instruction, applies to Native American language programs in schools serving the Navajo Nation.<sup>(1)</sup>

### **Summary Answer**

If a school is run by the tribe or the federal government, then the school is not subject to Proposition 203. State public schools, in contrast, are generally subject to Proposition 203, but the State law must be applied in a manner consistent with federal law, including principles of tribal sovereignty and the federally-recognized right of Native Americans to express themselves through the use of Native American languages. Proposition 203 cannot prohibit a State public school located on the Reservation or elsewhere from teaching students Native American language and culture.

### **Background**

#### **Navajo Law and Tribal Sovereignty**

Principles of tribal sovereignty provide the backdrop for any analysis of the application of a State law on tribal land. Native American tribes have generally retained their power of self-rule:

It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. . . . "The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position . . . with the power of regulating their internal and social relations. . . ."

*McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172-73 (1973) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

The Navajo have adopted specific laws recognizing the importance of the Navajo language to the "life, culture and identity of the Navajo People." Navajo Tribal Code, T. 10 § 111. Under the Navajo Code, "instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation." *Id.* Navajo law encourages competence in both English and Navajo. *See id.* at T.10 § 102(2), (3).

#### **Proposition 203**

In November 2000, Arizona voters passed Proposition 203, an initiative regarding teaching English in public schools. The Proposition notes that "[i]mmigrant parents are eager to have their children acquire a good knowledge of English." *Id.* at ¶ 2. Hence, it is the duty of Arizona schools "to provide all of Arizona's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society," and the Proposition states that English literacy is one of the most important such skills. *Id.* at ¶ 3. The law is based on the idea that "immigrant children" can gain full fluency in English by heavy exposure to that language at a young age. *Id.* at ¶ 5. Proposition 203 states that, subject to certain exceptions, "all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms."<sup>(2)</sup> A.R.S. § 15-752 (as amended by Proposition 203 hereinafter "Prop. 203"). Students who are "English learners" or "limited English proficient" are

generally educated through "sheltered English immersion during a temporary transition period not normally intended to exceed one year." (3) A.R.S. § 15-752 (as amended by Prop. 203). In sheltered English immersion classes, teachers may use only "minimal amount[s]" of a student's native language in teaching English. A.R.S. § 15-751(5) (as amended by Prop. 203).

Proposition 203 has certain limits. For example, Proposition 203 provides that "[f]oreign language classes for children who already know English shall be completely unaffected." A.R.S. § 15-752 (as amended by Prop. 203). In addition, the requirements of English immersion and placement in English language classrooms may, in certain circumstances, be waived upon the request of a student's parents or guardians. A.R.S. § 15-753 (as amended by Prop. 203) (allowing parental waivers from requirements of section 15-752 for children who "already know English," and children over ten years old and special needs children whose educational needs would be better met by alternate teaching methods).

## **Native American Languages Act**

The history of United States government policy towards tribal languages, including Navajo, is long and troubled. Historically, federal Indian boarding schools outlawed the use of Native American languages. *See, e.g.*, Dep't of the Interior, Remarks of Kevin Gover, Assistant Secretary-Indian Affairs, Sept. 8, 2000, <http://www.doi.gov/bia/as-ia/175gover.htm> (acknowledging previous policy of outlawing traditional tribal ways and vowing "never again" to attack Native American religions, languages or rituals).

That policy has now been reversed as a matter of law. In addition to extensive statutes dealing with Indian education and the right of Indians to self-determination generally, Congress enacted the Native American Languages Act ("NALA") in 1990 to protect and promote the rights of Native Americans to preserve their native languages. 25 U.S.C. §§ 2901-06. In NALA, Congress declared that "the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values." 25 U.S.C. § 2901(3). Similarly, the law states that "there is convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student." 25 U.S.C. § 2901(6). Congress also found that "acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans." 25 U.S.C. § 2901(8).

Accordingly, Congress declared that our national policy is to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages." 25 U.S.C. § 2903(1). The law encourages schools to use Native American languages as a medium of instruction to support "increased student success." 25 U.S.C. § 2903(3)(C). The law also encourages all schools to offer Native American language courses as foreign language courses, and expressly reserves the right of Native Americans to use their language as a medium of instruction in any school funded by the Department of Interior. 25 U.S.C. § 2903(5), (8). Finally, NALA also provides that "[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, *including publicly supported education programs.*" 25 U.S.C. § 2904 (emphasis added).

## **Analysis**

### **A. Proposition 203 Does Not Apply to Federal or Tribal Schools.**

Proposition 203 applies only to "Arizona public schools." A.R.S. § 15-752 (as amended by Prop. 203). "Arizona" public schools are, by definition, created by State law and financed by the State. *See generally* 15 A.R.S. §§ 101-2201 (establishing Arizona public schools). In contrast, federal (BIA) schools and tribally-run schools are created by federal or tribal law and generally maintained by federal or tribal funds. *See, e.g.*, 25 U.S.C. §§ 271-304, 2501-2651 (establishing federally and tribally-run Native American schools). Thus, by its own terms, Proposition 203 does not apply to federal or tribal schools. A.R.S. § 15-752 (applying to "all children in *Arizona public schools*") (emphasis added); *see also, e.g.*, Ariz. Att'y Gen. Op. I79-128 (a federally-run school is not under the jurisdiction of a State school district).

### **B. State Public Schools Must Apply Proposition 203 in a Manner Consistent with Federal Law.**

Arizona public schools, even those located on tribal land, are created and governed by State law.<sup>(4)</sup> As the Arizona Court of Appeals explained in finding that traditional Indian sovereign immunity did not extend to tribal members sued in their capacity as trustees of an on-reservation State public school:

Creation of school districts and their powers is governed by State law; likewise are the powers and duties of the trustees of the school district. It would be anomalous indeed if the [Native American] trustees on the one hand could exercise authority derived from State statutes and, when such authority is challenged, question the jurisdiction of the State courts.

*Indian Oasis Sch. Dist. No. 40 v. Zambrano*, 22 Ariz. App. 201, 202, 526 P.2d 408, 409 (1974); *see also* Ariz. Att'y Gen. Op. I86-019 (tribe has no right to assert its tribal preference in employment ordinance over State public school located on Indian reservation).

Although State law generally governs the operation of State public schools, it is still necessary to determine if federal law itself, including concerns for tribal sovereignty, bars the application of Proposition 203 to Native American students in State public schools located within or outside the Reservation. As a general proposition, "even on reservations, State laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The test is different with regard to the application of state laws to Native Americans outside a reservation. "Absent *express* federal law to the contrary, Indians going beyond reservation boundaries have [] been held subject to non-discriminatory State law otherwise applicable to all citizens of the State." *Id.* at 148-49 (State could impose non-discriminatory tax on off-reservation ski resort operated by Indian tribe) (emphasis added). Under traditional federal law preemption principles, federal law preempts State law if the federal law expressly states that it does, or the federal law is so comprehensive as to leave no room for State law, or if the State law directly conflicts with the federal law and both cannot be followed.<sup>(5)</sup> *See, e.g., Kadera v. Superior Court*, 187 Ariz. 557, 560, 931 P.2d 1067, 1070 (App. 1996).

