

2006 AG Opinions

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December 22, 2006	No. 106-008 (R056-034) Re: The Application of Proposition 203, The Arizona Early Childhood Development and Health Initiative, to Taxation of On-Reservation Tobacco Sales
December 22, 2006	No. 106-007 (R06-033) Re: The Application of Proposition 201, Smoke-Free Arizona Act, to Taxation of On-Reservation Tobacco Sales
December 1, 2006	No. 106-006 (R06-034) Re: Proposition 203 Increase in State Tax on Cigarettes
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August 25, 2006	No. 106-002 (R06-022) Re: Application of A.R.S. § 38-503(C) to Sales of Goods or Services by School District Employees to Their Employing School Districts
March 27, 2006	No. 106-001 (R06-001) Re: Certificates of Educational Convenience and Tuition Requirements

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 22, 2006	No. I06-008 (R06-034) Re: The Application of Proposition 203, the Arizona Early Childhood Development and Health Initiative, to Taxation of On- Reservation Tobacco Sales
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TO: Gale Garriott
Director, Arizona Department of Revenue

Questions Presented

You have requested a formal opinion answering the following questions¹ concerning the application of the Proposition 203, more commonly known as the Arizona Early Childhood Development and Health Initiative, passed by the electorate at the general election held November 7, 2006:

Will the Tobacco Tax for Early Childhood Development and Health levied under new section A.R.S. § 42-3371 apply to sales of tobacco products on Indian reservations?

If so:

1) Would the tax apply only to purchasers other than enrolled members of the tribe and under circumstances in which such sales are not otherwise exempt from the current Indian Reservation Tax under A.R.S. § 42-3304?

¹ On December 1, 2006, this Office issued Ariz. Att’y Gen. Op. No. I06-006, which addressed your question relating to the amount of the tax increase on cigarettes imposed by Proposition 203. This Opinion addresses your remaining questions relating to Proposition 203.

2) Would the tax be levied as a direct tax on the consumer that is precollected and remitted by the distributor, as the current Indian Reservation Tobacco Tax is pursuant to A.R.S. § 42-3303, or would it be levied under a different theory of taxation?

3) Would the tax be offset by a luxury/excise tax imposed by the tribe that is equal to or greater than the tax?

Summary Answer

The Tax for Early Childhood Development and Health levied under new statute A.R.S. § 42-3371 does not apply to on-reservation sales of tobacco by tribes or tribal members² to non-tribal members. It does apply to on-reservation sales of tobacco by federally licensed Indian traders or other non-tribal members to non-tribal members. Because Proposition 203 does not incorporate the provisions of Title 42, Chapter 3, Article 7 (A.R.S. §§ 42-3301 to 42-3306), neither the “direct tax on consumers” provision nor the luxury/excise tax setoff applies to the new tax.

Background

At the 2006 general election, voters approved Proposition 203, which provides dedicated funding for early childhood development and health programs and establishes a statewide structure to coordinate these programs. It establishes an early childhood development health care board and fund along with regional partnership councils throughout the state to identify childhood development and health services needs at the local level and provides for distribution of monies and grants to eligible programs serving pre-kindergarten-age children.

² For purposes of this Opinion, the term “tribal member” denotes an enrolled member of the tribe for the benefit of which the reservation on which the transaction in question takes place was established. Thus, a “non-tribal member” would include someone who is a member of a tribe established on a reservation other than the one on which the transaction at issue takes place, as well as someone who is not a member of any tribe.

Indian tribes located in a designated region are represented in the partnership council by either one public official or an employee of the tribal government. A.R.S. § 8-1162(A)(9) (as added by Proposition 203). Indian tribes may either participate in designated regions, in which their land is located, or elect to be treated as a separate region. A.R.S. § 8-1164(D) (as added by Proposition 203).

Proposition 203 establishes a tax on tobacco products to fund these programs by amending Title 42, Chapter 3 of the Arizona Revised Statutes to add new Article 9 and statute A.R.S. § 42-3371, which provides:

In addition to all other taxes, there is levied and shall be collected by the department in the manner provided by this chapter, on all cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco the following tax:

1. On each cigarette, four cents.
2. On smoking tobacco, snuff, fine cut chewing tobacco, and refuse, scrubs, clippings, cuttings and sweepings of tobacco, excluding tobacco powder or tobacco products used exclusively for agricultural or horticultural purposes and unfit for human consumption, 9 cents per ounce or major fraction of an ounce.
3. On all cavendish, plug or twist tobacco, 2.2 cents per ounce or fractional part of an ounce.
4. On each twenty small cigars or fractional part weighing not more than three pounds per thousand, 17.8 cents.
5. On cigars of all descriptions except those included in paragraph 4, made of tobacco or any tobacco substitute:
 - (A) If manufactured to retail at not more than five cents each, 8.8 cents on each three cigars.
 - (B) If manufactured to retail at more than five cents each, 8.8 cents on each cigar.

A.R.S. § 42-3371 (as added by Proposition 203). The taxes collected under A.R.S. § 42-3371 are to be deposited in the early childhood development and education fund. A.R.S. § 42-3372 (as added by Proposition 203).

Analysis

State taxation of tobacco sales on Indian reservations has a long and circuitous history in the courts. Ultimately, courts have applied a flexible approach under which state tax laws apply to on-reservation transactions involving non-members of an Indian tribe unless authority to do so would be preempted by federal law or would interfere or is incompatible with federal and tribal interests reflected in federal law. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *State ex rel. Ariz. Dep't of Revenue v. Dillon*, 170 Ariz. 560, 566, 826 P.2d 1186, 1192 (App. 1991).

Prior to 1994, there was no specific methodology in the Arizona statutes to tax on-reservation sales of tobacco. At that time, the only excise tax on tobacco in Arizona was a luxury privilege tax on tobacco. See A.R.S. § 42-3052. This tax, which is still in effect, is an excise tax on the privilege of selling certain luxury items to consumers.³ *Watkins Cigarette Serv., Inc. v. Ariz. State Tax Comm'n*, 111 Ariz. 169, 171, 526 P.2d 708, 710 (1974). The vendor is responsible for paying the tax, for it is the vendor who is

³ The luxury privilege tax set forth in A.R.S. § 42-3052 applies to on-reservation tobacco sales by federally licensed Indian traders to non-tribal members. See *Dillon*, 170 Ariz. at 570, 826 P.2d at 1196. However, this tax does not apply to on-reservation sales from the tribe or tribal members to other tribal members. This is because state law is generally inapplicable when on-reservation conduct involving only tribal members is at issue. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (holding that state tax laws did not apply to business activity of non-Indian logging company conducted solely on reservation) (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-481 (1976)). In addition, the luxury tax does not apply to sales from non-tribal members to tribal members. See *Dillon*, 170 Ariz. at 567, 826 P.2d at 1193 (state taxation of federally licensed Indian traders is preempted only to the extent of their receipts from reservation sales to reservation Indians). And, because the tax is a vendor tax, it does not apply to on-reservation sales from tribes or tribal members to non-tribal members.

paying for the privilege of engaging in selling luxury items. *Id.* at 172, 526 P.2d at 711; Ariz. Att’y Gen. Op. I79-141.

In 1994, Proposition 200 was approved by the electorate, adding two new articles to Chapter 3 of Title 42.⁴ Article 6 imposes the Tobacco Tax for Health Care (currently set forth in A.R.S. §§ 42-3251 to 42-3253), and Article 7 imposes the Indian Reservation Tobacco Tax (currently set forth in A.R.S. §§ 42-3301 to 42-3306). Article 6 sets forth a new tax on several different types of tobacco (*see* A.R.S. § 42-3251) and directs that these monies be deposited into the tobacco tax and health care fund established by A.R.S. § 36-771. *See* A.R.S. § 42-3252. Article 7 applies this new tax to on-reservation tobacco sales pursuant to the particular rates set forth in A.R.S. § 42-3251, specifically incorporating that section by reference. *See* A.R.S. § 42-3302(A). Article 7 also provides that the revenue be deposited in the tobacco tax and health care fund established by A.R.S. § 36-771 and the tobacco products tax fund established by A.R.S. § 36-770. *See* A.R.S. § 42-3302(B).

In addition, Article 7 also lays out a luxury/excise tax setoff option for the tribes. If a tribe imposes its own tax on tobacco at a rate that is less than the state tax, then the tax is levied at a rate equal to the difference between the state tax rate and the tribal tax rate. *See* A.R.S. § 42-3302(C)(1). If a tribe imposes its own tax on tobacco at a rate that is equal to or greater than the state tax, then the tax rate is zero. *See* A.R.S. § 42-3302(C)(2). Article 7 also provides that “[t]he taxes levied pursuant to this article are conclusively presumed to be direct taxes on the consumer but shall be precollected and

⁴ The two articles were initially added as Article 1.2 (codified as A.R.S. §§ 42-1241 & 42-1242) and Article 1.3 (codified as A.R.S. §§ 42-1251 to 42-1257) of Title 42–The Taxation Code. The Taxation Code was reorganized by Laws 1997, Chapter 150. The reorganization resulted in the renumbering of much of the Code. Consequently, the articles added in 1994 as articles 1.2 and 1.3 of Chapter 7 are now situated at articles 6 and 7 of Chapter 3 of the Code.

remitted to the department by the distributor for purposes of convenience and facility only.” A.R.S. § 42-3303(A). Finally, A.R.S. § 42-3304 exempts the tax levied when taxes have already been paid under the Tobacco Tax For Health Care and when tobacco is sold by an Indian tribe or by a federally licensed Indian trader on a reservation to tribal members. Thus, the passage of Proposition 200 in 1994 established that the new tobacco tax would be applied to on-reservation sales from tribes or tribal members to non-tribal members.⁵

In 2002, the voters passed Proposition 303, which imposed another health care tobacco tax, embodied in new statute A.R.S. § 42-3251.01. Proposition 303 also amended the Indian Reservation Tobacco Tax in A.R.S. § 42-3302(A) to explicitly refer to newly added § 42-3251.01, as well as continuing to refer to § 42-3251.

Unlike the 1994 and 2002 propositions, Proposition 203 did *not* amend Article 7 to include a reference to the newly imposed tax in new statute A.R.S. § 42-3371, nor did it expressly incorporate any other provisions from Article 7, including the conclusive presumption that the legal incidence of the tax falls upon the consumer. A.R.S. § 42-3303(A). While Proposition 203 does include provisions specifically relating to the tribes’ participation in early childhood health and development programs, *see* A.R.S. § 8-1162(A)(9) & § 8-1164(D), it contains no language indicating whether or how the new tax in A.R.S. § 42-3371 is meant to apply to on-reservation tobacco sales. The fact that the drafters of Proposition 203 could have amended Article 7 to incorporate the tax

⁵ The Arizona Department of Revenue issued a luxury tax ruling following the adoption of the Indian Reservation Tobacco Tax. This ruling required licensed Indian traders to sell cigarettes with the same type of blue stamp used for sales off the reservation, as contrasted with sales by tribal members to non-tribal members that required a red stamp. Arizona Luxury Tax Ruling 94-1. The statutory administration of tobacco sales requires that distributors affix tax stamps to packages of cigarettes. *See* A.R.S. §§ 42-3202 to 42-3210; Arizona Luxury Tax Ruling 94-1.

embodied in A.R.S. § 42-3371 along with the other health care taxes applied to on-reservation sales from tribes or tribal members to non-tribal members, as was done in 2002, but did not do so indicates that the new tax was not meant to apply to such sales.

Moreover, the Department has consistently applied the taxes set forth in the Indian Reservation Tobacco Tax in Article 7 of Title 42 to on-reservation tobacco sales from tribes or tribal members to non-tribal members. *See Arizona Luxury Tax Ruling 94-1*. The drafters of Proposition 203 and the electorate were presumably aware that the Department applied Article 7 as the vehicle for taxing such sales, yet did not incorporate the new tax into Article 7. *Cf. State ex rel. Ariz. Dep't of Revenue v. Short*, 192 Ariz. 322, 324-25, 965 P.2d 56, 58-59 (App. 1998) (noting that in construing statute legislature is presumed to know how administrative department interprets statutes it is responsible for administering).

