1999 AG Opinions

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Jackie Vieh, Director
Arizona Department of Commerce

December 30, 1999
No. I99-030 (R99-036)

Questions Presented

You have asked whether (1) the Work Force Recruitment and Job Training Fund (" Fund") can be used to reimburse grant recipients for costs relating to the recruitment of new employees; and (2) in light of the limitations in article IX, § 10 of the Arizona Constitution, corporations that own or operate private or parochial schools may receive grants from the Fund to train teachers or school administrators.

Summary Answer

(1) The Fund is to be used only for costs relating to job training, which does not include recruitment.

(2) To ensure compliance with article IX, § 10 of the Arizona Constitution, corporations operating private or parochial schools should not receive grants from the Fund for training teachers or school administrators.

Background

In 1993, the Legislature established the Work Force Recruitment and Training Program ("Program") within the Department of Commerce ("Department"). 1993 Ariz. Sess. Laws ch. 1 (codified in A.R.S. §§ 41-1541 through -1544) . The Program provides grants to businesses for training, which may be provided through the State community college system, a private post-secondary educational institution, a community college operated by a tribal government, or, if the employer requests another qualified training provider. A.R.S. §§ 41-1541(B), (E). The Work Force Recruitment and Job Training Council ("Council") develops guidelines for the Program. A.R.S.§ 41-1542(C). The Legislature also established the Fund, consisting of "legislative appropriations, gifts, grants and other monies." A.R.S. § 41-1544(A). Monies in the Fund are spent at the direction of the Department's Director, using the Council's guidelines and procedures. A.R.S. § 41-1544(C).

When the Legislature considered this 1993 legislation, there was testimony that Arizona was one of only five states without State-funded job training programs and that the availability of job training funds would assist efforts to attract business to the State and encourage expansion of businesses already here. *Hearing on H.B.2164: Senate Committee on Commerce and Economic Dev.*, 41st Legis., 1st Reg.Sess. 2-3 (Ariz. 1993); Fact Sheet for H.B. 2164 Staff Senate, 41st Legis., 1st Reg.Sess. (Ariz. 1993). Consistent with the goal of using job training to encourage expansion, the Legislature required that a business already operating in this State "must maintain or exceed its current level of training expenditures" before it is eligible to receive training monies under the Program. A.R.S. § 41-1541(F).

Analysis

A. Monies in the Work Force Recruitment and Job Training Fund Must Be Used for Costs Related to Training, Which Does Not Include Recruiting.

The primary objective of statutory construction is to ascertain and give effect to the intent of the Legislature. *Mail Boxes, Etc. v. Industrial Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The plain and natural meaning of a statute's language is to be followed whenever possible. *State v. Arthur*, 125 Ariz. 153, 155, 608 P.2d 90, 92 (App. 1980). The statutory language here indicates that monies in the Fund should be spent on job training.

The Legislature specifically provided that "[a]ll monies for the program shall be expended *only for the costs related to training*." A.R.S. § 41-1544(B) (emphasis added). This is consistent with the Program's purpose, which is to "provide *training* and *retraining*" for specific employment opportunities with "new and expanding businesses and businesses undergoing economic conversion." A.R.S. § 41-1541(A) (emphasis added). The statutes governing the Program include other references to using Fund monies specifically for training. For example, A.R.S. § 41-1541(C) refers to "the business receiving monies for training and the provider of training" and bases the recipient's share of program costs on "the estimated cost of the proposed training or retraining." A.R.S. § 41-1541(C). The Legislature dedicated specific percentages of the amount appropriated for the Program "to provide training to businesses" in rural areas and to businesses with fewer than 100 employees. A.R.S. §§ 41-1544(D), (E). Also, a business already located in Arizona must "maintain or exceed its current level of training expenditures" before it is eligible "to receive training monies." A.R.S. § 41-1541(F). The statutory application criteria specifically requires the Director of the Department to consider

the "training cost" per employee, the ability to "leverage other job training resources," "the quality of jobs that will result from the training or retraining proposal," and the number of jobs resulting "from the training proposal." A.R.S. §§ 41-1543(1), (2), (3), (7).

The Legislature's mandate that monies in the fund be expended only for costs related to job training requires that the Fund be used in a manner related to job skill instruction. The Legislature did not define "job training," and, absent a statutory definition, words are to be given their ordinary meanings. A.R.S. § 1-213. "Training" is the "development of a particular skill or group of skills, instruction in . . . [a] profession or occupation."[(1)] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2424 (1993). In contrast, "recruitment" means "the act of offering inducement to qualified personnel to enter a particular job or profession," and is a distinctly separate act from "training." *Id.* at 1899.