### **1. Application of Proposition 203 to State Public Schools Outside the Reservation.**

Determining if federal law precludes the application of Proposition 203 to Native American students attending State public schools outside the Reservation requires careful consideration of the specific provisions and general purposes of the State law and NALA. At the outset, it is important to recognize that Proposition 203 does not seek to ban the use of Navajo in State public schools. Indeed, a strong argument can be made that Proposition 203 was not intended to apply to Native American languages at all. For example, Proposition 203 focuses primarily on non-English speaking *immigrant* children. *See, e.g.,* Proposition 203, Section 1: Findings and Declarations at ¶ 2 ("Immigrant parents are eager to have their children acquire a good knowledge of English."); *id.* at ¶ 5 ("Immigrant children" can gain full fluency in English by heavy exposure to that language at a young age). Despite the expressions of intent, however, the actual language in Proposition 203 directs that "all children . . . shall be taught English by being taught in English," and, thus, its requirements are not limited to immigrant children. A.R.S. § 15-752 (as amended by Prop. 203).

Application of Proposition 203 to Native American students in State public schools does not mean that the Navajo language cannot be taught. Even in sheltered immersion programs, Proposition 203 permits a limited use of languages other than English. Specifically, the Proposition provides only that "nearly all classroom instruction is in English" and expressly permits "use of a minimal amount of the child's native language when necessary." A.R.S. § 15-751(5) (as amended by Prop. 203). In addition, bilingual programs are permitted if parental waivers are obtained. A.R.S. § 15-753 (as amended by Prop. 203). Proposition 203 also does not prohibit the use of languages other than English outside the classroom. *See Calif. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945, 953 (C.D. Cal. 1999) (noting that California's Proposition 227 "involves a policy decision on curriculum" and does not limit the use of languages other than English in disciplining students, emergency training, social interactions, tutoring, parent-teacher conferences, and other matters).

In addition, Proposition 203 does not prohibit a State public school from teaching students Native American language and culture. Proposition 203 provides that "foreign language classes for children who already know English shall be completely unaffected" by the Proposition's requirements.<sup>(6)</sup> A.R.S. § 15-752 (as amended by Prop. 203). Foreign

language studies necessarily include related cultural studies. See Ariz. Dep't of Educ., Arizona Academic Standards & Accountability, Foreign Language Standards, <http://www.aazdes.gov/standards>.

Proposition 203 and NALA thus are directed at different, and not necessarily conflicting, purposes. Proposition 203 aims to ensure that Arizona students learn English. NALA, on the other hand, aims to "preserve, protect, and promote" the "use, practice, and develop[ment]" of Native American languages. 25 U.S.C. § 2903(1). One reason for the unique treatment of Native American languages under federal law is that many Native American languages are threatened with extinction. See Scott E. Ferrin, *Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J. L. & Educ. 1, 13 (1999) (contrasting "potential for language extermination that threatens Native American languages" with the "demographic vitality" of Spanish, most Asian languages and other minority languages in this country); see also Allison M. Dussias, *Waging War with Words: Native Americans Continuing Struggle Against the Suppression of Their Languages*, 60 Ohio St. L. J. 901, 978-977 (1999) (discussing risk of extinction of Native American languages). Thus, while Proposition 203 seeks to ensure that students with limited ability in English become proficient in that language, NALA aims to protect and promote knowledge of Native American languages. Cf. Navajo Tribal Code, T.10 § 102(2), (3) (recognizing that an "appropriate education" includes competence in English as well as Navajo).

The provisions of NALA do not indicate that this federal law generally precludes a State from requiring structured immersion programs to teach English to children who are "limited English proficient." As noted above, NALA recognizes the importance of Native American languages, encourages schools to use Native American languages as a medium of instruction and to offer foreign language classes in such languages, and specifically reserves the right of Native Americans to use their languages as a medium of instruction in schools funded by the Department of Interior. The provisions of NALA, however, do not expressly preempt State law and do not attempt to comprehensively regulate State public school curricula involving instruction to Native American students.

In one of the few reported cases addressing NALA, the court noted that the Act "merely speaks in terms of general policy goals and does not create a new set of regulations which might lend itself to enforcement through suits by private citizens." *Office of Hawaiian Affairs v. Dep't of Educ.*, 951 F. Supp. 1484 (D. Hawaii 1996) (holding that NALA did not create a private cause of action). In trying to determine what types of restrictions are subject to NALA, the Hawaii district court noted:

It would appear impracticable for public schools to not impose any restrictions on Native American languages, such as requiring students to speak English in a class taught in English. If not, in application the statute would effectively require teachers to be bilingual (or multilingual as the case may be) in order to understand their students who are allowed to respond in their native tongue. This would defeat Congress' apparent intention that NALA would not impose affirmative obligations on states, as evidenced by the other provisions in NALA.

*Id.*

The court also indicated that "§ 2904 is the only provision of NALA which could conceivably be interpreted to impose requirements on states." *Id.* at 1494. Although the case did not decide the issue, the court noted "it is unclear whether this provision extends to state public education, rather than federally funded education programs discussed in other portions of the Act." *Id.* at 1495. Assuming this provision applies to the states, the court commented that "at most it prevents the state from barring the use of . . . [native] languages in schools." *Id.* This analysis supports the conclusion that NALA leaves room for State policy concerning the use of the English language for instruction in State public schools. <sup>(7)</sup>

There is a significant difference, however, between allowing room for State policy and interpreting Proposition 203 in a way that would conflict with NALA. To avoid any such conflict, State public schools should not restrict "[t]he right of Native Americans to express themselves through the use of Native American languages" in publicly supported education programs. 25 U.S.C. § 2904. Moreover, the congressionally-recognized purpose of preserving Native American languages, and the tribe's strong interest in preserving its language and culture, indicate that Proposition 203 should be construed to allow a State public school to make Navajo classes available to all children, regardless of whether the children technically "already know English." This accommodation is necessary to ensure that Proposition 203 is applied in a manner consistent with federal law.

## **2. Application of Proposition 203 to State Public Schools Within the Reservation.**

The question remains whether Proposition 203 applies to State public schools within the Navajo reservation as it does to State public schools outside the reservation boundaries. As explained above, State laws may apply to State public schools within reservations unless such application would interfere with tribal self-government or would impair a right granted or reserved by federal law.

The importance of the Navajo language to the Navajo People and culture is well-established. Under Navajo law, the Navajo language is considered an "essential element of the life, culture and identity of the Navajo People." Navajo tribal code, t. 10 § 111. Moreover, the Navajo Code recognizes "the importance of preserving and perpetuating [the Navajo] language to the survival of the Nation." *Id.* Congress also has recognized the importance of Native American language to the survival of Native American culture and political institutions. *See* 25 U.S.C. § 2901(3). Proposition 203, however, does not directly interfere with the Navajo Nation's right to self-government, but instead directs how students with limited English skills are taught to become proficient in that language.