A.R.S. § 42-3371 does state that the new tax “shall be collected by the Department in the manner provided by this chapter,” but this general language does not incorporate the new tax into the Indian Reservation Tobacco Tax in Article 7. First, doing so would mean assuming that the drafters chose this general language as a means of incorporation instead of specifically incorporating the new tax by reference, as the drafters of the previous 1994 and 2002 propositions did. Given that these previous propositions affirmatively amended Article 7 to include the tobacco taxes in on-reservation transactions, this assumption is unlikely to be correct. Second, Article 7 cannot be applied to A.R.S. § 42-3371 without rewriting the language of the statutes in Article 7. For example, A.R.S. § 42-3302 is specifically tied to the tax rates in A.R.S. §§ 42-3251 and 42-3251.01. A.R.S. § 42-3302 makes no reference whatsoever to new

A.R.S. § 42-3371. Third, Chapter 3 of Title 42 also includes a luxury privilege tax that is *not* levied in on-reservation sales from tribes or tribal members to non-tribal members. *See* A.R.S. § 42-3052. Because Chapter 3 contains both tobacco taxes that are levied in on-reservation sales and are not levied in on-reservation sales, one cannot logically draw the conclusion that the language “in the manner provided by this chapter” indicates a clear intention to apply the new tax to on-reservation sales through Article 7. In addition, there are many provisions in Chapter 3 necessary for administering the tobacco tax collection process. There is no indication that the general direction to levy and collect in the manner of the chapter was intended to be more than a general direction to the Department to use its normal procedures of providing stamps to be affixed to packages of cigarettes by distributors. *See* Title 42, Chapter 3, Article 1 (General Administration), Article 4 (Enforcement) and Article 5 (Cigarettes, Cigars and Tobacco Products).

Furthermore, the state can only tax on-reservation sales from tribes or tribal members to non-tribal members if the legal incidence of the tax falls upon the non-tribal consumer. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (state could require Indian tribe to collect cigarette taxes from non-Indian purchasers on reservation and remit to state only if legal incidence of tax was on non-Indian purchasers). In *Chemehuevi Indian Tribe*, the United States Supreme Court held that California could indeed require tribes to collect taxes on cigarettes sold by the tribe to non-tribal members. 474 U.S. at 12. However, the Court arrived at this conclusion because, in reading the California cigarette tax scheme as a whole, it was evident that the legal incidence of the tax fell on the consuming purchaser. *Id.* at 11-12.

Here, there is nothing in the Arizona tax scheme that would imply that the legal incidence of the tax imposed by new A.R.S. § 42-3251.02 is on the consumer. On the contrary, Proposition 203 failed to amend the Indian Reservation Tobacco Tax in Article 7 to apply the same presumptive conclusion that the legal incidence of the tax was on the consumer that Article 7 applies to A.R.S. §§ 42-3251 and 42-3251.01. *See* A.R.S. § 42-3303(A) (“The taxes levied pursuant to this article are conclusively presumed to be direct taxes on the consumer.”). Once again, the drafters of Proposition 203 could have easily incorporated the presumption contained in A.R.S. § 42-3303, but did not do so.

The Arizona Supreme Court has held that the words of a statute “will be read to gain their fair meaning, but not to gather new objects of taxation by strained construction or implication.” *Ariz. State Tax Comm’n v. Staggs Realty Corp.*, 85 Ariz. 294, 297, 337 P.2d 281, 283 (1959). In interpreting revenue statutes, the courts liberally construe statutes imposing taxes in favor of taxpayers and against the government. *State ex rel. Ariz. Dep’t of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, 88 P.3d 159, 162 (2004); *see also Energy Squared, Inc. v. Ariz. Dep’t of Revenue*, 203 Ariz. 507, 510, 56 P.3d 686, 689 (App. 2002) (“Uncertainty about the scope and meaning of a taxing provision is to be resolved in favor of the taxpayer and against the taxing authority.”). Given that Proposition 203 fails to amend Article 7 of Title 42 to include new statute A.R.S. § 42-3371 in the Indian Reservation Tobacco Tax or otherwise include a provision stating that the legal incidence of the new tax is conclusively presumed to be on the consumer, the tax embodied in A.R.S. § 42-3371 cannot be interpreted to apply to on-reservation sales from tribes or tribal members to non-tribal members.

Regarding the application of the tax to on-reservation sales from non-tribal sellers to non-tribal purchasers, this Office finds that the tax is applicable to such sales. In *State ex rel. Arizona Department of Revenue v. Dillon*, a federally licensed Indian trader argued that he was not liable for the taxes on cigarettes he sold to non-tribal members on the reservation because his business was federally regulated and states were therefore preempted by federal law from imposing a state tax on reservation purchases. 170 Ariz. at 566, 826 P.2d at 1192; *see also* 25 U.S.C. §§ 261-264 (federal statutes requiring non-tribal members engaging in trade with tribal members on the reservation to be federally licensed traders and governing business practices). The court held that federal law did not preempt the state from imposing the tax, because “[s]tate jurisdiction over activities on Indian reservations is preempted by federal law only if it interferes or is incompatible with federal and tribal interests reflected in federal law.” *Id.*, at 566, 826 P.2d at 1192. Federal law regulates the practice of licensed Indian traders, but, the Court said, since Dillon’s sale of cigarettes to non-tribal members was not part of his federally regulated Indian trading, there was no federal policy disturbed by Arizona’s taxation of Dillon’s cigarette sales to non-Indians. *See id.*

Finally, because Proposition 203 does not incorporate Article 7 of Title 42 to include the new tax, the provision in A.R.S. § 42-3303 stating that the taxes in Article 7 are direct taxes on the consumer, but are precollected and remitted to the Department is inapplicable. Likewise, regarding the luxury-excise tax setoff, the only provision for such a setoff is set forth in the Indian Reservation Tobacco Tax in Article 7. *See* A.R.S. § 42-3303(C). Given that Proposition 203 does not amend Article 7 to incorporate the

new tax set forth in A.R.S. § 42-32371, the luxury/excise tax setoff in Article 7 does not apply either.

Conclusion

The new tobacco tax established by Proposition 203 applies to on-reservation sales from non-tribal members to non-tribal members. The new tax does not apply to on-reservation tobacco sales from tribes or tribal members to non-tribal members. Because Proposition 203 does not amend the Indian Reservation Tobacco Tax in Article 7 to incorporate or reference new statute A.R.S. § 42-3371, the new tax is not subject to the luxury/excise tax setoff established by A.R.S. § 42-3302(C) or the provision in A.R.S. § 42-3303 providing that the tax is a direct tax on the consumer.

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Attorney General

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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 22, 2006</p>	<p>No. I06-007 (R06-033)</p> <p>Re: The Application of Proposition 201, Smoke-Free Arizona Act, to Taxation of On- Reservation Tobacco Sales</p>
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To: Gale Garriott
Director, Arizona Department of Revenue

Questions Presented

You have requested a formal opinion answering the following questions concerning the application of Proposition 201, more commonly known as the “Smoke-Free Arizona Act,” passed by the electorate at the general election held November 7, 2006:

Will the Tobacco Tax for Smoke-Free Arizona levied under new section A.R.S. § 42-3251.02 apply to on-reservation sales of tobacco products? If so:

- 1) Would the tax apply only to purchasers other than enrolled members of the tribe and under circumstances in which such sales are not otherwise exempt from the current Indian Reservation Tax under A.R.S. § 42-3304?

2) Would the tax be levied as a direct tax on the consumer that is precollected and remitted by the distributor, as the current Indian Reservation Tobacco Tax is pursuant to A.R.S. § 42-3303, or would it be levied under a different theory of taxation?

3) Would the tax be offset by a luxury/excise tax imposed by the tribe that is equal to or greater than the tax?

Summary Answer

The tobacco tax implemented and levied under the Smoke-Free Arizona Act and new section A.R.S. § 42-3251.02 does not apply to on-reservation sales of tobacco products by tribes or tribal members¹ to non-tribal members. The tax does apply to on-reservation sales of tobacco products by federally licensed Indian traders or other non-tribal members to non-tribal members. Because Proposition 201 does not incorporate the provisions of Title 42, Chapter 3, Article 7 (A.R.S. §§ 42-3301 to 42-3306), neither the “direct tax on consumers” provision nor the luxury/excise tax setoff applies to the new tax.

Background

Arizona voters approved Proposition 201 in the 2006 general election. The measure establishes the following: (1) a ban on smoking in all public places and places of employment within the State of Arizona with some enumerated exceptions; (2) the imposition of an additional tax of one-tenth of one cent on each cigarette sold; and (3) the Smoke-Free Arizona Fund for the deposit of all revenues collected from the additional tax and to be used to enforce the smoking ban. Ariz. Sec’y of State, *Ballot Propositions*

¹ For purposes of this Opinion, the term “tribal member” denotes an enrolled member of the tribe for the benefit of which the reservation on which the transaction in question takes place was established. Thus, a “non-tribal member” would include someone who is a member of a tribe established on a reservation other than the one on which the transaction at issue takes place, as well as someone who is not a member of any tribe.

and Judicial Performance Review for the Gen. Election of Nov. 7, 2006 (“Publicity Pamphlet”) at 87-90. Any money remaining in the Smoke-Free Arizona Fund after the Department of Health Services meets its enforcement obligations are to be deposited in the Tobacco Products Fund and to be used for education programs to reduce and eliminate tobacco use. Publicity Pamphlet at 90.

Section 4 of Proposition 201 establishes the smoking ban and the Smoke-Free Arizona fund through the addition of new statute A.R.S. § 36-601.01. Subsection N of A.R.S. § 36-601.01 states that “[t]his section [A.R.S. § 36-601.01] has no application on Indian reservations as defined in A.R.S. § 42-3301(2).”

Section 5 of the Proposition 201 establishes the additional cigarette tax through the addition of new statute A.R.S. § 42-3251.02:

A.R.S. § 42-3251.02. Levy and Collection of Tobacco Tax for Smoke-Free Arizona Fund.

A. In addition to the taxes imposed by 42-3251(1), there is levied and shall be collected an additional tax of one tenth of one cent on each cigarette.

B. Monies collected pursuant to this section shall be deposited, pursuant to §§ 35-146 and 35-147, in the Smoke-Free Arizona Fund established by § 36-601.01.

Your question concerns the application of these new statutes to on-reservation sales of tobacco.

Analysis

State taxation of tobacco sales on Indian reservations has a long and circuitous history in the courts. Ultimately, courts have applied a flexible approach under which state tax laws apply to on-reservation transactions involving non-members of an Indian tribe unless authority to do so would be preempted by federal law or would interfere or is

incompatible with federal and tribal interests reflected in federal law. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *State ex rel. Ariz. Dep't of Revenue v. Dillon*, 170 Ariz. 560, 566, 826 P.2d 1186, 1192 (App. 1991).

Prior to 1994, there was no specific methodology in the Arizona statutes to tax on-reservation sales of tobacco. At that time, the only excise tax on tobacco in Arizona was a luxury privilege tax on tobacco. See A.R.S. § 42-3052. This tax, which is still in effect, is an excise tax on the privilege of selling certain luxury items to consumers.² *Watkins Cigarette Serv., Inc. v. Ariz. State Tax Comm'n*, 111 Ariz. 169, 171, 526 P.2d 708, 710 (1974). The vendor is responsible for paying the tax, for it is the vendor who is paying for the privilege of engaging in selling luxury items. *Id.* at 172, 526 P.2d at 711; Ariz. Att'y Gen. Op. I79-141.