The phrase "related to job training" should not be read so broadly to include activities that are distinct from training. *Cf. Yslava v. Hughes Aircraft Co.*, 188 Ariz. 380, 384, 936 P.2d 1274, 1278 (1997) (in the context of a statute limiting joint and several liability, "relating to" means based on or predicated on); *Cella Barr Assoc. v. Cohen*, 177 Ariz. 480, 485, 868 P.2d 1063, 1068 (App. 1994) (professional malpractice action for failure to discover hazardous waste not an action "relating to" hazardous waste). You note in your opinion request that recruitment and training are considered distinct and independent activities. The separate references to training and recruitment in the name of the Program supports the conclusion that the Legislature recognized training and recruitment as distinct activities. Other than incorporating the word "recruitment" in the names of the Program, Council and Fund, the Legislature used a form of the word "recruit" only once in the relevant statutes -- requiring the Council's annual report to specify the "number of businesses recruited." A.R.S. § 41-1542(D). The statutes governing the Program do not describe grants for employee recruitment, nor do they allocate funds for employee recruitment. Instead, the statutes describe a program that uses job training grants to help recruit businesses and encourage business expansion.

Contrary to this Opinion's conclusion that the statutes do not authorize expenditures from the Fund for employee recruitment, the regulations establishing "allowable project costs" specifically permit recovery of recruitment costs. *See* A.A.C. R20-1-109. Although deference is given to State agencies in rulemaking, that deference is not appropriate if the rule exceeds the agency's statutory authority. *See Dioguardi v. Superior Court*, 184 Ariz. 414, 417, 909 P.2d 481, 484 (App. 1995). An agency's authority is strictly limited by statute. *Boyce v. City of Scottsdale*, 157 Ariz. 265, 267, 756 P.2d 934, 936 (App. 1988). To the extent the rules permit reimbursement for recruitment costs, those regulations are inconsistent with the Legislature's express requirement that the Fund be expended on costs relating to training. To be consistent with the statutory authority, any future expenditures should be limited to costs related to training.[(2)]

B. To Ensure Compliance with Article 9, § 10 of Arizona's Constitution, Grants Should Not Be for Training Private or Parochial School Teachers or Administrators.

You also inquired about the ability of the Department to use the Fund for grants to private corporations that own or operate private or parochial schools and seek job training assistance from the Program to help train teachers or school administrators. Specifically, you asked whether article IX, § 10 of the Arizona Constitution limits the Department's ability to use the Fund for these purposes.

Article IX, § 10 of Arizona's Constitution provides: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." It is broader than the other "religion clauses" of Arizona's Constitution in that it also applies to private nonsectarian schools and to public service corporations.[(3)] *Cf.* Ariz. Const. art II, § 12 (prohibiting use of public money or property for religious instruction); Ariz. Const. art XI,

§ 7 (prohibiting sectarian instruction in any public school). To be subject to article IX, § 10, there must be (1) a tax "laid" or an "appropriation of public money made" (2) "in aid of" a church, or private or sectarian school or a public service corporation.

By statute, "public money" includes money "belonging to, received or held by state . . . officers in their official capacity." A.R.S. § 35-302; *see also State v. Mecham*, 173 Ariz. 474, 481, 844 P.2d 641, 648 (App. 1992). Thus, monies in the Fund are "public money."

A grant from the Fund also involves an "appropriation," within the meaning of article IX, § 10, because "appropriation" encompasses "executive and administrative contracts and disbursements." *Community Council v. Jordan*, 102 Ariz. 448, 455, 432 P.2d 460, 467 (1967).

The final issue is whether a training grant from the Fund would be "in aid of" a private or sectarian school. Article IX § 10 does not prohibit all payments of public money to organizations subject to that article's restrictions. *Id*. at 451, 432 P.2d at 463; *see also Kotterman v. Killian*, 193 Ariz. 273, 289, 972 P.2d 606, 622 (1999), *cert. denied*, 67 U.S.L.W. 3671 (U.S. Oct. 4, 1999) (No. 98-1716). For example, article IX, § 10 does not prohibit the government from using a religious organization merely as a "conduit" for providing certain services when the "true beneficiaries" of the government expenditure are the recipients of the services. *Community Council* at 455-456, 432 P.2d at 467-468. Based on this reasoning, the Arizona Supreme Court upheld a contract between the State and the Salvation Army that reimbursed the Salvation Army for 40% of its expenditures to provide services to people in emergency situations. *Id.*

However, the Program is not structured so that the organization receiving the grant is merely a "conduit" through which the State provides a service to its citizens, as in *Community Council.* Rather, this Program focuses on the business receiving the grant, more than the individual receiving the training. In that way, it differs from other job training services referenced in statute that are targeted at a specific population, such as juveniles or adults on probation, A.R.S. §§ 8-371(A)(2), 12-299.01(D)(3), people who are developmentally disabled, A.R.S. §§ 36-554(A)(1), -558(C)(2), or recipients of cash assistance, A.R.S. §§ 46-101(23), -294(C), -299. Given the nature of the Program, to ensure compliance with article IX, § 10, training grants should not be provided for personnel working in private or parochial schools. This would apply whether the training grant is for classroom teachers or employees who perform administrative functions related to the operation of the school.[(4)]

Conclusion

The Fund is to be used only for costs relating to job training, which does not include recruitment. To ensure compliance with article IX, § 10 of the Arizona Constitution, corporations operating private or parochial schools should not receive grants from the Fund for training teachers or school administrators.