Proposition 203, as construed in this Opinion, can generally be applied to State public schools located within the Reservation. Possible conflict between the State law and the interests of the Tribes and Congress in promoting and protecting tribal languages is avoided by allowing State public schools on the Reservation to provide classes in Native American culture and language to all students, regardless of their level of English ability. If in other circumstances Proposition 203's focus on English language acquisition and the lack of protection for Native American languages would be "incompatible with federal and tribal interests reflected in federal law," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334, Proposition 203 must yield to the federal law. That determination cannot be made in the abstract but requires school districts to assess the particular educational program in question, the community needs, and the requirements of applicable State and federal law.

In short, all State public schools must apply Proposition 203 in a manner that complies with NALA, as well as the requirement under the federal Equal Educational Opportunities Act that schools take appropriate action to overcome language barriers that impede equal participation by students in instructional programs. 20 U.S.C. § 1703(f), 25 U.S.C. §§ 2901-06. In making good faith judgments regarding the implementation of Proposition 203 in a manner consistent with federal law, educators should not be subject to personal liability for "willful and repeated failure" to implement Proposition 203. *See* A.R.S. §§ 15-754 (personal liability under Proposition 203); 38-446 (no public officer or employee shall be personally liable for acts taken in good faith reliance on Attorney General opinions).

## **Conclusion**

Federal and tribal schools are not subject to Proposition 203. Although State public schools are generally subject to Proposition 203, they must comply with Proposition 203 in a manner that is consistent with the federal law protecting Native American language rights as well as the Equal

Educational Opportunities Act. State public schools may offer students classes in Native American languages and culture, whether or not such children are already proficient in English.

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Janet Napolitano  
Attorney General

1. Although your opinion request referred only to the Navajo Nation, the analysis in this Opinion also applies to other recognized Native American tribes.
2. An "English language classroom" is "a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. . . ." A.R.S. § 15-751(2) (as amended by Prop. 203).
3. An "English learner" or "limited English proficient student" is "a child who does not speak English or whose native language is not English, and

who is not currently able to perform ordinary classroom work in English." A.R.S. § 15-751(4) (as amended by Prop. 203).

4. This Opinion does not address the application of Proposition 203 to charter schools, which are a type public school under Arizona law. A.R.S. § 15-181. Although charter schools are public schools, they are also exempt from many of the statutory requirements that generally govern State public schools. *See* A.R.S. § 15-183(E)(5).

5. Federal preemption is based on the Supremacy Clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, Cl. 2. Arizona's Constitution also incorporates this principle. *See* Ariz. Const. art. 2, § 3 ("The Constitution of the United States is the supreme law of the land.").

6. Although one might question whether Navajo is a "foreign language" when it involves Navajo children who reside on the Navajo Nation, in the context of Proposition 203 any language other than English appears to be a "foreign language." *Cf.* 25 U.S.C. § 2903(5) (encouraging schools to offer Native American language courses as foreign language courses).

7. Given the broad language in NALA and the general principle of liberal construction in favor of Native Americans, this analysis assumes that NALA applies to State public schools. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("statutes are to be construed liberally in favor of . . . Indians, with ambiguous provisions interpreted to their benefit").

To: L. Gene Lemon  
Chairman, Citizens Clean Elections Commission

February 1, 2001

Re: Approval for Clean  
Elections Funding

101-005 (R00-061)

### Question Presented

You have asked whether the Secretary of State or the Citizens Clean Elections Commission ("Commission") has the authority to approve or deny clean elections funding to participating candidates pursuant to Arizona Revised Statutes ("A.R.S.") § 16-950.

### Summary Answer

The Clean Elections Commission has the authority to deny funding to candidates who fail to meet the requirements of A.R.S. § 16-950, with the exception of A.R.S. § 16-950(C). The Secretary of State has the authority to enforce the requirements of A.R.S. § 16-950(C).

### Background

Arizona voters passed Proposition 200, the Citizens Clean Elections Act ("Act"), as an initiative in the November 1998 general election. The Act authorizes public funding for the election campaigns of political candidates who voluntarily limit campaign spending and fund-raising in statewide and State legislative elections. *See generally* A.R.S. §§ 16-940 through -961. The initiative established a Citizens Clean Elections Commission ("Commission") to administer and enforce the Act. *See* A.R.S. § 16-956.

To qualify for funding, a candidate must be certified as a participating candidate and must also obtain the requisite number of qualifying contributions. *See* A.R.S. §§ 16-947, -950(D).<sup>(1)</sup> In order to be certified as a participating candidate, a candidate must file the required paperwork with the Secretary of State. A.R.S. § 16-947. The Commission has the authority to deny a certification application for good cause. A.R.S. § 16-947(C). Once certified, the candidate must, within a specified time, submit to the Secretary of State a list of people who gave the candidate qualifying contributions, the reporting slips for each qualifying contribution, and an amount of money equal to the sum of the qualifying contributions the candidate received. A.R.S. § 16-950(A), (B). The Secretary of State selects a random sample of the contributors and faxes the selected reporting slips to the counties for verification. A.R.S. § 16-950(C). Funding is contingent on the outcome of the verification process. *Id.*

To receive funding during a party primary, the candidate must also properly file nominating papers and petitions. A.R.S. § 16-950(E)(1). To receive funding during the general election, the candidate must be the party nominee or an independent candidate. A.R.S. § 16-950(E)(2).<sup>(2)</sup> Once these requirements are met, the Commission must provide funding to the candidates as prescribed in statute. *See* A.R.S. §§ 16-951, -952.

### Analysis

The Commission is authorized and obligated to enforce the Act. A.R.S. § 16-956(B)(5). Although the Commission is generally responsible for enforcement, the Secretary of State also has a number of responsibilities under the Act. For example, the Secretary of State receives campaign finance reports, lobbyist fees, and certification applications.<sup>(3)</sup> *See* A.R.S. §§ 16-944 (lobbyist fee); -947 (certification application); -958 (reports).

The Act also assigns the Secretary of State a role in approving candidates for funding. After candidates submit their qualifying contributions and related documentation, the Secretary of State selects a random sample of five percent of the number of names on the qualifying contribution list and forwards them to the county recorder for verification. The county recorder reports to the Secretary of State the number of slips that were disqualified for the specified reasons.<sup>(4)</sup> The Secretary of State then multiplies the number of valid slips by twenty. If that number is less than ninety percent of the quantity required, the Secretary of State "shall deny the application for funds." A.R.S. § 16-950(C). If the number is more than one hundred-ten percent of the quantity required, the Secretary

of State "shall approve the candidate for funds." *Id.* In these situations, the statute unambiguously gives the Secretary of State, not the Commission, the responsibility to determine whether a candidate has sufficient qualifying contributions, and to either approve or deny the application for funding under A.R.S. § 16-950(C).