In 1994, Proposition 200 was approved by the electorate, adding two new articles to Chapter 3 of Title 42.³ Article 6 imposes the Tobacco Tax for Health Care (currently set forth in A.R.S. §§ 42-3251 to 42-3253), and Article 7 imposes the Indian Reservation Tobacco Tax (currently set forth in A.R.S. §§ 42-3301 to 42-3306). Article 6 sets forth a new tax on several different types of tobacco (see A.R.S. § 42-3251) and directs that

² The luxury privilege tax set forth in A.R.S. § 42-3052 applies to on-reservation tobacco sales by federally licensed Indian traders to non-tribal members. See *Dillon*, 170 Ariz. at 570, 826 P.2d at 1196. However, this tax does not apply to on-reservation sales from the tribe or tribal members to other tribal members. This is because state law is generally inapplicable when on-reservation conduct involving only tribal members is at issue. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (holding that state tax laws did not apply to business activity of non-Indian logging company conducted solely on reservation) (citing *Moe v. The Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-481 (1976)). In addition, the luxury tax does not apply to sales from non-tribal members to tribal members. See *Dillon*, 170 Ariz. at 567, 826 P.2d at 1193 (state taxation of federally licensed Indian traders is preempted only to the extent of their receipts from reservation sales to reservation Indians). And, because the tax is a vendor tax, it does not apply to on-reservation sales from tribes or tribal members to non-tribal members.

³ The two articles were initially added as Article 1.2 (codified as A.R.S. §§ 42-1241 & 42-1242) and Article 1.3 (codified as A.R.S. §§ 42-1251 to 42-1257) of Title 42—The Taxation Code. The Taxation Code was reorganized by Laws 1997, Chapter 150. The reorganization resulted in the renumbering of much of the Code. Consequently, the articles added in 1994 as articles 1.2 and 1.3 of Chapter 7 are now situated at articles 6 and 7 of Chapter 3 of the Code.

these monies be deposited into the tobacco tax and health care fund established by A.R.S. § 36-771. *See* A.R.S. § 42-3252. Article 7 applies this new tax to on-reservation tobacco sales pursuant to the particular rates set forth in A.R.S. § 42-3251, specifically incorporating that section by reference. *See* A.R.S. § 42-3302(A). Article 7 also provides that the revenue be deposited in the tobacco tax and health care fund established by A.R.S. § 36-771 and the tobacco products tax fund established by A.R.S. § 36-770. *See* A.R.S. § 42-3302(B).

In addition, Article 7 lays out a luxury/excise tax setoff option for the tribes. If a tribe imposes its own tax on tobacco at a rate that is less than the state tax, then the tax is levied at a rate equal to the difference between the state tax rate and the tribal tax rate. *See* A.R.S. § 42-3302(C)(1). If a tribe imposes its own tax on tobacco at a rate that is equal to or greater than the state tax, then the tax rate is zero. *See* A.R.S. § 42-3302(C)(2). Article 7 also provides that “[t]he taxes levied pursuant to this article are conclusively presumed to be direct taxes on the consumer but shall be precollected and remitted to the department by the distributor for purposes of convenience and facility only.” A.R.S. § 42-3303(A). Finally, A.R.S. § 42-3304 exempts the tax levied when taxes have already been paid under the Tobacco Tax For Health Care and when tobacco is sold by an Indian tribe or by a federally licensed Indian trader on a reservation to tribal members. Thus, Proposition 200 in 1994 established that the new tobacco tax would be applied to on-reservation sales from tribes or tribal members to non-tribal members.⁴

⁴ The Arizona Department of Revenue issued a luxury tax ruling following the adoption of the Indian Reservation Tobacco Tax. This ruling required licensed Indian traders to sell cigarettes with the same type of blue stamp used for sales off the reservation, as contrasted with sales by tribal members to non-tribal members that required a red stamp. Arizona Luxury Tax Ruling 94-1. The statutory administration of tobacco sales requires that distributors affix tax stamps to packages of cigarettes. *See* A.R.S. §§ 42-3202 to 42-3210; Arizona Luxury Tax Ruling 94-1.

In 2002, the voters passed Proposition 303, which imposed another health care tobacco tax, embodied in new statute A.R.S. § 42-3251.01. Proposition 303 also amended the Indian Reservation Tobacco Tax in A.R.S. § 42-3302(A) to explicitly refer to newly added § 42-3251.01, as well as continuing to refer to § 42-3251.

In addition to adding new § 36-601.01 which establishes the ban on smoking and the Smoke-Free Arizona Fund, Proposition 201 also adds new statute § 42-3251.02, which is a new tobacco tax under Article 6, Tobacco Tax for Health Care; it joins the two taxes previously mentioned, passed in 1994 and 2002 and encoded at A.R.S. §§ 42-3251 and 42-3251.01. However, Proposition 201, unlike the propositions in 1994 and 2002, does not amend the Indian Reservation Tobacco Tax in Article 7. A.R.S. § 42-3302 continues to refer only to the previously enacted health care tobacco taxes in A.R.S. §§ 42-3251 and 42-3251.01. Article 7 cannot be applied to A.R.S. § 42-3251.02 without rewriting the language of the statutes therein. Consequently, the tax imposed by Proposition 201 does not apply to on-reservation sales through the operation of Article 7 and the Indian Reservation Tobacco Tax. The question becomes, can the new tax be otherwise imposed upon on-reservation sales from tribes or tribal members to non-tribal members?

Whether the state can tax on-reservation sales from tribes or tribal members to non-tribal members depends upon whom the legal incidence of the tax falls. In *California State Board of Equalization v. Chemehuevi Indian Tribe*, the United States Supreme Court held that California could indeed require tribes to collect taxes on cigarettes sold by the tribe to non-tribal members. 474 U.S. 9, 12 (1985). The Court arrived at this conclusion because, in reading the California cigarette tax scheme as a

whole, it was evident that the legal incidence of the tax fell on the consuming purchaser. *Id.* at 11-12.

Here, however, there is nothing in the Arizona tax scheme that would imply that the legal incidence of the tax imposed by new A.R.S. § 42-3251.02 is on the consumer. On the contrary, Proposition 201 failed to amend the Indian Reservation Tobacco Tax in Article 7 to reflect the inclusion of this new tax, or to apply the same presumptive conclusion that the legal incidence of the tax was on the consumer that Article 7 applies to A.R.S. §§ 42-3251 and 42-3251.01. *See* A.R.S. § 42-3303(A) (“The taxes levied pursuant to this article are conclusively presumed to be direct taxes on the consumer.”). The Arizona Supreme Court has held that the words of a statute “will be read to gain their fair meaning, but not to gather new objects of taxation by strained construction or implication.” *Ariz. State Tax Comm’n v. Staggs Realty Corp.*, 85 Ariz. 294, 297, 337 P.2d 281, 283 (1959). In interpreting revenue statutes, the courts liberally construe statutes imposing taxes in favor of taxpayers and against the government. *State ex rel. Ariz. Dep’t of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, 88 P.3d 159, 162 (2004); *see also Energy Squared, Inc. v. Ariz. Dep’t of Revenue*, 203 Ariz. 507, 510, 56 P.3d 686, 689 (App. 2002) (“Uncertainty about the scope and meaning of a taxing provision is to be resolved in favor of the taxpayer and against the taxing authority.”). That the drafters of Proposition 201 could have applied a similar presumption but did not indicates that no such presumption was meant to apply. And, if the legal incidence of the tax does not fall on the non-tribal member consumer, it cannot be applied to on-reservation sales from tribes or tribal members to non-tribal members.

Regarding the application of the new tax to on-reservation sales from non-tribal sellers to non-tribal purchasers, this Office finds that the tax is applicable to such sales. In *State ex rel. Arizona Department of Revenue v. Dillon*, a federally licensed Indian trader argued that he was not liable for the taxes on cigarettes he sold to non-tribal members on the reservation because his business was federally regulated and states were therefore preempted by federal law from imposing a state tax on reservation purchases. 170 Ariz. at 566, 826 P.2d at 1192; *see also* 25 U.S.C. §§ 261-264 (federal statutes requiring non-tribal members engaging in trade with tribal members on the reservation to be federally licensed traders and governing business practices). The court held that federal law did not preempt the state from imposing the tax, because “[s]tate jurisdiction over activities on Indian reservations is preempted by federal law only if it interferes or is incompatible with federal and tribal interests reflected in federal law.” *Id.*, at 566, 826 P.2d at 1192. Federal law regulates the practice of licensed Indian traders, but, the Court said, since Dillon’s sale of cigarettes to non-tribal members was not part of his federally regulated Indian trading, there was no federal policy disturbed by Arizona’s taxation of Dillon’s cigarette sales to non-Indians. *See id.*

Finally, because Proposition 201 does not incorporate Article 7 of Title 42 to include the new tax, the provision in A.R.S. § 42-3303 stating that the taxes in Article 7 are direct taxes on the consumer, but are precollected and remitted to the Department is inapplicable. Likewise, regarding the luxury-excise tax setoff, the only provision for such a setoff is set forth in the Indian Reservation Tobacco Tax in Article 7. *See* A.R.S. § 42-3302(C). Given that Proposition 201 does not amend Article 7 to incorporate the new

tax set forth in A.R.S. § 42-3251.02, the luxury/excise tax setoff in Article 7 does not apply either.

Conclusion

The new tobacco tax established by Proposition 201 applies to on-reservation sales from non-tribal members to non-tribal members. The new tax does not apply to on-reservation tobacco sales from tribes or tribal members to non-tribal members. Because Proposition 201 does not amend the Indian Reservation Tobacco Tax in Article 7 to incorporate or reference new statute A.R.S. § 42-3251.02, the new tax is not subject to the luxury/excise tax setoff established by A.R.S. § 42-3302(C) or the provision in A.R.S. § 42-3303 providing that the tax is a direct tax on the consumer.

Terry Goddard
Attorney General

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 1, 2006</p>	<p>No. I06-006 (R06-034)</p> <p>Re: Proposition 203 Increase in State Tax on Cigarettes</p>
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To: Director Gale Garriott
Department of Revenue

Questions Presented

Arizona voters approved Proposition 203 in the 2006 general election. You have asked whether the effective tax increase on cigarettes under Proposition 203 will be 4 cents per cigarette as provided in the text of the proposed amendment (80 cents per pack of 20 cigarettes), or .80 cents per pack of cigarettes as stated in the descriptive title of the Proposition shown on the ballot format.¹

Summary Answer

Because the text of A.R.S. § 42-3371, as added by Proposition 203, states unambiguously that the amount of the new tax is 4 cents per cigarette, the tax levied under A.R.S. § 42-3371 is 4 cents per cigarette. The unambiguous statutory language is not altered by the misprint in the ballot description.

¹ Your November 9, 2006, letter also requests an opinion in relation to the application of Proposition 203 to sales of tobacco products on Indian reservations. This Office will address those questions in a separate opinion.

Background

A. Arizona's Initiative Process.

The Arizona Constitution reserves to the people the power to propose laws and constitutional amendments for placement on the ballot through the submission of petitions signed by a certain percentage of qualified electors. Ariz. Const. art. IV, pt. 1, § 1(2) & (4). Each sheet containing petitioners' signatures must be attached to a full and correct copy of the text of the proposed measure. Ariz. Const. art. IV, pt. 1, § 1(9). Before circulating an initiative petition, the person or organization proposing the law must file with the Secretary of State an application that includes the full text of the proposed law. A.R.S. § 19-111(A). If the requisite number of petition signatures is submitted, the Secretary of State prints a publicity pamphlet that contains the following: (1) a true copy of the text of the measure; (2) the form in which the measure will appear on the ballot; (3) the arguments for and against the measure; (4) an impartial analysis of the measure; and (5) a fiscal impact statement. A.R.S. § 19-123(A). The publicity pamphlet is sent to every household that has a registered voter. A.R.S. § 19-123(B).

B. Proposition 203.

At the 2006 general election, voters approved Proposition 203, which will take effect upon proclamation of the Governor, Ariz. Const. art. IV, pt. 1, § 1(5). The Proposition provides dedicated funding for early childhood development and health programs and establishes a statewide structure to coordinate these programs. It establishes an early childhood development health care board and fund along with regional partnership councils throughout the state to identify childhood development and health services needs at the local level and provides for distribution of monies and grants to eligible programs serving pre-kindergarten-age children.