Janet Napolitano
Attorney General

1)Consistent with the ordinary meaning of the term "training," the regulations governing the Program define "training" as "job skill instruction given to trainees by training providers either on-the-job, in a classroom, or any combination thereof . . . and intended to provide the trainees with the specific skills required to perform specified jobs." Arizona Administrative Code ("A.A.C.") R20-1-101(29).

2) An agency must follow its own rules and regulations. *Clay v. Arizona Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989). Therefore, prior expenditures made in good faith reliance on the rules governing the Program are not affected by this Opinion. *See Austin v. Campbell*, 91 Ariz. 195, 203, 370 P.2d 769, 775 (1962).

3. State benefits to any private business may be subject to scrutiny under the gift prohibition in article IX, § 7, but article IX, § 10 establishes an additional limitation for the State's support of private schools and public service corporations. *See* John D. Leshy, The Arizona State Constitution: The Making of the Arizona Constitution, A Reference Guide, 216 (1993) (noting article IX, § 10 is a more targeted and potentially more stringent limitation than the prohibition against subsidies to private entities in article IX, § 7).

4. You also inquired whether the Fund may be used to train employees who do not work at the school and are not involved in the operations of the school, but serve a corporate function. This issue cannot be decided in the abstract. Instead, a case-by-case assessment is necessary to determine whether a training grant is sufficiently attenuated from a corporation's private or parochial school operation to avoid implicating article IX, § 10.

The Honorable Betsey Bayless
Arizona Secretary of State

December 28, 1999
No. I99-029 (R99-050)

Questions Presented

Does the Secretary of State, the Citizens Clean Elections Commission, or some other public officer or body have the duty or authority to enforce the provisions of Arizona Revised Statutes ("A.R.S.") § 16-944 requiring lobbyists to pay an annual fee?

Summary Answer

The Citizens Clean Elections Commission has the duty and authority to enforce the provisions of A.R.S. § 16-944 requiring lobbyists to pay an annual fee.

Background

Arizona voters passed Proposition 200, the Citizens Clean Elections Act ("Act"), as an initiative in the 1998 general election. The Act authorizes public funding for the campaigns of political candidates who voluntarily limit campaign spending and fund-raising in statewide and State legislative elections. *See generally* A.R.S. §§ 16-940 through -961. A Citizens Clean Elections Fund ("Fund"), established by the Act, pays the costs of the program. A.R.S. § 16-949(D). The Act also creates funding mechanisms, one of which is a new fee on certain registered lobbyists. A.R.S. § 16-944. According to A.R.S. § 16-944, this "fee shall be in the amount of one hundred dollars annually per lobbyist and shall be collected by the secretary of state and transmitted to the state treasurer for deposit into the fund."(1)

The initiative also established a Citizens Clean Elections Commission ("Commission") to administer and enforce the Act. Among other things, the Commission is required to "[e]nforce the provisions of this article [Title 16, ch. 6, art. 2] . . . and ensure that money required by this article to be paid to the fund is deposited in the fund." A.R.S. § 16-956(B)(5). In addition, the Act sets out enforcement procedures that the Commission is to follow if it finds "that there is reason to believe that a person has violated" a provision of the Act. A.R.S. § 16-957. After making a public finding of violation, the Commission may assess a civil penalty in accordance with A.R.S. § 16-942. *See* A.R.S. § 16-957(B). However, none of the civil penalties contained in A.R.S. § 16-942 apply to a lobbyist's failure to pay the required annual fee. Similarly, the criminal violations provided for in the Act do not include failure to pay the lobbyist fee. *See* A.R.S. § 16-943.

Analysis

Although the Act prescribes that the Secretary of State shall collect the one hundred dollar annual fee imposed on lobbyists, A.R.S. § 16-944, the Act does not give the Secretary of State any duty or authority to enforce its provisions. Moreover, other statutes providing the Secretary of State with enforcement responsibilities do not extend to the lobbyist fee imposed by the Act. Section 41-1237.01, A.R.S., which establishes the Secretary of State's enforcement responsibilities regarding lobbyists, specifically applies only to violations of the article in Title 41 regulating lobbyists. Similarly, the authority of the Secretary of State to enforce the provisions of the campaign finance laws in article 1, chapter 6, of Title 16, is confined to violations of that article. A.R.S. § 16-924. Consequently, that authority does not extend to the Act, which is in article 2, chapter 6 of Title 16.