The statute is less direct regarding the Secretary of State's role when the number of valid slips in the random sample falls between ninety percent and one hundred-ten percent of the required number. In that situation, the Act provides that "the Secretary of State shall forward facsimiles of all of the slips to the county recorder for verification, and the county recorders shall check all slips in accordance with the process above." A.R.S. § 16-950(C). The reference to the "process above" logically refers to the process for the initial random samples in which the county recorder reviews the slips and declares inadequate slips as disqualified in a report to the Secretary of State. The next step in this process is for the Secretary of State to approve or deny funding based on the report received from the county. Such an interpretation considers the statutory provisions in context of the entire statute and gives effect to all of the statute's provisions. *Pinto Valley Copper Corp. v. Arizona Dep't of Econ. Sec.*, 146 Ariz. 484, 486, 706 P.2d 1251, 1253 (App. 1985).

For these reasons, the Secretary of State approves or denies funding to a candidate under A.R.S. § 16-950(C). If funding is to be approved or denied for some other reason, however, the Commission would make that determination under its general enforcement power.<sup>(5)</sup>

### **Conclusion**

Although the Act generally assigns enforcement responsibilities and funding decisions to the Commission, A.R.S. § 16-950(C) expressly provides that the Secretary of State shall deny or approve funding applications based on whether the candidate submitted a sufficient number of valid contribution slips. Therefore, the Secretary of State approves or denies funding based on whether the candidate submitted sufficient valid contribution slips, and the Commission approves or denies funding based on whether the candidate meets the other requirements of the Act.

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Janet Napolitano  
Attorney General

1. Qualifying contributions are five dollar contributions that meet certain statutory requirements. *See* A.R.S. § 16-946. The number of required qualifying contributions varies depending on the office the candidate is seeking. A.R.S. § 16-950(D).

2. Independent candidates must meet the general requirements of A.R.S. § 16-950 to qualify for funding. A.R.S. § 16-950(E). Independent candidates, however, receive only one payment equal to seventy percent of the sum of the "original primary election spending limit" and the "original general election spending limit," at the beginning of the primary election period. A.R.S. § 16-951(A)(2).

3. Although the Secretary of State collects the lobbyist fees, the Commission is responsible for any enforcement if lobbyists fail to pay this fee. *See* Ariz. Att'y Gen. Op. I00-029.

4. The county recorder is required to provide a report to the Secretary of State which disqualifies "any slips that are unsigned or undated or that the recorder is unable to verify as matching a person who is registered to vote, on the date specified on the slip, inside the electoral district of the office the candidate is seeking." A.R.S. § 16-950(C).

5. This might include, for example, failure to properly file nominating papers under A.R.S. §§ 16-311 and 16-950(E), or failure to present a list of names of persons who contributed under A.R.S. § 16-950(B).

To: Leroy Gilbertson  
Director, Arizona State Retirement System

January 23, 2001

Re: Employer Early  
Retirement Program  
Benefits

I01-004 (R00-043)

### **Question Presented**

Eligible public employees receive benefits under the Arizona State Retirement System ("ASRS") based on their years of credited service and their average monthly compensation. Apart from benefits received under the ASRS defined benefit plan, employees may also be paid amounts by their employer under an early retirement program ("ERP"). You have asked if amounts paid under an ERP should be included as "compensation" for purposes of the ASRS plan.

### **Summary Answer**

Benefits paid under an ERP are not "compensation" for employees who joined the ASRS plan after December 31, 1983 (or who were hired earlier and elected to have retirement benefits calculated under the law as amended in 1983), regardless of when the ERP benefits are paid.

For employees who became members of ASRS on or before December 31, 1983 and did not elect to have retirement benefits calculated under the law as amended in 1983, ERP benefits paid at or before termination of employment are "compensation" for purposes of the ASRS plan, but ERP benefits paid thereafter are not.

### **Background**

#### **A. Compensation under the ASRS Plan.**

As a condition of employment, eligible public employees become members of the ASRS defined benefit plan ("Plan") and contribute to the plan as provided by law. See A.R.S. §§ 38-711(22), -727 (eligibility for membership in the ASRS Plan), -736 (member contributions). Under the Plan, retirement benefits are based on an employee's years of credited service and average monthly compensation at the "normal retirement date." A.R.S. § 38-757. From 1970 through 1983, the term "compensation" was defined as: the amounts actually received by the participant for remuneration for employment from an employer on an hourly or salaried basis including any incentive compensation, overtime or other irregular payments.

A.R.S. § 38-781.01(5) (1970) (repealed 1995) (current version at A.R.S. § 38-711(7)(2000)). This Opinion refers to this definition as the "1970 Definition of Compensation." While this definition was in effect, "average monthly compensation" was calculated based on the "five contiguous years during which a participant receives his highest compensation within a ten-year period ending with his normal retirement or . . . cessation of employment." A.R.S. § 38-781.01(3)(a)(1970) (repealed 1995) (current version at A.R.S. § 38-711(5)(a)(2000)).

During the 1983 regular session, the Legislature substantially narrowed the definition of compensation. The amended definition of compensation read:

"Compensation" means the gross amount paid to a participant by an employer as salary or wages, including amounts which are subject to deferred compensation or tax shelter

agreements, for services rendered to or for an employer, or which would have been paid to the participant except for the participant's election or a legal requirement that all or part of the gross amount be used for other purposes. Compensation does not include:

(a) Lump sum payments, on termination of employment, for accumulated vacation or annual leave, sick leave, compensatory time or any other form of termination pay.

(b) Damages, costs, attorney fees, interest or other penalties paid pursuant to a court order or a compromise settlement or agreement to satisfy a grievance or claim even though the amount of the payment is based in whole or in part on previous salary or wage levels, except that, if the court order or compromise settlement or agreement directs salary or wages to be paid for a specific period of time, the payment is compensation for that specific period of time.

(c) Payment, at the participant's option, in lieu of fringe benefits which are normally paid for or provided by the employer.

1983 Ariz. Sess. Laws, ch. 293, § 1 (effective January 1, 1984). This Opinion refers to this definition as the "1984 Definition of Compensation."

In 1983, the Legislature also changed "average monthly compensation" to base it on "a period of sixty consecutive months during which a participant receives the highest compensation within the last one hundred twenty months of service during which he made retirement contributions." A.R.S. § 38-781.01(3)(a)(1984) (repealed 1995) (current version at A.R.S. § 38-711(5)(a)(2000)). In the 1985, the Legislature further amended the definition of average monthly compensation by substituting a thirty-six month average for the previous sixty month average. 1985 Ariz. Sess. Laws, ch. 294, § 3.

Since July 1, 1985, the thirty-six month compensation average, based on the 1984 Definition of Compensation, has been the exclusive method of calculating average monthly compensation for employees who became members of the ASRS Plan after December 31, 1983. Employees who became members of the ASRS Plan before that date had a vested contractual right to benefits under the broader 1970 Definition of Compensation. See Ariz. Att'y Gen. Op. 184-039. Nonetheless, those employees may elect to have their retirement benefit computed under the 1984 Definition of Compensation and the thirty-six month compensation average. See A.R.S. § 38-711(5), (7). A member who elects to have retirement benefits calculated under the 1970 Definition of Compensation is eligible only for the sixty-month compensation average. *Id.*

## **B. ERPs**

Some public employers that participate in the ASRS also offer ERPs to their employees. School districts, for example, have offered ERPs as a fringe benefit under A.R.S. § 15-502(A). See Ariz. Att'y Gen. Op. 100-010. Although ERPs vary in their terms, they typically are offered to long-term employees who agree not to work full-time again for the employer in exchange for certain benefits.