Under the Proposition, an increase in the tax on tobacco products provides the new funding for these programs. In addition to creating new statutes governing early childhood development and health programs, Proposition 203 amends Title 42 of the Arizona Revised Statutes to add new statute A.R.S. § 42-3371, which provides the following:

In addition to all other taxes, there is levied and shall be collected by the department in the manner provided by this chapter, on all cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco the following tax:

1. *On each cigarette, four cents.*
2. On smoking tobacco, snuff, fine cut chewing tobacco, and refuse, scrubs, clippings, cuttings and sweepings of tobacco, excluding tobacco powder or tobacco products used exclusively for agricultural or horticultural purposes and unfit for human consumption, 9 cents per ounce or major fraction of an ounce.
3. On all cavendish, plug or twist tobacco, 2.2 cents per ounce or fractional part of an ounce.
4. On each twenty small cigars or fractional part weighing not more than three pounds per thousand, 17.8 cents.
5. On cigars of all descriptions except those included in paragraph 4, made of tobacco or any tobacco substitute:
 - (A) If manufactured to retail at not more than five cents each, 8.8 cents on each three cigars.
 - (B) If manufactured to retail at more than five cents each, 8.8 cents on each cigar.

A.R.S. § 42-3371 (as added by Proposition 203)² (emphasis added). The taxes collected under A.R.S. § 42-3371 are to be deposited in the early childhood development and education fund. A.R.S. § 42-3372 (as added by Proposition 203).

² Ariz. Sec’y of State, *Ballot Propositions and Judicial Performance Review for the Gen. Election of Nov. 7, 2006* (“Publicity Pamphlet”) at 122.

When an initiative is placed on the ballot for voter approval, it must be accompanied by a description that states the essential change in existing law that will occur in the case of either a vote for or against the proposed measure. A.R.S. § 19-125(D). In the case of Proposition 203, the 2006 general election ballot stated the following:

A “yes” vote shall have the effect of [1] establishing an early childhood development health care board and fund, [2] increasing the state tax on cigarettes (.80 cents/pack), cigars and other tobacco products, [3] establishing regional partnership councils throughout the state to identify childhood development and health services needs at the local level and [4] distributing monies and grants to eligible programs that serve children up to five years of age and their families.

This same ballot language also appeared on page 132 of the Publicity Pamphlet. The ballot description states that the measure, if passed, would increase state taxes on tobacco products, and as an aside in parentheses, it further describes the cigarette increase as an “.80 cents/pack” increase. This is incorrect. The correct way to describe the per-pack increase would have been either 80 cents or \$.80. William A. Sabin, *The Gregg Reference Manual: A Manual of Style, Grammar, Usage and Formatting* ¶ 418 at 128 (10th ed. 2005). The language on the ballot conflates the two forms of addressing U.S. currency within a written document.³

Your question concerns the correct amount of the tax imposed by Proposition 203, in light of the misprint that describes the tax as “.80 cents/pack” rather than 80 cents per pack of 20 cigarettes.

³ If the language had intended only a fraction of a cent, it would have been written “0.8 cent/pack” or “eight-tenths cent/pack.” In contrast, the language on the ballot had a zero after the eight, which is consistent with writing out the correct form of \$.80 when writing it in integer form accompanied by a dollar sign. The ballot language also added an “s” at the end of the word “cent” suggesting that it was not an increase of merely a fraction of a cent, but an increase of several “cents” per pack. In short, the ballot description was erroneous.

Analysis

When the voters pass an initiative, the text of the measure becomes law. A.R.S. § 19-127(B) (“The secretary of state shall cause every measure . . . submitted under the initiative and approved by the people to be printed with the general laws enacted by the next ensuing session of the legislature.”). If the language of an initiative is clear and unambiguous, its plain language controls. *State v. Gomez*, 212 Ariz. 55, 57, ¶ 11, 127 P.3d 873, 875 (2006) (noting rule that if initiative’s language is unambiguous, then it is construed by applying the language without further resort to rules of statutory construction). Here, the language in the proposed amendment is clear, unambiguous, and capable only of one reasonable interpretation—namely, that A.R.S. § 42-3371, as added by Proposition 203, imposes an additional state tax of four cents per cigarette.

The tax would not be “.80 cents/pack,” because the ballot description is not enacted into law; it is merely a description of the proposed law, not the law itself. *See* A.R.S. § 19-125(D). As stated above, the text of Proposition 203 is clear; but, if the text were ambiguous, then the ballot description could be considered as one factor to be weighed in determining the intent of the electorate. *See Calik v. Kongable*, 195 Ariz. 496, 500, ¶ 16, 990 P.2d 1055, 1059 (1999) (noting that “‘context, subject matter, historical background, effects and consequences, and spirit and purpose’” of statutory language may be considered) (quoting *Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66, 977 P.2d 784, 788 (1999)). Because formal statements of intent are not usually recorded in connection with propositions, courts typically rely on related legislation, case law, publicity pamphlets, and voter guides to interpret ambiguous propositions. *Id.*, ¶ 17. Here, however, even if the language of Proposition 203 could be said to be ambiguous, a review of the context of its passage and the contents of the publicity pamphlet, as well as the language of the

ballot description, indicate that Proposition 203 cannot be construed to mean anything other than four cents per cigarette. The text of Proposition 203 was included in the Publicity Pamphlet, sent to every household with a registered voter in Arizona, and the proposed amendment stated that it would impose a tax of 4 cents on each cigarette. Publicity Pamphlet at 122. The impartial analysis by Legislative Council, the fiscal impact statement prepared by the Joint Legislative Budget committee, and multiple arguments “for” and “against” Proposition 203 included in the Publicity Pamphlet correctly referred to the tax increase. Publicity Pamphlet at 123, 128, 130-31. The ballot description with the “.80 cents/pack” language also appeared in the Publicity Pamphlet. Publicity Pamphlet at 132. Thus, every reference to the proposed cigarette tax in the Publicity Pamphlet, save one, was correct. It should also be noted that the purpose of a ballot description is “to direct the voters’ attention to the specific amendment so it will not be confused with other amendments on the ballot”; its purpose is not to “educate the voter.” *Hood v. State*, 24 Ariz. App. 457, 464, 539 P.2d 931, 938 (1975). Accordingly, even if the language in the ballot description were ambiguous, the context and circumstances surrounding the passage of Proposition 203 compel the conclusion that it imposes a four-cents per cigarette tax.

Conclusion

The text of Proposition 203, as submitted to the Secretary of State and set forth in the Publicity Pamphlet, clearly and unambiguously mandates a four-cent per cigarette tax increase. Therefore, the effective increase in state taxes on cigarettes under Proposition 203 is four cents per cigarette.

Terry Goddard
Attorney General

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>November 15, 2006</p>	<p>No. I06-005 (R06-009)</p> <p>Re: County Fire Code Authority</p>
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To: Kirk Rowdabaugh
State Forester

Questions Presented

You have requested a formal opinion answering the following questions regarding counties' enforcement of adopted fire codes and their interaction with Declarations of Covenants, Conditions, and Restrictions ("CC&Rs"):

1. Do counties have the authority to enforce wildland-urban interface fire codes?
2. Do State or county fire codes supersede CC&Rs?
3. Are county fire codes automatically incorporated into CC&Rs?
4. Regardless of whether it has a conflicting fire code, does a county ever have authority to enforce a CC&R?

Summary Answers

1. Counties have the authority to enforce wildland-urban interface fire codes.
2. State or county fire codes supersede CC&Rs when fire code provisions directly conflict with CC&R provisions. When a fire code provision and a CC&R provision are not in

direct conflict, but rather, are both restrictive, the provision that contains the more stringent restriction will control and will establish the permitted use.

3. Existing law at the time of enactment of CC&Rs, including fire codes, is incorporated into such agreements. However, newly-enacted fire codes are not retroactively incorporated into existing CC&Rs.

4. In general, counties do not have the authority to enforce CC&Rs.

Background

In 1970, the Arizona Legislature enacted A.R.S. § 11-861(A), which states in part: “In any county which has adopted zoning pursuant to this chapter, the board of supervisors *may adopt and enforce*, for the unincorporated areas of the county so zoned, a building code” A.R.S. § 11-861(A) (emphasis added); 1970 Ariz. Sess. Laws ch. 177, § 2. In 1996, the Legislature added that the “board of supervisors *may adopt* a fire prevention code in the unincorporated areas of the county in which a fire district has not adopted the uniform fire code pursuant to section 48-805. . . .” A.R.S. § 11-861(B) (emphasis added); 1996 Ariz. Sess. Laws ch. 113, § 1. In 2004, the Legislature added further that the “board of supervisors *may adopt* a current wildland-urban interface code. . . .” A.R.S. § 11-861(D) (emphasis added); 2004 Ariz. Sess. Laws ch. 326, § 3.

CC&Rs are private, restrictive covenants or servitudes running with the land. *See Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006). CC&Rs govern and restrict the use of land within a given community and constitute “a contract between the subdivision’s property owners as a whole and the individual lot owners.” *Ariz. Biltmore Estates Ass’n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993).

Analysis

A. Counties Have Authority to Enforce Wildland-Urban Interface Codes.

Although A.R.S. § 11-861(D) itself does not specifically state that a county may enforce an adopted wildland-urban interface fire code, A.R.S. § 11-863(B) establishes that a county may do so: “The board may adopt necessary rules and regulations for the enforcement of any code adopted under this article [A.R.S. §§ 11-861 to 11-866]” Furthermore, the “penalty provisions of § 11-808 may be applied by the county in enforcing the provisions of this article.” A.R.S. § 11-866. Thus, counties have authority to enforce wildland-urban interface codes through the imposition of statutory penalties.

B. State/County Fire Codes Supersede CC&R Provisions.

In general, when a contract is incompatible with a statute, the statute will control. *Higginbottom v. State*, 203 Ariz. 139, 142, ¶ 11, 51 P.3d 972, 975 (App. 2002). The exercise of police power to protect the public welfare, such as the enactment of fire codes, may supersede provisions in private contracts like CC&Rs if the government’s actions are reasonable and appropriate to the public purpose. *See Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 119, ¶ 101, 83 P.3d 573, 597 (App. 2004) (noting that state can impair contract obligations in exercise of its police power in order to protect important public interests). Accordingly, a fire code will render unenforceable a CC&R provision that permits a use or activity prohibited by the code or forbids a use or activity required by the code. *See* Restatement (Third) of Property: Servitudes § 3.1 cmt. c (2000) (“Although zoning regulations and servitudes are usually compatible in the sense that the more restrictive prevails, a servitude that authorizes a use prohibited by zoning is illegal or unenforceable to that extent.”);¹ *Dillon-Malik, Inc. v.*

¹ “In the absence of contrary precedent, Arizona courts look to the Restatement.” *Paxson v. Glovitz*, 203 Ariz. 63, 67, ¶ 21 & n.3, 50 P.3d 420, 424 & n.3 (App. 2002) (applying Restatement (Third) of Property: Servitudes).

Wactor, 151 Ariz. 452, 454, 728 P.2d 671, 673 (App. 1986) (lessee's obligation to comply with zoning ordinance does not violate lessor's obligations under implied covenant of quiet enjoyment); *Verna v. Links at Valleybrook Neighborhood Ass'n, Inc.*, 852 A.2d 202, 209 (N.J. Super. Ct. App. Div. 2004) (restrictive covenants cannot avoid obligations imposed by parking ordinance); *Fanning v. Grosfent*, 58 A.2d 366, 368 (App. Div. 1977) (municipal ordinance imposing fence requirements supersedes restrictive covenant). If both the fire code and the CC&R restrict a given use or activity, both provisions are enforceable; the more restrictive provision will ultimately establish the permitted use. *See, e.g., McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals*, 697 P.2d 69, 71-72 (Kan. App. 1985) (setback requirement in CC&R required removal of garage otherwise permitted under zoning variance obtained by property owner).

C. Fire Codes Existing at the Time of Enactment of the CC&R Are Incorporated Into its Provisions.

CC&Rs are construed to incorporate fire code provisions in effect prior to the enactment of the CC&R. "It has long been the rule in Arizona that a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract." *Higginbottom*, 203 Ariz. at 142, ¶ 11, 51 P.3d at 975 (citations omitted); *see also Friedman v. LeNoir*, 73 Ariz. 333, 337, 241 P.2d 779, 781 (1952) (terms of municipal building ordinance incorporated into lease agreement). However, a contract is only "to be construed in the light of the statute, of the law then in force." *Higginbottom*, 203 Ariz. at 142, ¶ 11, 51 P.3d at 975 (quoting *McCullough v. Commonwealth of Virginia*, 172 U.S. 102, 112 (1898)). Thus, while existing fire codes are incorporated into CC&Rs when those agreements are executed, newly-enacted fire codes are not retroactively incorporated into existing CC&Rs.