In contrast, the Commission is specifically authorized to enforce the Act. A.R.S. § 16-956(B)(5). Enforcement tools include assessing civil penalties and issuing orders requiring compliance. A.R.S. § 16-957. Although the Act does not establish a civil penalty for failure to pay the one hundred dollar lobbyist fee, the Commission may issue orders requiring compliance with the lobbyist fee provision in the Act. A.R.S. § 16-957(A). If the lobbyist fee remains unpaid, the Commission may make a public finding to that effect. A.R.S. § 16-957(B). The subject of the order may appeal this finding to the superior court. *Id.* If no appeal is filed, the amount of the unpaid fee would become a debt owed the State and subject to collection by this

office. A.R.S. § 41-191.04 (permitting the Attorney General to initiate proceedings to collect debts to this State, or to any agency, board, commission or department of this State).(2)

Conclusion

The Secretary of State is not authorized to enforce the requirement in A.R.S. § 16-944 that lobbyists pay a one hundred dollar fee that is deposited into the Fund. Rather, the Commission has the duty and authority to enforce the lobbyist fee

imposed by A.R.S. § 16-944.

Janet Napolitano
Attorney General

1)State law also requires the registration and regulation of lobbyists. See A.R.S. §§ 41-1231 through -1239. Under these registration provisions each person or entity, "at the time of registering or re-registering, shall pay a registration or re-registration fee of twenty-five dollars to the secretary of state." A.R.S. §§ 41-1232(E) (registration of principals), and -1232.01(E) (registration of public bodies). These fees are deposited in the general fund. Id.

2) The Attorney General, or the appropriate county, city or town attorney, is authorized to enforce any of the provisions of Title 16 in any election. A.R.S. § 16-1021. However, because the payment of a lobbyist fee is not an election, that broad authority does not apply under these circumstances.

The Honorable Jean Hough McGrath
Arizona House of Representatives

December 17 , 1999
No. I99-028 (R99-022)

Questions Presented

You have asked whether: (1) a State university may require purchasers of certain tickets for intercollegiate athletic events conducted in State-owned facilities to also contribute a specified amount to a booster foundation created to support the university's athletic program; and (2) such a practice violates the "gift prohibition" in article IX, § 7 of the Arizona Constitution

Summary Answer

A State university may require purchasers of certain athletic tickets to also contribute to a booster foundation created to support the university's athletic programs, and this practice would not violate the gift prohibition in article IX, § 7 of the Arizona Constitution provided that the benefit the public receives is adequate.

Background

Although your opinion request poses a general question concerning contributions to booster foundations that benefit a State university, because your request specifically references the Sun Angel Foundation ("Sun Angels"), this background on the Sun Angels is provided to establish a framework for the analysis. The Sun Angels is a private non-profit charitable corporation whose purpose is "to assist Arizona State University in the accomplishment of its athletic and educational objectives." Amended and ReStated Bylaws of the Sun Angel Foundation, art. I (May 24, 1997) (hereinafter "Sun Angel Bylaws"). The Sun Angels is one of several private non-profit organizations that are "financially related" to ASU and subject to university oversight. The Arizona Board of Regents (ABOR) requires external audits of organizations such as the Sun Angels. Arizona Board Of Regents Policy Manual, § 5-209(E)(5) ("ABOR Policy") (Revised Aug. 1, 1996). The National Collegiate Athletic Association ("NCAA") also requires that independent organizations have annual audits and makes the university responsible for their acts promoting the university's intercollegiate athletic program. 1998-99 NCAA Division I Manual, Constitution, §§ 6.2.3; 6.4 (effective Aug. 1, 1998). The Sun Angels assists ASU by raising money to support the university's programs, and the Sun Angels itself relies on ticket sales to athletic events as a major fund-raising tool. When buying tickets to ASU football games, for example, a purchaser pays the ticket price directly to ASU and, for certain seats, the purchaser is also required to pay a separate amount to the Sun Angels. 1999 Arizona State University Brochure, 1999 Sun Devil Football Season Tickets. The amount of the required contribution to the Sun Angels varies depending on the seat location. Id. Sun Angel contributors receive a variety of benefits, in addition to the right to purchase certain tickets, based on the amount of their contribution. The benefits may include, for example, priority for ASU bowl tickets, preferred parking, and, for major contributors, complimentary tickets to annual athletic banquets and travel to an away-game. Sun Angel Foundation, Arizona State University, 1999 Donor Manual 7, 8 (1999). According to the Sun Angels Donor Manual, when a donor receives a 'right to purchase' seating with a contribution to the Sun Angels, the donor may take an eighty percent tax deduction, after subtracting the value of the other benefits received from the contribution amount. Id. at 11; see also Internal Revenue Service T.A.M. 122293-98 (July 7, 1999) (discussing tax implications of contribution to university foundation for right to purchase sky box seating). The Sun Angels uses the funds it collects through this process and other fund-raising efforts to fulfill "ongoing commitments with the University including coaches support, capital improvements, grants, scholarships and miscellaneous athletic gifts." Deloitte & Touche, LLP, Sun Angel Foundation, Financial Statements at 7 n. 4 (years Ended June 30, 1998 and 1997) ("Sun Angel Financial Statements").