## **Analysis**

### **A. ERP Benefit Payments Are Not "Compensation" under the 1984 Definition of Compensation.**

The 1984 Definition of Compensation excludes "[l]ump sum payments, on termination of

employment, for accumulated vacation or annual leave, sick leave, compensatory time or any other form of termination pay whether the payments are made in one payment or by installments over a period of time."<sup>(1)</sup> A.R.S. § 38-711(7). Payments that would not have been made absent the termination of employment are excluded from "compensation" under this definition. See Ariz. Att'y Gen. Ops. 184-097, 185-124.

ERP benefits are paid to an employee in consideration of the employee's long-term employment and agreement to terminate employment. Ariz. Att'y Gen. Op. 100-010. ERP benefits may be paid before, at, or after termination of employment in a single payment or in installments, but must be included as part of the person's contract in his or her final year of employment. *Id.* This Office previously determined that an "incremental increase in salary" in one ERP and other employee benefits in another ERP were forms of termination pay excluded from "compensation" under the 1984 Definition of Compensation. Ariz. Att'y Gen. 184-097. Because benefit payments under ERPs are a type of termination pay, which may be paid in a single payment or in installments, ERP payments are not "compensation" under the 1984 Definition of Compensation.

## **B. ERP Benefits Paid before or at Termination of Employment or Retirement**

### **Are Includible in Compensation under the 1970 Definition of Compensation, but ERP Benefits Paid after Termination of Employment or Retirement Are Not.**

The 1970 Definition of Compensation includes "the amounts actually received . . . for remuneration for employment from an employer on an hourly or salaried basis including any incentive compensation, overtime or other irregular payments." A.R.S. § 38-781.01(5) (1970) (current version at A.R.S. § 38-711(7)(2000)). Unlike the 1984 Definition of Compensation, the 1970 definition did not exclude termination pay. Under the earlier, broad definition, any payments (e.g. regular wages or salary, bonuses, payments for accrued leave, termination pay or retirement incentive pay) that an employee actually received from an employer in consideration of that person's employment may be included in compensation.<sup>(2)</sup>

The definition of "average monthly compensation" applicable to the 1970 Definition of Compensation, however, is limited to "compensation on which [retirement] contributions were remitted during a period of sixty consecutive months during which the member receives the highest compensation within the last one hundred twenty months of credited service." A.R.S. § 38-711(5)(a). "Credited service" is "the number of years standing to the member's credit on the books of ASRS during which the member made the required contributions." A.R.S. § 38-711(9). The term credited service refers to the time a person performs services for an employer within ASRS and receives compensation for those services. *Cf.* A.R.S. § 38-739(C) (credited service for less than a full service year). Consequently, "average monthly compensation" generally includes only amounts received before termination of employment and on which retirement contributions were remitted. In limited circumstances that do not apply to ERP benefits, "average monthly compensation" may include compensation received after a person's employment has ended. For example, the entire amount paid to a teacher who is compensated under a twelve month contract for services rendered in the prior nine months would be included in "average monthly compensation." *Cf.* Ariz. Att'y Gen. Op. 180-195 (university faculty member who was compensated over a twelve month period was eligible to receive retirement benefits at the date employment terminated (May, 1980), rather than the later date (August, 1980) when he ceased receiving his compensation for those services). In that situation, the payments received in the three months after ceasing employment are for services rendered in the prior nine months under a twelve-month

contract. This reasoning, however, does not extend to ERP benefits paid after an employee terminates services. Unlike the teacher's twelve-month contract, ERP benefits are not direct payments for services rendered within that year. Rather, the ERP benefits are retirement incentives based on multiple years of service for an employer and the forfeiture of future employment rights. See Ariz. Att'y Gen. Op. 100-010.

For these reasons, if ERP benefits are received after the person's "credited service" for the employer has ended, they are not "compensation within the last one hundred twenty months of credited service" and, therefore, are not used to calculate "average monthly compensation."

### **Conclusion**

Benefits paid under an ERP are not "compensation" for employees who joined the ASRS plan after December 31, 1983 (or who were hired earlier and elected to have retirement benefits calculated under the law as amended in 1983), regardless of when the ERP benefits are paid. For employees who became members of ASRS on or before December 31, 1983 and did not elect to have retirement benefits calculated under the law as amended in 1983, ERP benefits paid at or before termination of employment are "compensation" under the ASRS plan, but ERP benefits paid thereafter are not.

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Janet Napolitano  
Attorney General

1. The Legislature added the language "whether the payments are made in one payment or by installments over a period of time" in 1992. 1992 Ariz. Sess. Laws Ch. 320, § 5. This was consistent with an earlier Attorney General's Opinion which concluded that lump sum termination payments paid over time are excluded from the 1984 Definition of Compensation. Ariz. Att'y Gen. Op. I85-124.

2. Although not controlling, federal cases construing the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. § 3101-3128, support this broad interpretation of compensation. See *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 365 (1946) (noting statutory terms "wages," "employment," and "service" are to be broadly interpreted to "import breadth of coverage"). Under FICA, "wages" subject to employment taxes generally "means all remuneration for employment" unless the remuneration falls within one of the specified exceptions. See 26 U.S.C. § 3121(a). In turn "employment" is defined as "any service, of whatever nature, performed . . . by an employee for the person employing him." 26 U.S.C. § 3121(b). Federal courts have construed FICA to apply to termination pay in some circumstances. See *Mayberry v. United States*, 151 F.3d 855, 860 (8th Cir. 1998) (ERISA settlement award based on former employee's length of service and expected pre-layoff earnings held to be FICA wages).

To: The Lisa Graham Keegan  
Superintendent of Public Instruction

January 16, 2001

Re: Implementation Time  
Line for Proposition 203

I01-003 (R00-076)

### **Question Presented**

At the general election in November 2000, Arizona voters approved Proposition 203, which made major changes to the requirements for educating children who are learning to speak English. The Department of Education ("Department") has proposed a time line for implementing Proposition 203 which would have curriculum for English language acquisition that complies with the Proposition in place in schools by the beginning of the 2001-2002 school year. You have asked whether this proposed time line complies with the Proposition and federal law.

### **Summary Answer**

Because of the many tasks necessary to complete the state-wide transition from current methods of English language instruction to the methods and procedures required by Proposition 203, the proposal to have programs that comply with Proposition 203 in place in schools by the beginning of the 2001-2002 school year satisfies Proposition 203 and federal law.