D. Counties Generally Cannot Enforce CC&Rs.

Only parties intended to benefit from an agreement have the right to enforce the agreement. *See Lacer v. Navajo County*, 141 Ariz. 396, 403, 687 P.2d 404, 411 (App. 1983) (citing Restatement (First) of Property § 542 (1944)); *see also* Restatement (Third) of Property: Servitudes § 8.1 (2000) (“A person who holds the benefit of a servitude ... has a legal right to enforce the servitude.”); *Singleterry v. City of Albuquerque*, 632 P.2d 345, 347-48 (N.M. 1981) (in contrast to zoning laws, restrictive covenants enforceable only by private parties—the grantors). Generally, counties are not parties or beneficiaries to CC&Rs.² The one generally accepted exception to the rule is where developers adopt restrictive covenants as a condition of subdivision or other zoning approval. Only then may a county enforce the covenants as part of its general zoning authority. *See Village of Los Ranchos de Albuquerque v. Shiveley*, 791 P.2d 466, 470-71 (N.M. Ct. App. 1990).

Conclusion

Counties have the authority to enforce adopted wildland-urban interface fire codes. The provisions of these and other fire codes supersede conflicting provisions in CC&Rs. CC&Rs incorporate the provisions of only those fire codes in effect when the CC&Rs were adopted. Counties generally cannot enforce the terms of CC&Rs.

Terry Goddard
Attorney General

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² A few jurisdictions outside Arizona have enacted statutes granting municipalities the power to enforce private restrictive covenants. *See, e.g.*, Tex. Local Gov’t Code Ann. §§ 212.131 to 212.136.

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL October 30, 2006	No. I06-004 (R06-008) Re: County Meet-and-Confer Ordinances
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To: The Honorable Phil Lopes
Arizona House of Representatives

Questions Presented

You have requested a formal opinion answering the following questions regarding the ability of a county board of supervisors to establish a formal meet-and-confer process by which the board would obtain advice on county personnel policies from county management and an authorized employee representative:

1. May a county ordinance allow county employees to elect an authorized employee representative and require the elected authorized employee representative and county management to meet in an effort to resolve differences, address working conditions and other issues of interest to employees, and present proposals to the board of supervisors for the board's possible action?
2. Must the process be purely advisory and not result in any collective bargaining agreement or binding contract such that where employees and county

management agreed on policy proposals, they submit the issues to the board of supervisors for action?

3. Can participation in this formal process be restricted to the elected authorized employee representative as long as the process allows individual employees to remain entirely free to communicate with county management outside that formal process?

Summary Answers

1. A county may enact a meet-and-confer¹ ordinance provided that the ordinance does not extend beyond the scope of the statutory mandate of county authority, and that the ordinance does not deprive the county of policy-making authority.

2. The meet-and-confer process must not result in any binding collective bargaining agreement or contract because such an agreement would be an unlawful delegation of legislative authority.

3. A county may restrict the formal meet-and-confer process to the elected authorized employee representative as long as individual county employees are allowed to communicate freely with county management and the board of supervisors on employment and personnel issues.

¹ The opinion's use of the term "meet and confer" accords with the definition expressed in *City of Phoenix v. Phoenix Employment Relations Board*, 145 Ariz. 92, 94-95, 699 P.2d 1323, 1325-26 (App. 1985). The term "meet and confer" in the realm of public employment denotes a process by which public employer and the authorized employee representative meet and confer in good faith with respect to certain topics, which may include wages, hours, and other terms of employment. *Id.* at 94, 699 P.2d at 1325. Although a memorandum of understanding may result from the process, no binding agreement may be the product of such negotiation; final decision-making authority is necessarily reserved to the public employer. *Id.* at 95, 699 P.2d at 1326.

Analysis

A. Validity of County Meet-and-Confer Ordinances.

A county may pass a meet-and-confer ordinance provided that the ordinance is drafted in a manner that does not extend beyond the scope of the statutory mandate of county authority and also does not deprive the county of policy-making authority.

County authority is necessarily limited. Counties are created by the Legislature to exercise part of the general governmental power in a specific location. *Marsoner v. Pima County*, 166 Ariz.195, 196, 801 P.2d 430, 431 (Ariz. App. 1990), *vacated on other grounds by Marsoner v. Pima County*, 166 Ariz. 486, 803 P.2d 897 (1991); *Maricopa County v. Black*, 19 Ariz. App. 239, 241, 506 P.2d 279, 281 (1973). The boards of supervisors of the various counties have only such powers as have been expressly or

by necessary implication, delegated to them by the state legislature. Implied powers do not exist independently of the grant of express powers and the only function of an implied power is to aid in carrying into effect a power expressly granted. Therefore, unless there has been an express grant of power by the legislature to the board to enact the ordinance here involved, it must be held to be invalid, regardless of whether the subject of said ordinance is of local or state-wide concern.

Associated Dairy Producers Co. v. Page, 68 Ariz. 393, 395-96, 206 P.2d 1041, 1043 (1949) (citations omitted); *see also Maricopa County v. Maricopa County Mun. Water Conservation Dist. No. 1*, 171 Ariz. 325, 328, 830 P.2d 846, 849 (App. 1991); *Shaffer v. Allt*, 25 Ariz. App. 565, 570, 545 P.2d 76, 81 (1976). A county “must act not only within the limits of the power granted it by the legislature, but must also comply with the statutory requirements prescribed by the Legislature.” *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420, 586 P. 2d 978, 981(1978).

In Ariz. Att’y Gen. Op. 74-11, this Office answered a question very similar to the one presented here. In that opinion, the question posed was whether a county could enter

into an agreement to meet and discuss wages, terms of employment, and working conditions with a public employee union. This Office determined that a county could enter into such an agreement. Ariz. Att’y Gen. Op. 74-11 at 6-7. The question at issue here asks if the county may enact an ordinance requiring such a meeting between county management and an authorized employee representative.

Given the analysis in Ariz. Att’y Gen. Op. 74-11 and the statutory grants of county authority to set wages, benefits, and terms of employment,² it follows that the county not only has the authority to engage in these types of discussions with employee unions, but also to require itself to do so through a meet-and-confer ordinance. A meet-and-confer ordinance is not prohibited by any statutory provision and does not extend beyond the scope of statutory grants of county power.

While courts construe implied authority narrowly, the specific articulations of county authority within Arizona statutes suggest that the county may create ordinances to mandate meet-and-confer arrangements with employee representatives. Because Title 11 explicitly grants the authority to implement plans for the compensation of county employees, it follows that a county should be able to create an ordinance that requires a particular plan. A meet-and-confer policy is not an exercise of a new power; it is a procedural device by which a local government entity chooses to exercise the power that it already possesses. *See City of Phoenix v. Phoenix Employment Relations Bd.*, 145

² The Legislature grants counties the authority to provide compensation for county employees. A.R.S. § 11-251(38). The Legislature also authorizes counties to provide for benefits for county employees and to provide for reimbursement to county employees who utilize public transportation to and from work. A.R.S. § 11-251(50), (51) & (53).

Ariz. 92, 97-98, 699 P.2d 1323, 1328-29 (Ariz. App. 1985) (noting ordinance was official procedure by which city determined policy decisions).

B. Binding Agreements Through Collective Bargaining.

In Ariz. Att’y Gen. Op. 74-11, this Office also considered whether public employees could use collective bargaining with the city in the same manner as do private or industrial employees. This Office concluded that public employees may organize and select representatives, but they do not have the authority to force a governmental agency to bargain with the representative through collective action. *Id.* at 6 (citing *Commc’ns Workers of Am. v. Ariz. Bd. of Regents*, 17 Ariz. App. 398, 401, 498 P.2d 472, 475 (1972)). Unlike private industry, the employer-employee relationship in public employment is governed by statutory law and administrative regulation, not by contract. *Id.* at 4 (citing *City of Los Angeles v. Los Angeles Bldg. and Constr. Trades Council*, 94 Cal.App.2d 36, 45, 210 P.2d 305, 310 (1949)); *see also Bd. of Educ. of the Scottsdale High Sch. Dist. No. 212 v. Scottsdale Educ. Ass’n*, 17 Ariz. App. 504, 511, 498 P.2d 578, 585 (1972), *vacated on other grounds by Bd. of Educ. of the Scottsdale High Sch. Dist. No. 212 v. Scottsdale Educ. Ass’n*, 109 Ariz. 342, 509 P.2d 612 (1973). Absent a statutory provision allowing for collective bargaining, a county cannot create an ordinance for anything beyond the scope of meeting and conferring with employee representatives for the purpose of obtaining information and advice in order to make ultimately unilateral decisions. Ariz. Att’y Gen. Op. 74-11 at 6.

C. Exclusivity of Meet-and-Confer Process.

As noted above, a county does not have the power to engage in collective bargaining resulting in binding agreements because its authority to set wages and

employment conditions is delegated to it by the Legislature, and this use of collective bargaining in public employment would constitute an unlawful delegation of legislative authority. The primary difference between collective bargaining in private employment and in public employment “is in the exclusiveness of the bargaining representative.” Ariz. Att’y Gen. Op. 74-11 at 2. A county may not regard the employee representative as the exclusive representative of the employees, nor can the meet-and-confer ordinance preclude other negotiations or agreements between county management and individual employees or representatives of other employee groups. *Id.*

The question here is whether the formal meet-and-confer process can be restricted to the authorized employee representative as long as individual employees or representatives of other employee groups remain free to communicate with county management on employment and personnel issues. Because it cannot result in binding agreements, the meet-and-confer process is merely a means to provide information to county management on employment and personnel issues and to aid in informed governmental decision-making. Whether the county gathers that information through the “formal” meet-and-confer process or it is received from individual employees or representatives of other employee groups outside of that process seems to make no legal difference, as long as the flow of information from other sources to county management is not impeded. Therefore, a county may restrict the formal meet-and-confer process to the elected authorized employee representative as long as individual employees or representatives of other employee groups are allowed to communicate freely with county management and the board of supervisors on employment and personnel issues.

Conclusion

A county has the authority to pass a meet-and-confer ordinance so long as such an ordinance does not go beyond the scope of the county's delegated powers and so long as the ordinance does not give up county policy-making authority. An ordinance that allows collective bargaining, as that term is used in private industry, is invalid because an exclusive bargaining agreement would be an unlawful delegation of legislative authority. Furthermore, a county's formal meet-and-confer process can only be limited an to authorized employee group representative on the specific condition that individual employees and representatives of other employee groups are allowed to communicate freely with county management and the board of supervisors on employment and personnel issues.

Terry Goddard
Attorney General

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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 6, 2006</p>	<p>No. I06-003 (R06-024)</p> <p>Re: Amending Contracts of Certain School Employees to Include Monies Appropriated for Increases in Compensation of those Employees</p>
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To: Donald Peters
Miller LaSota & Peters PLC

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253(B), you submitted for review an opinion you prepared for the Washington Elementary School District dated June 7, 2006, and an addendum to that opinion dated July 14, 2006. This Office concurs with your opinion that previously executed contracts between a school district or charter school (“district”) and district nonadministrative employees may be amended to reflect increases in salary and benefits as a result of the recent legislative appropriation of \$100 million without violating either Article IX, § 7 (the “Gift Clause”) or Article IV, part 2, § 17 (the “Extra Compensation Clause”) of the Arizona Constitution. We issue this Opinion to provide guidance to all Arizona school districts and charter schools concerning the issue because of its broad statewide applicability. *See* Ariz. Att’y Gen. Op. I04-009 (review may be granted when facts have broad statewide applicability).

Question Presented

Whether a school district or a charter school may amend a contract between the district and nonadministrative personnel to increase the salary and benefits of a school district's nonadministrative employees, including the district's teachers, which is funded by a special legislative appropriation specifically targeted for that purpose.