Analysis

A. ABOR Policy Allows a University to Require Purchasers of Athletics Tickets to Contribute to a Booster Foundation That Supports University Programs. Under Arizona's Constitution, the ABOR is responsible for "the general conduct and supervision" of State universities. Ariz. Const. Art. XI, § 2. In recognition of the ABOR's constitutional responsibilities, enabling legislation establishes that ABOR "shall have and exercise the powers necessary for the effective governance and administration of the institutions under its control." A.R.S. § 15-1626(A)(1). Intercollegiate athletics is part of the educational mission of the State universities and is subject to the oversight of the ABOR. See ABOR Policy 5-209(A) (athletic policies). Although there are no statutes governing ticket policies to events at university facilities, the ABOR has established policies on this subject. ABOR Policy 5-209(H)(4). ABOR policies provide that "there is no implication of any obligation or responsibility on the part of the institutions to provide the public at large with entertainment." ABOR Policy 5-209(H)(5). According to ABOR policy, the price of admission to athletic events, and the policies as to seating and concessions are to be determined "by the appropriate university authorities on the basis of the best interests of the institutions and without regard to pressure from outside interests." ABOR Policy 5-209(H)(4). University presidents are responsible for enforcing the ABOR athletic policies. ABOR Policy 5-209(F). Thus, each university has the authority to establish ticket prices and seating requirements that are in the best interests of the institution. On its face, a contribution to a booster foundation dedicated to supporting the university's athletics programs is not inconsistent with this policy. B. Requiring Purchasers of Tickets to Athletic Events to Contribute to a Booster Foundation Does Not Violate the Gift Clause. You have also asked whether the practice violates Arizona Constitution's gift prohibition, which is intended to prevent government entities from depleting the public treasury by giving advantages to special interests. Industrial Dev. Auth. v. Nelson, 109 Ariz. 368, 372, 509 P.2d 705, 709 (1973); see also Ariz. Atty. Gen. Op. I98-003 (application of gift clause to charter school laws). Arizona's gift prohibition provides, in part: 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 . . . . Ariz. Const. art. IX, § 7. Arizona courts have applied article IX, § 7, not only to direct expenditures of public funds, Wistuber v. Paradise Valley Unified School Dist., 141 Ariz. 346, 687 P.2d 354 (1984), but also to leases of public property, City of Tempe v. Pilot Properties, Inc. 22 Ariz. App. 356, 527 P.2d 515 (1974). By requiring a ticket purchaser to make a contribution to the booster foundation, the State university has arguably granted a "subsidy" to the foundation that implicates the gift clause. But cf. Kotterman v. Killian, 193 Ariz. 273, 288, 972 P.2d 606, 621 (1999), cert. denied, 67 U.S.L.W. 3671 (U.S. Oct. 4, 1999) (No. 98-1716) (allowing tax credit for contributions that support private schools does not implicate gift clause). For purposes of analyzing the issue presented, this Opinion will assume that the gift clause applies to the contribution requirement. The Arizona Supreme Court has established a two-part test to determine whether a transaction violates the gift prohibition in article IX, § 7. Wistuber, 141 Ariz. 346, 687 P.2d 354. First, the court must determine whether the transaction serves a public purpose. Id. at 349, 687 P. 2d at 357. Second, the court must evaluate the consideration involved because the constitution may be violated "if the value to be received by the public is far exceeded by the consideration being paid by the public." Id. The phrase "public purpose" is "incapable of exact definition," and its meaning changes to meet new developments and conditions. Id. at 348, 647 P. 2d at 356. Supporting State universities, including the universities' athletic programs, serves a public purpose. Thus, the first prong of the Wistuber test is satisfied. Where a transaction has a public purpose, a court must also assess the consideration involved. Wistuber, 141 Ariz. at 349, 687 P.2d at 357. The public benefit from the transaction is the "consideration" received in exchange for the "consideration" paid to the private entity (here, at least some of the contributions paid to the Sun Angels presumably could otherwise be included as part of the ticket price collected by the university). The consideration involved cannot be "so inequitable and unreasonable that it amounts to an abuse of discretion." Id. at 349, 678 P.2d at 357. In determining if the public benefit "is far exceeded by the consideration being paid by the public," a court must adopt a "panoptic view of the

facts" of the transaction, must not be overly technical, and must give "appropriate deference" to the findings of the governmental body. Id. Applying these principles to the issue of ticket premiums, a court would defer to the judgments of the universities regarding the most effective way to raise funds to support their programs. Unless the benefit to the private foundation is so disproportionate to the benefit the public receives that it amounts to an abuse of discretion, a contribution requirement to such an organization is constitutional. When a booster foundation is dedicated to supporting the university, it logically follows that the university would benefit from the foundation's fund-raising efforts. In fiscal year 1998, for example, the Sun Angels provided more than $3 million in university support, which among other things, went toward support for university coaches, capital improvements, grants and scholarships. Sun Angel Financial Statements at 3. The same year Sun Angels received $2.3 million in revenue from the premium on football tickets. Sun Angel Foundation, Ten-Year Financial History. This would plainly satisfy the requirement of adequate consideration for that time frame. In sum, assuming the gift clause applies, a requirement that, in order to purchase certain tickets to an athletic event, a person contribute to a booster foundation that supports university programs is constitutional provided that the public benefits adequately from the transaction.