### **Background**

In November 2000, Arizona voters passed Proposition 203 which dictates that public schools use certain methods of instruction for limited English proficient ("LEP") students. A stated purpose of Proposition 203 is to help LEP students "acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream." Proposition 203, § 1(2). The initiative repeals existing statutes that allow various methods of teaching English to LEP students-including transitional bilingual programs, structured bilingual programs, bilingual-bicultural programs, and English as a second language programs-and replaces them with a law that generally requires an English immersion program. *Compare* (Former) Arizona Revised Statutes ("A.R.S.") § 15-754(A)(1)-(4) *with* (New) A.R.S. § 15-752. Subject to certain exceptions, the new law requires that "all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms." A.R.S. §§ 15-752; -753 (allowing parental waivers from English immersion for children who "already know English" and older or special needs children whose educational needs would be better met by alternate methods).

Proposition 203 provides for private enforcement of its provisions. Parents of Arizona school children have legal standing to sue for enforcement and for actual and compensatory damages. A.R.S. § 15-754. In addition, "[a]ny school board member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of this statute may be held personally liable. . . ." *Id.* Individuals found liable under this provision cannot be indemnified by any public or private third party, and in addition, will be removed from office and barred from holding "any position of authority anywhere within the Arizona public school system" for five years. *Id.*

The Department has proposed an implementation schedule in which schools would begin using the English immersion curriculum required by Proposition 203 by the beginning of the

2001-2002 school year. You advised schools and various officials of your plan to implement Proposition 203 for the 2001-2002 school year in memoranda dated November 13, 2000 and January 10, 2001. According to your opinion request, during the intervening time, the Department intends to assist school districts in identifying successful English immersion programs and their costs and, if appropriate, develop rules to implement Proposition 203. The Department also anticipates that school districts will work on identifying, selecting, and developing curricula that satisfies Proposition 203 during the remainder of the 2000-2001 school year.

### **Analysis**

Proposition 203 became effective when it was signed by the Governor on December 7, 2000. See Ariz. Const. art. IV, Part 1, § 1(5). However, the *effective* date of a statute is not necessarily identical to the date by which the *implementation* of its substantive provisions must be completed. See, e.g., *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953) ("the date a provision becomes *law* and the date it becomes *operative* may be different").

Proposition 203 leaves open the issue of when it must become operative. Cf. Cal. Educ. Code § 330 (stating that similar law "shall become operative for all school terms which begin more than sixty days following the date on which it becomes effective"). Therefore, the time line for implementing Proposition 203 must be assessed based on reasonableness and the intent of the law. See, e.g., *Watahomigie v. Arizona Bd. of Water Quality Appeals*, 181 Ariz. 20, 30, 887 P.2d 550, 560 (App. 1994) (statute must be read so as to give it a "fair and reasonable meaning"); *Grove v. Arizona Criminal Intelligence Sys. Agency*, 143 Ariz. 166, 169, 692 P.2d 1015, 1018 (App. 1984) (agency action must be reasonable and related to the purpose of the statute).

A state-wide switch from current teaching methods for LEP students to a new method cannot occur overnight. The successful implementation of a new method of instruction requires careful consideration by the Department and by the school district governing boards that are charged with adopting curricula for the schools within a district. See A.R.S. § 15-341(A)(6). In addition, individual schools presumably need time to prepare and plan for implementing the new teaching method. Because of their expertise and experience, the Department and school districts are in the best position to determine an appropriate implementation time line for Proposition 203. See, e.g., *Watahomigie*, 181 Ariz. at 31, 887 P.2d at 561 (agency interpretation of its statutes is given great weight).

The Department's proposed schedule appears to serve the stated purpose of Proposition 203 -- to help LEP students effectively learn English. In addition, the proposed schedule avoids changing current English acquisition classes mid-year, and therefore should be less disruptive to LEP students than an immediate transition. Because the proposed time line appears to be reasonable and consistent with the stated goals of Proposition 203, the Department's proposal to implement the Proposition in schools by the beginning of the 2001-2002 school year complies with Proposition 203. <sup>(1)</sup>

Furthermore, Proposition 203 must be implemented in a manner that complies with federal law. The federal Equal Educational Opportunities Act ("EEOA") requires any public school to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f); see also *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (Civil Rights Act requires that LEP students be given a meaningful opportunity to participate in educational programs). To comply with the EEOA, the programs

and practices used by a school must be "reasonably calculated to implement effectively the educational theory adopted." *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5<sup>th</sup> Cir. 1981) (emphasis added). Allowing the Department sufficient time to study successful English immersion programs and develop appropriate rules -- and giving schools sufficient time to prepare for the new programs -- will help implement Proposition 203 effectively and thus in a manner that complies with federal law.<sup>(2)</sup>

Educators attempting to implement Proposition 203 by the 2001-2002 school year should not be subject to liability under the statute. The Proposition establishes liability for "[a]ny school board member or other elected official or administrator who *willfully and repeatedly refuses* to implement the terms of this statute." (New) A.R.S. § 15-754 (emphasis added). Under the Department's proposed schedule, the process for implementing Proposition 203 is currently under way, and any new curricula based on Proposition 203 should generally be in place in the classroom by the beginning of the 2001-2002 school year. Such a systemic approach to implementing Proposition 203 is not a refusal to implement the Act, much less a willful and repeated refusal. Indeed, effectively implementing Proposition 203 furthers the purpose of the law. In addition, the state law must meet the federal requirement that LEP students be given a meaningful educational opportunity, including *effective* implementation of a school's chosen educational theory. Thus, school board members and other elected officials and administrators should not be subject to personal liability if they are working in good faith toward an appropriate and effective transition to the English immersion teaching method described in Proposition 203. See also A.R.S. § 38-446 (providing that no public officer or employee shall be personally liable for acts taken in good faith reliance on Attorney General opinions).

### **Conclusion**

The Department's proposed time line of completing the transition to programs that comply with Proposition 203 by the beginning of the 2001-2002 school year comports with the requirements of both Proposition 203 and federal law.

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Janet Napolitano  
Attorney General

1. School district governing boards' implementation plans must also be reasonable and further the objectives of Proposition 203. Certain schools may have individual needs that require a different implementation schedule, and to the extent those different schedules are reasonable and allow for an effective implementation of the teaching method required by Proposition 203, they are most likely appropriate under the new statutory scheme.
2. This Opinion does not address the application of Proposition 203 to Native American language programs in public schools on tribal lands. This Office is currently reviewing that issue at the request of Senator Jack Jackson and will issue a separate Opinion on the subject.

To: The Honorable Robert Burns  
Chairman, Joint Committee on Capital Review

January 3, 2001

Re: Building  
Renewal Fund

101-002 (R00-075)

### Questions Presented

You have asked the following questions regarding the statutory authority of the Arizona School Facilities Board ("SFB") in connection with the Building Renewal Fund:

1. Is the SFB required to instruct the State Treasurer to credit a \$2.7 million supplemental distribution from the State's transaction privilege tax revenues for the Building Renewal Fund for fiscal year ("FY") 2000-01 based on the most recent data received by the SFB from school districts?
2. If the SFB is not *required* to instruct the Treasurer to credit a supplemental distribution for FY2000-01, is the SFB *permitted* to do so?