Relevant Factual Background

In June of 2006, the Arizona Legislature passed House Bill 2874 as part of the budget process for fiscal year 2006-07. 2006 Ariz. Sess. Laws, ch. 353. Section 27 of HB 2874 (the "Legislation") contains an appropriation in fiscal year 2006-2007 of \$100 million from the General Fund "to provide salary and benefit increases for school district and charter school nonadministrative personnel:"¹

Sec. 27. Appropriation; basic state aid; base level increase

A. The sum of \$100,000,000 is appropriated from the state general fund in fiscal year 2006-2007 to the department of education to fund the increase in the base level authorized in section 15-901, subsection B, paragraph 2, Arizona Revised Statutes, as amended by this act.

B. The funding appropriated in subsection A of this section shall be used to provide salary and benefit increases for school district and charter school nonadministrative personnel.

2006 Ariz. Sess. Laws ch. 353, § 27.

The Legislation was enacted after many districts had executed contracts with nonadministrative personnel for employment in the 2006-2007 fiscal year. For instance, Arizona school districts are required to enter into contracts with continuing certificated

¹ In this Opinion, the phrases "nonadministrative employee compensation increases" and "compensation increases for nonadministrative employees" mean "salary and benefit increases for school district and charter school nonadministrative personnel" as used in the Legislation.

teachers for the following school year between March 15 and May 15. A.R.S. §§ 15-536, -538.01. While charter schools are not required to enter into contracts with continuing teachers by any specific date, many charter schools had likely done so at the time the Legislation became law to ensure that the school was fully staffed for the following school year. In addition, because many districts enter into contracts with nonadministrative, non-certificated personnel well in advance of the upcoming school year, many of these contracts may have been executed before the Legislation was enacted.

The legal issues raised in your letter apply only to those contracts between the district and nonadministrative employee contracts that were executed before the Legislation was enacted. The constitutional issues addressed in your letter and this Opinion are not implicated by contracts executed after the Legislation's enactment because presumably those contracts incorporated the increases that the Legislation authorized.²

Analysis

I. The Gift Clause.

A change to a contract to increase compensation may violate the Gift Clause of the Arizona Constitution. The Gift Clause, however, does not proscribe the implementation of HB 2874 with regard to previously executed contracts.

The Gift Clause in article IX, § 7 of the Arizona Constitution states:

² Likewise, as addressed in your opinion, contracts that include an appropriate enforceable contingency clause to encompass increased funding may be amended in accordance with the contingency without implicating the constitutional issues addressed in this Opinion. *See* Ariz. Atty. Gen. Ops. I84-034 and I85-093.

Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

The Gift Clause is “intended to prevent government from depleting the public treasury by disbursing public funds for the private or personal benefit of private individuals, corporations, or associations.” *McClead v. Pima County*, 174 Ariz. 348, 358, 849 P.2d 1378, 1388 (App. 1992); *see also Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984). The Arizona Attorney General has previously concluded that the Gift Clause prohibits a school district from raising a teacher’s compensation beyond the amount that the teacher previously has contractually agreed to accept in exchange for the performance of the teacher’s duties. *See Ariz. Att’y. Gen. Ops.* I80-027, I83-065. “[I]f a district teacher agrees to perform his duties at the salary rate specified in his written contract, the district may not pay the teacher an additional amount for the same services. Payment for services which a teacher is already legally obligated to perform would constitute a gift in violation of” the Gift Clause. I83-065. These earlier opinions, however, did not address the ability to amend a contract to incorporate amounts subsequently appropriated by the Legislature for salary increases for certain personnel.

To comply with the Gift Clause, a transaction involving a distribution of public monies must be made for a public purpose and there must be consideration such that the value of the benefit received by the public is not “far exceeded by the consideration being paid by the public.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. “The reality of the

transaction both in terms of purpose and consideration must be considered.” *Id.* Thus, the determination of whether a particular transaction violates the Gift Clause is made on a case-by-case basis, applying the criteria outlined in Arizona case law to the facts of the particular transaction.

As the Arizona Court of Appeals observed, “[a] government expenditure satisfies the [Gift Clause] if made for a public purpose, which is a flexible concept.” *McClead*, 174 Ariz. at 358, 849 P.2d at 1388. Further, the Arizona Supreme Court has recognized that “[a] panoptic view of the facts of each transaction is required.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. When analyzing legislation, courts have presumed that the Legislature has acted for a public purpose. *McClead*, 174 Ariz. at 358-59, 849 P.2d at 1388-89.

For example, in *McClead*, the court rejected a taxpayer’s claim that increases to already contracted pension benefits violated the Gift Clause. In arguing that there was a public purpose to a pension benefit increase, the defendant cited the public purposes that might justify such increases to pensions, such as “satisfy[ing] the state's moral obligation to remedy the effect of inflation,” “serv[ing] as a recruiting inducement for prospective employees” and “motiv[at]ing current civil servants to remain” employed. *Id.* The court agreed, holding that the challenged increase served a public purpose.

The salary increases authorized by the Legislation undeniably serve an important public purpose. The Legislature is charged with enacting laws for the establishment and maintenance of a general and uniform public school system. Ariz. Const. art. XI, § 1. The Legislature can appropriately decide to grant compensation increases to teachers for the same reasons cited by the court in *McClead*. Increases in nonadministrative

employee compensation help ensure that Arizona schools will have high quality personnel by encouraging good teachers to stay within the State and by inducing qualified teachers from outside the State to teach in Arizona.

The second prong of the test--to determine whether a particular transaction violates the Gift Clause--requires an analysis of the consideration for the benefit conferred upon the private party (the nonadministrative district employee) as a result of the transaction. In order to comply with the Gift Clause, “[t]here must also be ‘consideration’ which is not ‘so inequitable and unreasonable that it amounts to an abuse of discretion,’ thus providing a subsidy to the private entity.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357 (internal citation omitted). “[I]n reviewing such questions, the courts must not be overly technical and must give appropriate deference to the finding of the governmental body.” *Id.*

Thus, under *Wistuber*, there must be a determination that the nonadministrative employee compensation increases would not be clearly disproportionate to the anticipated benefits to the State. The compensation increases that would result from this legislative appropriation, as we understand it, would probably range from a few hundred dollars to perhaps a thousand dollars per nonadministrative employee. Applying the *Wistuber* test, the nonadministrative employee compensation increases resulting from the Legislation are not clearly disproportionate to the substantial public benefit that is anticipated to result from the infusion of funding into Arizona’s public education system. Thus, the value to be received by the public under the Legislation is not exceeded by the consideration being paid by the public.

Under the narrow facts addressed in your opinion, a district would not violate the Gift Clause by amending previously executed contracts between the district and nonadministrative employees in light of the Legislation. Unlike factual situations addressed in previous opinions of this office, the raises arise from a special appropriation enacted for the explicit purpose of funding salary and benefit increases for district nonadministrative personnel. Here, the Legislation expressly requires a district to use the monies it receives for this precise purpose, and no other. Under these facts, a district may provide current fiscal year compensation increases to its nonadministrative employees pursuant to the legislative mandate in the Legislation without violating the Gift Clause.

II. The Extra Compensation Clause.

Amending contracts to incorporate the Legislation's pay increases also does not violate the Extra Compensation Clause in Article IV, part 2, § 17 of the Arizona Constitution. This clause states:

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer . . . be increased or diminished during his term of office

The first section of the Extra Compensation Clause, which prohibits the grant of extra compensation to public officers and employees under contract, was addressed in *Rochlin v. State*, 112 Ariz. 171, 540 P.2d 643 (1975) as a result of legislative changes to the benefits paid to Public Safety Personnel Retirement System ("PSPRS") members. The legislation at issue in *Rochlin* changed retirement benefits available to public employees, such that, in some cases, the number of years that an employee had to work to qualify for a specified retirement benefit was reduced. The plaintiffs argued that this

statutory change violated the Extra Compensation Clause because many public employees would immediately receive increased retirement benefits. The Arizona Supreme Court disagreed, holding that the challenged increases in pension benefits did not violate the Extra Compensation Clause because the increases served the important and constitutionally valid purpose of inducing public employees to remain in public service:

Prior service credit may have a tendency to increase the payments made to the teacher during the time he or she teaches, between the passage of the act and the time of retirement, but this does not contravene the constitutional provision. It may be considered in the nature of an inducement to have experienced teachers remain part of the public school system. If so construed, the act is still valid.

112 Ariz. at 178, 540 P.2d at 650 (citing *Gubler v. Utah State Teachers' Retirement Board*, 113 Utah 188, 192 P.2d 580 (1948)).

The court in *Rochlin* recognized that, as a result of the legislation at issue, public employees not previously eligible to retire could immediately become eligible to retire.

The court ruled, however, that such a result was not improper:

The 1971 amendment to the act allowed earlier retirement than that formerly provided, and it is argued that, as to those who took advantage of early retirement, the retirement benefits were a payment for past services because it was certainly not an inducement for their continued service. With respect to such employees the payment was not for past services. The act had a dual purpose: to . . . induce younger experienced officers to remain in service and to induce older officers to retire to provide opportunity for replacement by younger personnel. Either purpose is constitutional and not payment for past service.

Id.

As discussed above, the Legislation serves the valid public purposes of encouraging the retention of qualified and experienced public school employees and inducing other qualified and experienced public school employees to relocate to Arizona.

Based on *Rochlin*, the increase in nonadministrative employee compensation as a result of the Legislation does not violate the Extra Compensation Clause.

The second prohibition of the Extra Compensation Clause does not apply to the Legislation because the term “public officer” as used in that clause does not include a teacher or other nonadministrative school district employee. The position of a “public officer” under the Extra Compensation Clause “must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power. A position which has these three elements is presumably an ‘office,’ while one which lacks any of them is a mere ‘employment.’” *State Consol. Pub. Co. v. Hill*, 39 Ariz. 21, 31, 3 P.2d 525, 529 (1931) (emphasis in original); see also *State ex rel. Colorado River Commission v. Frohmiller*, 46 Ariz. 413, 424, 52 P.2d 483, 487 (1935) (holding that “the provisions of [the Extra Compensation Clause] do not apply to public officers who have no fixed or definite term of office but hold merely at the will of the appointing power”). Public school teachers and other nonadministrative employees are not invested with sovereign functions of the government nor do they have fixed or definite terms. Therefore, that portion of the Extra Compensation Clause that prohibits an increase or decrease in compensation during a public officer’s term in office does not apply to nonadministrative school district employees.

Conclusion

Previously executed contracts for the 2006-2007 school year of nonadministrative employees of school districts and charter schools may be amended to add compensation

increases as a result of HB 2874, without violating either article IX, § 7 or article IV, part 2, § 17 of the Arizona Constitution.

Terry Goddard
Attorney General

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL August 25, 2006	No. I06-002 (R06-022) Re: Application of A.R.S. § 38-503(C) to Sales of Goods or Services by School District Employees to Their Employing School Districts
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To: Tom Pickrell
General Counsel, Mesa Public Schools

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253, you submitted for review an opinion prepared for the Superintendent of Mesa Public Schools. The opinion you submitted for review concludes that A.R.S. § 38-503(C) requires school districts to follow the School District Procurement Code’s public competitive bidding procedures and not the Auditor General’s Guidelines for all transactions between school district employees and their employing school districts regardless of the dollar amount involved and regardless of whether the funds at issue are district funds, students activities monies or extracurricular activities and character education program contributions. This Office concurs with your opinion regarding the application of A.R.S. § 38-503(C) to sales of goods or services by school district employees to their school district or student

organization within the district.¹ We issue this opinion to provide uniform guidance on this question to all Arizona school districts.

Questions Presented

1. Is A.R.S. § 38-503(C)'s requirement for "public competitive bidding" met if, due to the small amount of the transaction, a sale of goods or services to a school district by a district employee complies with the Auditor General's *Guidelines for Competitive Purchasing Below the Dollar Limits Required for Sealed Bids* (the "Guidelines")?
2. Does A.R.S. § 38-503(C) require public competitive bidding for sales of goods or services to a school district by a district employee if the goods or services are purchased with student activities monies or extracurricular activities and character education program contributions?