Conclusion

Requiring a purchaser of certain tickets to also contribute to a booster foundation created to support a State university's athletic programs serves a public purpose and, provided that the benefit the public receives is adequate, this practice does not violate the gift prohibition of Arizona's Constitution.

Janet Napolitano
Attorney General

1) The Sun Angels' bylaws require that the president of ASU and the ASU athletic director serve as ex-officio members of the Sun Angels' board of directors. SUN ANGEL BYLAWS, art. II, § 1. Moreover, if Sun Angels were to dissolve, its assets would go to the ASU Foundation "for the benefit of intercollegiate athletics." Id., art. XII.

2) ASU's "approved financially related organizations" include the ASU Foundation, ASU Alumni Association, ASU Research Park, Sun Angel Foundation, Sun Angel Endowment and the Collegiate Golf Foundation. Arizona State University Comptroller's Office Policies and Procedures Manual, COM 301-02: Deposits-ASU-Approved, Financially Related Organizations (revised July 1, 1999) ("ASU Policy Manual").

3) Until 1997, ASU sold tickets to the Sun Angels and other booster organizations, such as the Sun Devil Club, for resale at a premium. See Minutes of ABOR Meeting 12 (Feb. 14, 1997). In 1997, ASU established a task force to examine how to improve fund-raising efforts to support intercollegiate athletics ("the task force"). That task force recommended that a single entity be used for this fund-raising program, rather than various booster organizations. Arizona State University Intercollegiate Athletics, Resource Acquisition Task Force 3, 4 (1997). As a result of this task force's recommendations, the system for using tickets to athletic events to assist in fund-raising changed to the current system in which a purchaser pays the ticket price to ASU and, for certain seats, pays a separate amount to the Sun Angels.

Mary E. Peters
Director, Arizona Department ofTransportation

December 13 , 1999

No. I99-027 (R99-034)

Questions Presented

You have asked (1) how the proceeds of Grant Anticipation Notes ("GANs") and the revenues from grant agreements pledged by the Arizona State Transportation Board ("the Board") for repayment of GANs can be invested; and (2) whether earnings on those investments must be credited to the State's general fund.

Summary Answer

Proceeds of GANs and the revenues from the grant agreements the Board pledges for repayment of the GANs constitute trust monies, as that term is used in A.R.S. § 35-310(5), and must be invested according to the directives of A.R.S. § 35-313(A). Interest accruing from those investments is not credited to the State general fund, but instead may be used as provided by A.R.S. § 28-7615.

Background

The Arizona Department of Transportation ("ADOT") may enter into grant agreements with the Federal Highway Administration under which ADOT receives federal monies to pay costs for eligible highway projects. A.R.S. §§ 28-334, -7341 to -7344. After ADOT enters a grant agreement, the Board may issue GANs in anticipation of ADOT's receipt of the federal grants.

The legislation authorizing the issuance of GANs provides specific directives regarding the uses of "grant revenues." *See* A.R.S. § 28-7615. "Grant revenues" include: (1) "any revenues the director [of ADOT] will receive under a grant agreement;" (2) proceeds of GANs; and (3) "income and gain from the investment of these revenues and proceeds." A.R.S. § 28-7611(3). When authorizing the issuance of GANs, the Board must determine the use of grant revenues. A.R.S. § 28-7615(A). At that time, the Board must require that grant revenues either be: (1) paid into the GANs Fund; (2) held to pay costs of the project to which the grant application relates; or (3) used to reimburse the ADOT Director for monies previously spent on the project. A.R.S. §§ 28-7615(A)(1) through (3). The legislation authorizing the issuance of GANs also specifically directs ADOT regarding the use of proceeds from the sale of GANs. *See* A.R.S. § 28-7616. The Director of ADOT may use the proceeds from the sale of GANs for expenditures related to the construction project, the costs of issuing the GANs, and to refinance any prior obligations issued to finance the project. *Id.* As long as GANs are outstanding, monies in the GANs Fund must be used to pay principal and interest on the GANs. A.R.S. § 28-7615(B).

Analysis

The proceeds of GANS and the revenues from the grant agreements are both included in grant revenues. *See* A.R.S. § 28-7611(3). To establish what investments are proper for these grant revenues, it is necessary to determine whether the grant revenues are treasury monies and, if so, whether the grant revenues are trust monies or operating monies.