### Summary Answer

1. No. The statutes do not require the SFB to amend or supplement its instructions to the State Treasurer regarding funding for the Building Renewal Fund after January 1 of each year based on new data the SFB receives from school districts.
2. No. The SFB does not have statutory authority to change the total amount of funding required for the Building Renewal Fund after it has instructed the State Treasurer on January 1 of each year.

### Background

The Students FIRST legislation fundamentally restructured the State's system of school financing for school facilities. It created the SFB to establish minimum adequacy standards for school facilities, to monitor district compliance with the standards, and to distribute funds from different sources to (1) bring existing facilities up to standards (the "Deficiencies Corrections Fund"); (2) construct new facilities for growing districts (the "New School Facilities Fund"); and (3) maintain all facilities at the adequacy level (the "Building Renewal Fund"). *See generally, Hull v. Albrecht*, 192 Ariz. 34, 37, 960 P.2d 634, 637 (1998).

Pursuant to Students FIRST, funding for the Building Renewal Fund is determined by a formula based on the square footage, age, and renovation history for certain school buildings in each school district. A.R.S. § 15-2031(D). By September 1 of each year, school districts must report to the SFB the information necessary for the SFB to create a database for purposes of calculating the Building Renewal Fund amounts according to the statutory formula. *Id.* The SFB is required to update the data in its Building Renewal Fund database at least annually to "reflect changes in the ages and value of school buildings." *Id.* Based on the statutory formula and the database, the SFB then advises the Joint Committee on Capital Review by December 1 of each year and the State Treasurer no later than January 1 of each year as to the amounts to be funded from the State's transaction privilege tax revenues for the upcoming fiscal year. *See* A.R.S. § 15-2002(A)(10).

Based on data submitted to the SFB by school districts by September 1, 1999, the SFB estimated that it would need \$120 million to fund the Building Renewal Fund for FY2000-01. Accordingly, on January 1, 2000, the SFB instructed the State Treasurer to credit \$120 million from the State's Transaction Privilege Tax revenues to the Building Renewal Fund for FY2000-01.

When the SFB updated its database on September 1, 2000, with information from the school districts to determine the Building Renewal Fund funding necessary for FY2001-02, the SFB concluded that the

updated figures indicated \$122.7 million would have been an appropriate funding level for the Building Renewal Fund for part of FY2000-01. The difference between the \$120 million that the SFB had on January 1, 2000 instructed the State Treasurer to transfer and the \$122.7 million updated figure is primarily attributable to two increases in a construction index that is used to calculate the building renewal formula.

### Analysis

- The School Facilities Board Is Not Required to Amend or Supplement Its Instructions to the State Treasurer After January 1 of Each Year.

Where legislative language is plain and unambiguous, the statutory text is applied as written. See *Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).

Section 15-2002(A)(10), A.R.S., provides, in relevant part:

*No later than January 1 of each year*, the board shall instruct the State treasurer as to the amounts under the transaction privilege tax to be credited in equal quarterly installments for the following State fiscal year.

(Emphasis added.) Nothing in statute requires the SFB to amend or supplement its instructions to the State Treasurer after January 1 of each year. Under the statutory timetable set forth in Students FIRST, the amount needed to fund the Building Renewal Fund is established before the fiscal year begins. The statutes do not envision, let alone require, the SFB to recalculate the funding amount based on new data that the SFB receives during the fiscal year. Thus, once the SFB has properly calculated the amount of funding that is required under the statutory formula and has advised the State Treasurer to transfer that amount to the Building Renewal Fund, the amount of funding required for the Building Renewal Fund for the upcoming fiscal year is permanently set. Were this not the case, the appropriate amount of funding would constantly change during the year as school districts added to or subtracted from their total square footage and as buildings were renovated or built.

The October 13, 2000 decision in *Roosevelt Elementary Sch. Dist. v. Hull*, No. CV99-19062 (Ariz. Super. Ct.) does not require a different conclusion. That case challenged the level of funding for the Building Renewal Fund only for the first two fiscal years Students FIRST was in effect. For those fiscal years, the Legislature and the SFB estimated the amount of funding required because the SFB did not have the data from school districts necessary to calculate the funding according to the statutory formula by the statutory deadline. The court's decision did not address the issue presented in this Opinion, which is whether the statutes would require or permit the SFB to amend or supplement its instructions to the State Treasurer after January 1 of a year in which the SFB used the school district data reported to it by September 1 to calculate the amount of funding necessary for the Building Renewal Fund. October 13, 2000 Minute Entry at 3-4, *Roosevelt Elementary Sch. Dist. v. Hull*, No CV99-19062 (Ariz. Super. Ct.).<sup>(1)</sup>

- The School Facilities Board Does Not Have the Authority to Change the Amount of Building Renewal Fund Funding After January 1 of Each Year.

The jurisdiction and powers of any State agency are limited by the terms of the statute that creates the agency. See, e.g., *Schwartz v. Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996). The statutory scheme provides that the SFB will instruct the State Treasurer on the amount of necessary funding "[n]o later than January 1" of the proceeding fiscal year. This statutory language does not allow the SFB to subsequently amend the Building Renewal Fund funding level based on changing data submitted by school districts during the fiscal year.<sup>(2)</sup>

If the SFB desires to revise the funding level for the Building Renewal Fund during the fiscal year, the Legislature must first grant the SFB statutory authority to do so. Alternatively, the Legislature could, without amending the statutes, specifically appropriate amounts to the Building Renewal Fund if supplemental funding is desirable.

### Conclusion

The SFB is not required or permitted to substantively amend or revise its instructions to the State Treasurer after January 1 of each year based on new data later submitted by school districts.

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Janet Napolitano  
Attorney General

1. As for the funding level established by the SFB for FY1999-2000, the court noted that the State, in arguing that the statutory timeline for calculating building renewal for FY1999-2000 did not apply, did not explain why the SFB could not have reported late to the State Treasurer or why a supplemental report could not have been made *for that fiscal year only*. See October 13, 2000 Minute Entry at 3, *Roosevelt Elementary Sch. Dist. v. Hull*, No. CV99-19062 (Ariz. Super. Ct.).

2. This Opinion does not address whether the SFB could amend or revise its instructions after January 1 to advise the State Treasurer to transfer a *lesser* amount to any of the three Students FIRST funds because it received the necessary funds from other sources. In that situation, the total amount of State funding for the Building Renewal Fund is not recalculated but rather remains the amount calculated by the SFB pursuant to statute by September 1.

To: Brian C. McNeil  
Executive Secretary, Arizona Corporation Commission

January 2, 2001

Re: Corporation  
Commission  
Membership

101-001 (R00-071)

### Questions Presented

You have asked the following questions concerning the effect of Proposition 103, which the voters approved at the 2000 general election:

1. Whether, by expanding the Corporation Commission ("Commission") from three members to five members, Proposition 103 created two vacancies to be filled by gubernatorial appointment.
2. Whether Commissioners elected to serve six-year terms before the approval of Proposition 103 are now required to remain out of office for a period of time before running for Commissioner again.