Summary Answer

1. To comply with A.R.S. § 38-503(C), procurements between school districts and their employees must follow the School District Procurement Code's competitive bidding procedures regardless of a procurement's total cost.
2. Arizona Revised Statutes § 38-503(C) requires public competitive bidding whenever a school district purchases goods or services from district employees, regardless of whether payment is made with

¹ We decline to review that portion of your opinion regarding the application of A.R.S. § 38-503(C) to limited liability companies in which a school district employee owns a membership interest.

student activities monies or extracurricular activities and character education program contributions.

Background

The Arizona Legislature promulgated A.R.S. § 38-503(C) in 1968² as part of a body of law meant to protect the public from self-dealing by public officers and employees. Ariz. Att’y Gen. Op. I99-020 (citing *Maucher v. City of Eloy*, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985)). The statute provides:

no public officer or employee of a public agency shall supply to such public agency any equipment, material, supplies or services, unless pursuant to an award or contract let after public competitive bidding

A.R.S. § 38-503(C).³ Certain exemptions exist for school district governing boards and other political subdivisions allowing the bodies to purchase supplies, materials, and equipment from their members if the costs fall below set thresholds. A.R.S. § 38-503(C)(1) and (2). No similar exemption exists, however, for purchases made from public agency employees, including school district employees.⁴

Public competitive bidding is defined as “the method of purchasing defined in title 41, chapter 4, article 3, **or procedures substantially equivalent** to such method of purchasing, or as provided by local charter or ordinance.” A.R.S. § 38-502(7) (emphasis

² 1968 Ariz. Sess. Laws ch. 88 (codified as A.R.S. § 38-501 through 38-511).

³ This provision is applicable to school district employees. A.R.S. § 38-502(2) and (5).

⁴ School district employees also must comply with other requirements in A.R.S. § 38-503, which require public employees to disclose any substantial interest that they, or a relative, have in any contract, sale, purchase or service to the employing public agency or decision of the public agency, and to refrain from participating in any manner in such contract, sale, purchase or service or decision. A.R.S. § 38-503(A) and (B). *See*, Ariz. Att’y Gen. Op. 72-25.

added). Opinions issued by this Office have described public competitive bidding as procedures substantially equivalent to those set forth in A.R.S. § 41-730,⁵ which required sealed competitive bids for purchases exceeding \$5,000. Ariz. Att’y Gen. Ops. I79-308; I79-133; I79-067;⁶ *see also Maucher*, 145 Ariz. at 337, 701 P.2d at 595. The Legislature repealed A.R.S. § 41-730 in 1984 and replaced it with the Arizona Procurement Code (1984 Ariz. Sess. Laws ch. 251 [codified as A.R.S. Title 41, ch. 23]). Ariz. Att’y Gen. Op. I99-020 n.3. Arizona Revised Statutes § 38-502(7) still references title 41, chapter 4, article 3, despite the repeal of A.R.S. § 41-730.

Analysis

1. Public Competitive Bidding Is Required For All School District Procurements From District Employees.

School districts adhere to a procurement process delineated by the Board of Education (“Board”). The Board is required by statute to adopt rules prescribing procurement practices for school districts that are consistent with the procurement practices set forth in the Arizona Procurement Code, title 41, chapter 23, and specifying the total cost of district procurements that are subject to invitations for bids, requests for proposals, and requests for clarification. A.R.S. § 15-213(A)(1). These rules are promulgated in the Arizona Administrative Code (“A.A.C.”), R7-2-1001 through R7-2-1195, and constitute the School District Procurement Code (the “Code”).

⁵ Arizona Revised Statutes § 41-730 stated in part, “All purchases or supplies, materials, equipment, risk management services, insurance and contractual services made by the section of purchasing having an estimated cost in excess of five thousand dollars per transaction shall be based on sealed competitive bids . . .” A.R.S. § 41-730 (1972).

⁶ The Opinions also referred to the Board of Education’s public competitive bidding rule, Arizona Administrative Code (“A.A.C.”) R7-2-701(1978). Ariz. Att’y Gen. Ops. I79-308; I79-133; I79-067. Like A.R.S. § 41-730, the rule had a sealed bid threshold of \$5,000 for school district purchases of supplies, materials, equipment and risk management services. A.A.C. R7-2-701 (December 4, 1978, Supp. 78-6).

The Code applies to procurements involving total costs that exceed the competitive sealed bid threshold and requires school districts to select a vendor from among sealed bids or proposals submitted after public notice of invitations for bids or proposals. A.A.C. R7-2-1002(A). The Board annually determines the competitive sealed bid threshold.⁷ See A.A.C. R7-2-1002(A). Procurements with total costs that are less than the competitive sealed bid threshold fall outside the Code, and are governed by guidelines adopted by the Auditor General pursuant to statutory authority. *Guidelines for Competitive Purchasing Below the Dollar Limits Required for Sealed Bids* (the “Guidelines”). The Guidelines require districts to obtain written price quotes for procurements between \$15,000 and the sealed bid threshold and oral price quotes for procurements between \$5,000 and \$15,000. No formal process exists for procurements below \$5,000. Uniform System of Financial Records (“UFSR”) at VI-G-8.

This Office has consistently taken the position that A.R.S. § 38-503(C) requires public competitive bidding regardless of the amount of a transaction when school districts wish to do business with their employees. See Ariz. Att’y Gen. Ops. I87-035; I79-308; I79-177; I79-133; and I79-067. Although these Opinions address the issue in the context of school district governing board members providing goods or services to school districts, the analysis also applies to school district employees.⁸

⁷ For fiscal year 2005-2006, the sealed bid threshold was \$33,689. USFR Memorandum No. 213 (June 20, 2005).

⁸ Except for Arizona Attorney General Opinion I87-035, the opinions cited interpret A.R.S. § 38-503(C) as it existed prior to the adoption of amendments exempting certain procurements between district governing boards and their board members. See 1980 Ariz. Sess. Laws ch. 170, § 3; 1986 Ariz. Sess. Laws ch. 17, § 3. Arizona Attorney General Opinion I87-035 discussed procurements involving services, which are still not exempt under A.R.S. § 38-503(C). Therefore, the analysis in the cited opinions regarding board members applies to district employees as well.

The conclusion that school district governing boards must follow public competitive bidding procedures when procuring goods or services from employees is bolstered by the fact that in 1980, the Legislature provided a limited exemption for school district governing board members from the public competitive bidding requirement but did not provide a corresponding exemption for school district employees. A.R.S. § 38-503(C)(1)⁹ Moreover, the Legislature historically has applied a higher standard to school district employees than it has to school district governing board members where district contracts are concerned. The statute preceding and subsequently replaced by the current conflict of interest laws prohibited school district employees from having any direct or indirect interest in school district contracts but made allowances for school district governing board members. A.R.S. § 15-205(A)(1960) (repealed by 1968 Ariz. Sess. Laws ch. 88, § 2).¹⁰

If the Legislature had intended school districts to follow a process other than or in addition to public competitive bidding when procuring goods or services from school district employees, it would have provided a statutory exemption for employees as it did for governing board members. When construing a statute, one presumes that “what the legislature means it will say.” *Padilla v. Indus. Comm’n*, 113 Ariz. 104, 106, 546 P.2d

⁹ Arizona Revised Statutes § 38-503(C)(1) states that “[a] school district governing board may purchase, as provided in sections 15-213 and 15-323, supplies, materials and equipment from a school board member.” Arizona Revised Statutes § 15-323(B) limits purchases from governing board members to \$300 per transaction or \$1,000 total per twelve-month period provided that the governing board has adopted a policy authorizing such purchases within the preceding twelve months. Arizona Revised Statutes § 15-323(C) eliminates price limits for school districts with less than 3,000 students, provided that the governing board follows certain requirements.

¹⁰ Arizona Revised Statutes § 15-205(A) stated, “No school officer, teacher or employee of a school district shall be interested directly or indirectly in any contract or in any sale or purchase made by the school district. Approval by the county school superintendent and by a unanimous vote of the board shall be required when a school board member is interested directly or indirectly in any contract or sale or purchase made by such school district.” A.R.S. § 15-205(A) (1960) (repealed by 1968 Ariz. Sess. Laws ch. 88, § 2).

1135, 1137 (1976); *see also Banks v. Arizona State Bd. of Pardons & Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035, 1039 (App. 1981) (“Where the legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the excluded section”).

For school districts, public competitive bidding means that process prescribed by the School District Procurement Code. The Code requires public notice of invitations for bids and proposals and sealed bids or proposals for procurements that exceed the sealed bid threshold. The Code’s competitive bidding process is substantially equivalent to repealed statute A.R.S. § 41-730’s (and repealed Board rule R7-2-701’s) sealed bid process that this Office identified as public competitive bidding pursuant to A.R.S. § 38-503(C). *See* A.R.S. § 38-502(7); Ariz. Att’y Gen. Ops. I79-308; I79-133; I79-067.

The Auditor General’s Guidelines are not substantially equivalent to the purchasing method set forth in A.R.S. § 41-730 because they allow for written or oral quotes rather than sealed bids or proposals for amounts that fall below the School District Procurement Code’s sealed bid threshold. Because the Guidelines specify the use of methods other than sealed bids or proposals, they do not satisfy the definition of public competitive bidding in A.R.S. § 38-502(7) or meet the public competitive bidding requirement of A.R.S. § 38-503(C). That statute requires a more rigorous process when districts procure goods or services from employees than the process that districts would normally follow for procurements falling below the competitive sealed bid threshold. Ariz. Att’y Gen. Ops. I87-035; I79-308; I79-177; I79-133; and I79-067. Therefore, school districts should comply with the School District Procurement Code’s competitive bidding procedures for all procurements from district employees regardless of the

transaction's total cost. Any other result would allow a school district employee contracting with his or her school district to be treated "no differently from any one else which is obviously contrary to the intent of A.R.S. § 38-503(C)." Ariz. Att'y Gen. Op. I79-067.

2. Public Competitive Bidding Is Required For All School District Purchases From District Employees, Regardless of the Source of the Funding.

Arizona Revised Statutes § 38-503(C) applies to transactions between public agencies and their employees. The issue here is whether purchases made from district employees using student activities monies or extracurricular activities and character education program contributions constitute purchases by a school district in its capacity as a public agency, thus requiring compliance with A.R.S. § 38-503(C).

a. Student Activities Monies.

Student activities monies include all monies raised with school district governing board approval "by the efforts of students in pursuance of or in connection with all activities of student organizations, clubs, school plays or other student entertainment other than funds [generated by the activities of book stores and athletic activities]" A.R.S. § 15-1121. The monies are "derived from various sources, including dues, concessions, ticket sales, fundraising events, and like activities." Ariz. Att'y Gen. Op. I98-009 (citing USFR, Appendix H, Student Activities Fund at X-H-5). Student activities monies are not district funds, but they are subject to school district governing board oversight. USFR, Appendix H, Student Activities Fund at X-H-1; *See* Ariz. Att'y Gen. Op. 58-13.¹¹ Student activities monies constitute public money.¹²

¹¹ Arizona Attorney General Opinion 58-13 concluded that pursuant to A.R.S. § 15-1271 (the predecessor to A.R.S. § 15-1121), student activities funds were not school district funds; school boards had no direct

A school district governing board establishes and oversees the student activities fund and appoints a treasurer (or assistant treasurer as necessary) to maintain the fund for the benefit of the student organizations, covers the cost of bond premiums related to the fund, prescribes the form for and reviews on a monthly basis revenue/expenditure records that the treasurer prepares, and invests and reinvests monies in the fund. A.R.S. §§ 15-1122, 1123. The district must maintain the fund in a manner that is separate and distinct from district operating funds. USFR, Appendix H, Student Activities Fund at X-H-1.

The board-appointed treasurer deposits the student activities monies in student activities bank accounts, signs the disbursement checks, and maintains accounts showing the balances for each student organization. A.R.S. §§ 15-1122, 1123. The treasurer oversees the fund's accounting functions, but the students must actively participate in the management of the monies. Ariz. Att'y Gen. Op. I98-009 (citing USFR, Appendix H, Student Activities Fund at X-H-1). Any disbursement from the fund must be authorized by or on behalf of the student club or organization as the USFR provides. A.R.S. § 15-1122(A); Ariz. Att'y Gen. Op. I98-009 (citing USFR, Appendix H. Student Activities Fund at X-H-1). The governing board may, however, allocate the monies between schools without student input or approval. Ariz. Att'y Gen. Op. I98-009. While the students decide how to spend student activities monies and authorize the disbursements,

authority to determine how monies were expended; and the school board's authority was regulatory or supervisory in nature.