Treasury monies include "all monies in the treasury of this state or coming lawfully into the possession or custody of the state treasurer." A.R.S. § 35-310(4). Unless otherwise provided, the State Treasurer is the custodian of all "special funds." A.R.S. §§ 35-142(A). There are two categories of treasury monies: operating monies and trust monies. A.R.S. § 35-310. "Operating monies" are monies on which the interest is paid to the State's general fund. A.R.S. § 35-310(2). "Trust monies" are "treasury monies other than operating monies, that are entrusted to the state treasurer for preservation and investment." A.R.S. § 35-310(5). The Legislature has directed the State Treasurer regarding permissible investments of "trust monies." *See* A.R.S. § 35-313. The Legislature has also provided that interest realized on any investment of treasury monies not otherwise apportioned by law is credited to the State's

general fund. A.R.S. § 35-317(F).

Applying these statutes to the laws governing GANs establishes that grant revenues are treasury monies and, more specifically, trust monies. The Legislature established the GANs Fund as a "special fund." A.R.S. § 28-7615(A)(1). In addition, the statute establishing the GANs Fund does not provide that the GANs Fund will be in the custody of an official other than the State Treasurer. Thus, the GANs Fund is a special fund of the State treasury, and the monies in it are treasury monies. *See* A.R.S. §§ 35-142(A) (establishing the State Treasurer as custodian of special funds, unless otherwise provided), - 310(4) (defining treasury monies).

Grant revenues received by the Director of ADOT under a grant agreement but not deposited in the GANs Fund are also treasury monies. These grant revenues that are not paid into the GANs Fund may be either (1) "[h]eld for application to the payment of the costs of the project to which the grant agreement relates," or (2) "[a]pplied to reimburse the director for monies previously spent with respect to the project." A.R.S. § 28-7615(A)(2) and (3). The statutes governing the State Highway Fund establish that "monies in the custody of an officer or agent of this state from any source that [are] . . . to be used for the construction, improvement or maintenance of state highways or bridges" are included in the State Highway Fund ("Highway Fund"). A.R.S. § 28-6991(6). Thus, grant revenues that are not paid into the GANs Fund are part of the State Highway Fund. Because the Highway Fund, like the GANs Fund, is a special fund within the State treasury, grant revenues in the Highway Fund are also "treasury monies." See A.R.S. §§ 35-142(A), -310(4).

Proceeds from the sale of GANs, which are also grant revenues, may be used for project-related expenditures, the costs of issuing and debt service on the GANs, and "[p]ayment of the principal, premium or interest on other obligations, all or a portion of the proceeds of which were or are to be applied to the financing of the project to which the grant agreement relates." A.R.S. § 28-7616(5). Because GANs proceeds must be used for highway construction costs or to pay debt service and transaction costs relating to the GANs, the GANs proceeds must either be placed in the GANs Fund or the Highway Fund. Therefore, these monies are also treasury monies.

The next step in the analysis requires determining whether the grant revenues are operating monies or trust monies. This depends on whether the income earned on the monies is deposited in the general fund or whether it is "otherwise apportioned." *See* A.R.S. §§ 35-310(2), (5) (defining operating monies and trust monies), -317(F) (requiring that interest on treasury monies not otherwise apportioned is credited to the general fund). Grant revenues expressly include "income and gain from the investment of [revenues received under a grant agreement and proceeds of GANs]." A.R.S. § 28-7611(3). By including income in the definition of grant revenues, the Legislature has "otherwise apportioned" this income and, therefore, the income is not credited to the general fund. *See* A.R.S. § 35-317(F). Instead, income earned on revenues from grant agreements and GANs proceeds may be used as provided in A.R.S. § 28-7615.

In addition, because the income earned on revenues from grant agreements and GANs proceeds is not paid to the general fund, grant revenues are trust monies. *See* A.R.S. § 35-310(2) and (5). As trust monies, grant revenues may be invested in any of the items listed in A.R.S. § 35-313(A), which incorporates by reference the securities and deposits set forth in A.R.S. § 35-312.

Conclusion

GANs proceeds and the revenues from grant agreements the Board has pledged for repayment of the GANs are trust monies that may be invested as described in A.R.S. § 35-313(A). The earnings on these investments are not deposited in the general fund, but instead may be used as provided in A.R.S. § 28-7615(A).

Janet Napolitano

Mary E. Peters

Director, Arizona Department of Transportation

December 9, 1999

No. I99-026 (R99-041)

Questions Presented

You have asked (1) whether the Arizona Department of Transportation ("ADOT") has the authority to borrow funds from an Indian tribe to advance a highway improvement project; and, (2) if so, what terms can be included in such an agreement.

Summary Answer

The Legislature has not authorized ADOT to borrow money from an Indian tribe to advance a highway improvement project. Accordingly, it is not necessary to address your second question.