### Summary Answer

1. Proposition 103 did not create vacancies on the Commission. Instead, at the general election in 2002, the voters of Arizona will elect the two additional Commissioners to increase the number of Commissioners from three to five.
2. Commissioners who were elected before approval of Proposition 103 are now eligible to serve two consecutive terms. A Commissioner who served a single term and then left office is eligible to run in any future election. A Commissioner currently serving may seek reelection for one more term without leaving office.

### Background

In the 2000 general election, Arizona voters approved Proposition 103, a constitutional amendment that expands the Commission from three members to five and changes the terms of Commissioners and the applicable term limits. Under the law before Proposition 103, Commissioners were elected for six-year terms and had to leave office for a full term after serving a term on the Commission.<sup>(1)</sup> Under Proposition 103, Commissioners are elected to four-year terms and may serve two consecutive terms. After serving two consecutive terms, a Commissioner must leave office for a full term before running again.<sup>(2)</sup>

### Analysis

#### A. The Voters Will Elect the Two Additional Commission Members in 2002.

By increasing the number of Commissioners from three to five, Proposition 103 did not create two vacancies on the Commission. Proposition 103 stated: "The two additional Commission members shall be elected at the 2002 general election for initial two-year terms beginning on the first Monday in January 2003." Ariz. Const. art. XV, § 1(B) (as amended by Proposition 103). This language directs that "the two additional . . . members" are to be elected in 2002. Until that time, the Commission continues to operate with three members.

The legislative history also confirms that the Commission will not have five members until after the voters elect two new members in the 2002 general election. As explained in the Legislative Council ballot analysis, "[t]his proposition . . . provides for a phase in process for the additional Corporation Commission members. Beginning with the election in 2002, the two new members would both serve a two-year term . . . ." Arizona

Secretary of State, ballot propositions for the general election of Nov. 7, 2000, 44-45 (Proposition 103). In addition, the fiscal analysis prepared by the Joint Legislative Budget Committee stated "[i]f . . . [Proposition 103] is enacted, the [two] . . . additional commissioners would not be sworn in until the first Monday in January 2003. As a result there will be no fiscal impact until [fiscal year] 2003." Joint legislative comm. staff, 44th leg. Fiscal Note on s. con. res. 1005 (Jan. 31, 2000); see *also* hearing on s. con. res. 1005 before the senate appropriations committee 44th Legis., 2d Reg. Sess. (Feb. 9, 2000) (noting that the fiscal impact of the increase from three to five members begins in fiscal year 2003).

The Arizona Supreme Court previously rejected arguments that a constitutional amendment restructuring the Arizona Legislature created vacancies in the State Senate to be filled by appointment. See *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 397, 265 P.2d 447, 452 (1953). In that case, the Court noted that construing the amendment as creating vacancies

would in our opinion be in direct conflict with the plain language of the amendment, and the result would be to deprive the people in the nine counties granted an additional senator . . . of the privilege of exercising their electoral franchise to select the person to fill the office. We believe this was never the intent of the electorate, for they have ever jealously guarded their right to elect their public officials and vested the appointing power in other hands only in exceptional cases. . . . A departure from this policy would have to be declared in clearer words than are here found.

*Id.* at 399, 265 P.2d at 453.

Similarly, Proposition 103 requires Arizona voters to fill the two additional seats on the Corporation Commission in 2002. The proposition creates no vacancies on the Commission that require action by the Governor.

#### B. Commissioners Elected to Six-Year Terms Are Subject to a Limit of Two Consecutive Terms.

Before Proposition 103 was approved, the Constitution limited Commissioners to serving a single six-year term after which each Commissioner was required to be out of office for one full term. The constitutional language limiting the terms of Commissioners now provides:

No member of the corporation commission shall hold that office for more than two consecutive terms. No corporation commissioner may serve again in that office until out of office for one full term. Any person who serves one half or more of a term shall be considered to have served one term for purposes of this section.

Ariz. Const. art. XV, § 1. This language imposes a two consecutive term limit on all Commissioners. It does not expressly limit the number of consecutive years a person may serve, nor does it establish different requirements for a Commissioner who previously served a six-year term. It establishes a limit based on the number of terms served, not the number of years.

This means that Commissioners who served six-year terms are no longer subject to a one-term limit. Therefore, a Commissioner who was elected to a six-year term and left office in 1998 or 2000 may run for the Commission in 2002. If elected to the Commission in 2002, that person may, after completing that term, run for one more consecutive term. If a Commissioner remains in office until 2002 or beyond while serving a six-year term, that person may, under Proposition 103, seek re-election to another term. If reelected, that person may serve the second term and must then remain out of office for one full term (four years) before running again.

The transition to Proposition 103 may result, for a limited time, in Commissioners reaching their two-term limit after serving anywhere from six to ten consecutive years. For example, a person could serve for ten

consecutive years (a six-year term followed by a four-year term) and would then be required to remain out of office for four years. A person might also serve a two-year term, the length of the initial term of the new Commission seats to be filled in 2002, followed by a four-year term for a total of six years, and would then be required to remain out of office four years because that person has served two consecutive terms. These differences naturally result from a limit based on the number of terms served, when the terms are for different lengths of time.

### Conclusion

The two additional members of the Corporation Commission authorized by Proposition 103 will be elected in 2002. Proposition 103 did not create any vacancies to be filled by the Governor.

Commissioners are now eligible to serve two consecutive terms rather than one. Therefore, Commissioners who had been elected to a single six-year term may run for re-election. If a person who was elected to a six-year term is out of office for a period of time before seeking a second term, that person may then run for two consecutive terms.

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Janet Napolitano  
Attorney General

1. Arizona voters approved the one-term limit in 1992 in a measure that imposed term limits on legislative and executive office-holders, as well as the Corporation Commission. Arizona Secretary of State, Publicity Pamphlet for the general election of nov. 3, 1992, 46-52, (Proposition 107).

2. Proposition 103 amended article XV, § 1, in part, as follows:

A. No member of the corporation commission shall hold that office for more than ~~one~~ TWO consecutive ~~term~~ TERMS. No corporation commissioner, ~~after serving that term,~~ may serve AGAIN in that office until out of office for one full term. Any person who serves one half or more of a term shall be considered to have served one term for purposes of this section. ~~This limitation shall apply to terms of office beginning on or after January 1, 1993.~~

B. A corporation commission is hereby created to be composed of ~~three~~ FIVE persons who shall be elected at the general election . . . and whose term of office shall be ~~coterminous with that of the Governor of the State elected at the same time~~ FOUR YEARS. . . . THE TWO ADDITIONAL COMMISSION MEMBERS SHALL BE ELECTED AT THE 2002 GENERAL ELECTION FOR INITIAL TWO-YEAR TERMS BEGINNING ON THE FIRST MONDAY IN JANUARY, 2003. THEREAFTER, ALL TERMS SHALL BE FOUR-YEAR TERMS.