¹² See *State v. Mecham*, 173 Ariz. 474, 481, 844 P.2d 641, 648 (1992) "public money" is defined as "all monies coming into the lawful possession . . . [of] a state officer . . . in his official capacity, irrespective of the source from which, or the manner in which, the monies are received").

the district, acting in its fiduciary capacity, is the purchaser. *See* A.R.S. § 15-1122.¹³ USFR, Appendix H, Student Activities Fund at X-H-1.

Expenditures from student activities monies are exempt from the School District Procurement Code. A.A.C. R7-2-1002(E). Despite the exemption, the USFR recommends that expenditures from student activities funds comply with the Code for sealed competitive bids and with the Guidelines for amounts exempt from the code. USFR, Appendix H, Student Activities Fund at X-H-1, 9. Although the Code exempts expenditures of student activities monies, that exemption only applies to purchases in which school district employees are not involved. Because the district is the purchaser, A.R.S. § 38-503(C) mandates a different result when purchases are made from district employees, thus raising the risk of self-dealing. Therefore, public competitive bidding is required where an employee proposes to sell goods or services to the district regardless of whether the transaction is funded with district or student activities monies and regardless of the amount involved.

b. Extracurricular Activities and Character Education Program Contributions

Extracurricular activities or character education program contributions are monies received pursuant to A.R.S. § 43-1089.01. In 1997, the Legislature enacted A.R.S. § 43-1089.01 to “provide a tax credit for taxpayers who paid fees [or cash contributions] to an Arizona public school to support the school’s extracurricular activities or character education programs.” *Ariz. Att’y Gen. Op. I03-008* (quoting *Ariz. Att’y Gen. Op. I98-007*). The district spends the fees in accordance with the purpose that the contributor

¹³ Pursuant to A.R.S. § 15-1122, the student activities treasurer or assistant treasurer and another co-signer designated by the school district governing board sign disbursement checks expending student activities monies.

designates or determines the use in cases where the contributor does not designate a purpose. A.R.S. § 43-1089.01(E). The contributions are essentially conditional or restricted donations that upon receipt become the district's property. *See* A.R.S. § 43-1089.01(E) and (F); Ariz. Att'y Gen. Op. I98-007.¹⁴ Therefore, if the district spends such funds to purchase goods and services from a school district employee, it must follow the public competitive bidding process that A.R.S. § 38-503(C) requires, regardless of the amount involved.

Conclusion

This Office concurs with your conclusion that A.R.S. § 38-503(C) requires school districts to follow the School District Procurement Code's public competitive bidding procedures and not the Auditor General's Guidelines for all procurements between school districts and their employees regardless of the dollar amount involved and regardless of whether the funds at issue are regular district funds, student activities monies or extracurricular activities and character education program contributions.

Terry Goddard
Attorney General

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¹⁴ The Opinion refers to contributions collected pursuant to § 43-1089.01 as revenues subject to guidelines for apportionment that the Auditor General creates in conjunction with the Arizona Department of Education, pursuant to A.R.S. § 15-271(C)(4). Ariz. Att'y Gen. Op. I98-007; *see also* USFR Memorandum No. 214 (August 8, 2005).

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>March 27, 2006</p>	<p>No. I06-001 (R06-001)</p> <p>Re: Certificates of Educational Convenience and Tuition Requirements</p>
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To: Anne Carl
Deputy Cochise County Attorney

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253, you submitted for review an opinion prepared for the Superintendent of the Willcox Unified School District (“Willcox”). This Office modifies your opinion regarding tuition requirements for students who have been issued certificates of educational convenience by the county school superintendent.¹

¹ We concur with your analysis and conclusion regarding tuition requirements for students from Bonita Elementary School District who attend high school in the Willcox Unified School District but do not have CECs. Tuition is clearly required for these students pursuant to A.R.S. § 15-824(A)(2).

Question Presented

Is a common school district required to pay tuition for students who reside within the common school district's boundaries and have been issued a certificate of educational convenience ("CEC") pursuant to A.R.S. § 15-825(A) to attend high school in another district within Arizona?

Summary Answer

If a student has a CEC issued pursuant to A.R.S. § 15-825(A) the school district of residence is not required to pay tuition to the school district within this State where the student actually attends school. Instead, the school district of attendance should include the student in its student count pursuant to A.R.S. § 15-825(A)(2). Because the student is included in the student count of the school district of attendance, the school district where the student resides should not include the student in its student count and should not receive state funding for the student.

Background

Currently, there are no high schools that serve the students who reside in the Bonita Elementary School District No. 16 ("Bonita") in Graham County. As a result, students who reside in Bonita attend high schools located in other school districts. Some students from Bonita attend high school in Willcox, which is in Cochise County.

Although students from Bonita have attended Willcox High School for some time, a dispute has arisen recently over tuition payments. According to the information submitted to this Office, in the past Bonita paid tuition to Willcox for students who

resided in Bonita and attended Willcox High School. Recently, however, Bonita has not paid tuition to Willcox. Bonita bases its refusal to pay tuition on the fact that six of the seven students currently attending Willcox High School have been identified on a CEC by the Graham County School Superintendent pursuant to A.R.S. § 15-825(A).

A student may apply for a CEC under A.R.S. § 15-825(A) if he or she “is precluded by distance and a lack of adequate transportation facilities from attending a school in the school district or county of the pupil’s residence or who resides in unorganized territory.” A.R.S. § 15-825(A). A county school superintendent may issue the student a CEC “[i]f it appears . . . that it is not feasible for the pupil to attend a school in the school district or county of residence.” *Id.* The CEC may authorize the student “to attend a school in an adjoining school district or county, whether within or without this state.” *Id.* If the CEC authorizes the student to attend school in another state, the student is considered to be enrolled in the school district of the student’s residence. A.R.S. § 15-825(A)(1). In other circumstances, the enrollment of a student who receives a CEC under A.R.S. § 15-825(A) is “deemed for the purpose of determining student count to be enrolled in the school district of actual attendance.” A.R.S. § 15-825(A)(2). The student count, or average daily membership, is used to determine the amount of State aid that a school district receives. *See* A.R.S. §§ 15-902, -941 to -980.

School districts are generally required to admit all students within their boundaries. *See Magyar ex rel. Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423 (D. Ariz. 1997). A school district is also required to admit: (1) a student who has a CEC; or (2) “without presentation of [a] . . . certificate,” a student who “is a resident of a

common school district within this state which is not within a high school district and which does not offer instruction in the pupil's grade." A.R.S. § 15-824(A)(2).

In addition, school districts must establish policies and implement "an open enrollment policy without charging tuition." A.R.S. § 15-816.01(A). Tuition may be charged to nonresident pupils "only when tuition is authorized under § 15-764, subsection C, § 15-797, subsection C, § 15-823, subsection A, § 15-824, subsection A or § 15-825." *Id.*

Analysis

Bonita is not required to pay tuition to Willcox for students who have CECs issued by the Graham County School Superintendent. This conclusion is supported by A.R.S. §§ 15-824 and -825.

Under Section 15-825(A)(2), a student with a CEC is included in the student count of the district where the student attends school. As a result, the district where the student attends school should receive the State funding for the student who has a CEC issued pursuant to A.R.S. § 15-825(A).² Because Willcox, rather than Bonita, should receive the State funding for the students with CECs, there is no need for Bonita to pay tuition to Willcox for these students. In addition, nothing in A.R.S. § 15-825 authorizes tuition payments for students who have CECs issued pursuant to A.R.S. § 15-825(A). In contrast, A.R.S. § 15-825(D) specifically addresses certain tuition requirements for CECs issued pursuant to A.R.S. § 15-825(B).

² The analysis in this opinion applies only to CECs issued pursuant to A.R.S. § 15-824(A) for a student to attend schools within this state. Students who attend out-of-state schools are included in the student count of the district of residence. A.R.S. § 15-825(A)(1).

Section 15-824(A) also supports the conclusion that no tuition is required for students attending schools within this State who have CECs issued pursuant to A.R.S. § 15-825(A). Section 15-824(A) establishes when a district must accept students from other school districts. This statute requires that districts accept students who do not have CECs and reside in a common school district that does not have a high school. A.R.S. § 15-824(A)(2). For these students, tuition is expressly required. *Id.*; *Ruth Fisher Elem. Sch. Dist. v. Buckeye Union High Sch. Dist.*, 202 Ariz. 107, 112, 41 P.3d 645, 650 (2002). In addition, these students are included in the student count of the district of residence. *Id.* The statute also requires that districts accept students with CECs but does not authorize tuition charges for these students. A.R.S. § 15-824(A)(1). Because there is no statute authorizing tuition for students with CECs issued pursuant to A.R.S. § 15-825 (A) who attend school within this State and because the district that the students attend should receive any State funding for students with these CECs, Bonita is not required to pay tuition to Willcox for students with CECs.

The holding in *Ruth Fisher Elem. Sch. Dist. v. Buckeye Union High Sch. Dist.*, 202 Ariz. 107, 41 P.3d 645 (2002) does not support a different conclusion. *Ruth Fisher* addressed whether students in a common school district that did not have a high school had the option of attending high school as either an open enrollment student under A.R.S. § 15-816.01 or under the provisions of A.R.S. § 15-824(A)(2). The high school encouraged students to enroll under the open enrollment statutes (which do not require tuition payments), even though the high school district was required to accept the students under A.R.S. § 15-824(A)(2) (which requires tuition payments). *Ruth Fisher*,

202 Ariz. at 109, 41 P.3d at 647. The common school district brought an action against the high school district to compel that district to admit common school district students as tuition students under A.R.S. § 15-824(A)(2) rather than as open enrollment students under A.R.S. § 15-816.01. The Court held that the open enrollment statute did not apply to the students who had to enroll in other districts under A.R.S. § 15-824. *Id.* at 112, 41 P.3d at 650. The Court’s holding does not answer the question of funding for students who have CECs issued under A.R.S. § 15-825(A). By its terms, section 15-824(A)(2) applies only when a student has no CEC.³

There is language in *Ruth Fisher* referring to tuition payments that are required when a student has a CEC: “Section 15-824(E) deals not only with tuition for residents of common school districts that are not within high school districts but also provides for other situations, such as where students attend school out of their districts under certificates of educational convenience.” *Ruth Fisher*, 202 Ariz. at 111, 41 P.3d at 649. This language does not mean that tuition is required for the CECs at issue here. Section 15-824(E) specifically refers to tuition required in § 15-825(D), which applies only to CECs issued under A.R.S. § 15-825(B). Nothing in A.R.S. § 15-824(E) supports imposing tuition on CECs issued under A.R.S. § 15-825(A).⁴

³ Section 15-824(A)(2) provides in part: “For three hundred fifty or fewer pupils, to a high school without the presentation of such certificate, if the pupil is a resident of a common school district within this state which is not within a high school district and which does not offer instruction in the pupil’s grade.” “Such certificate” is a certificate of educational convenience. A.R.S. § 15-824(A)(1).

⁴ It is not clear why CECs are necessary in the situation addressed in this Opinion, since the students must be admitted at the high school of their choice. *See Ruth Fisher*, 202 Ariz. at 110, 41 P.3d at 648. In *Ruth Fisher*, the high school was encouraging the *Ruth Fisher* students to attend as open enrollment students. The court in *Ruth Fisher* “[did] not believe the legislature wished to produce such an awkward situation by allowing high school students who do not reside in high school districts or unified school districts the choice of being either tuition students or open enrollment

Consequently, any students attending Willcox on a CEC issued pursuant to A.R.S. § 15-825(A) are included in the Willcox student count. Bonita does not pay tuition to Willcox for these children or include them in its student count. Rather, Willcox will receive State funding for these students by including them in their student count.

Conclusion

No tuition payments are required for students who attend another school district within this State subject to a CEC issued pursuant to A.R.S. § 15-825(A).

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students.” *Id.* at 112, 41 P.3d at 650. In contrast, here the county school superintendent, not a student, decides whether to issue the CEC.