Background

Apart from the Arizona State Transportation Board's ("the Board") authority to issue bonds and grant anticipation notes, ADOT's only authority to borrow money is in Arizona Revised Statutes ("A.R.S. ") Title 28, Chapter 21, Article 5 (A.R.S. §§ 28-7671 to 28-7678).[(1)] This article establishes the State Infrastructure Bank ("SIB"), from which ADOT, political subdivisions and Indian tribes may borrow money for highway projects. *See* A.R.S. § 28-7676 (enacted in 1998 Ariz. Sess. Laws ch. 263). This article also includes a statute that authorizes ADOT to enter into agreements with a city or town in which the city or town advances monies to ADOT to accelerate the right-of-way acquisition, design or construction of a project. A.R.S. § 28-7677.

Analysis

The ultimate goal in statutory interpretation is to discern the intent of the Legislature. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). A statute's language is the most reliable index of its meaning. *Calmat v. State ex rel. Miller*, 176 Ariz. 190, 193, 859 P.2d 1323, 1326 (1993).

The Legislature specifically authorized ADOT to enter agreements with cities or towns advancing money to ADOT. A.R.S. § 28-7677. However, the Legislature provided no similar authorization relating to Indian tribes. The Legislature's express authority regarding advances from cities and towns, and the absence of any similar authority regarding Indian tribes, indicates ADOT is not authorized to accept advances from Indian tribes. *See Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982) (the expression of one or more items of a class in a statute indicates the Legislature's intent to exclude all items of the same class which are not expressed).

A review of 1998 legislation that authorized cities and towns to advance ADOT money further supports the conclusion that ADOT is not authorized to borrow money from Indian tribes. *See Goulder v. Arizona Dep't of Transp.*, 177 Ariz. 414, 416, 868 P.2d 997, 999 (App.1993) (statutory provisions are to be read in the context of related provisions and of the overall statutory scheme). The Legislature adopted A.R.S. § 28-7677, which addresses advances from cities and towns, as part of the legislation that created the SIB. 1998 Ariz. Sess. Laws ch. 263. This 1998 legislation expressly authorized Indian tribes to receive loans or other financial assistance from the SIB and established specific requirements for SIB loans to Indian tribes. A.R.S. § 28-7676(B), (F)(6). Although the Legislature specifically included Indian tribes in the portions of legislation concerning the SIB, it did not include them in A.R.S. § 28-7677, which authorized ADOT to accept advances from cities and towns.[(2)]

Moreover, the statutes governing ADOT expenditures do not expressly authorize payments to Indian tribes for advances. ADOT cannot make an expenditure for any purpose during a

fiscal year in excess of the amount appropriated by the Legislature for that purpose, except for repayment of loans from SIB and repayment of advances and interest on advances made to cities and towns pursuant to A.R.S. § 28-7677. A.R.S. § 28-6999.[3] A review of the statutes authorizing ADOT to make expenditures reveals that the Legislation has not authorized ADOT to use the funds available for highway construction projects to repay loans from Indian tribes. *See* A.R.S. §§ 28-6303 (Regional Area Road Fund), -6993 (State Highway Fund), -6501 to -6503 (Highway Users Revenues), -7005 (Revolving Account), -7006 (Transportation Department Equipment Fund), -7509 (Highway Bond Proceeds Fund), -7615 to -7616 (Grant Anticipation Notes Fund), and -8101 to -8104 (Local Transportation Assistance Fund). In contrast, the Legislature specifically authorized the use of the State Highway Fund for "repayment of loans and other financial assistance, including repayment of advances and interest on advances made to the department pursuant to A.R.S. § 28-7677," which is the statute authorizing advances from cities and towns. A.R.S. § 28-6993.

An agency may not act without express statutory authority. *Corella v. Superior Court*, 144 Ariz. 418, 420, 698 P.2d 213, 215 (App. 1985). In addition, an agency can only incur indebtedness when authorized by a statute or the Arizona Constitution. *See Le Febvre v. Callaghan*, 33 Ariz. 197, 204, 263 P. 589, 591 (1928). Because of the lack of legislative authorization, ADOT cannot accept advances from Indian tribes to accelerate a highway project.

Conclusion

The Legislature has not authorized ADOT to enter into agreements with Indian tribes providing for an advance of monies to ADOT to accelerate a highway project. Accordingly, it is not necessary to address the second part of your question regarding the conditions of such agreements.

Janet Napolitano
Attorney General

1. Your question concerning a loan from an Indian tribe does not relate to the Board's bonding authority. The Board can issue bonds, designate the project for which the proceeds are to be used, and sell the bonds at public or private sales. *See* A.R.S. §§ 28-7501 to -7517 and -7561 to -7573.

2. The legislation also gave cities and towns the authority to advance monies to ADOT and to enter into loan repayment agreements with ADOT. 1998 Ariz. Sess Laws ch. 263, §1 (codified as A.R.S. § 9-500.17). In contrast, counties, which are eligible for SIB loans, were authorized to enter repayment agreements with ADOT but were not given the authority to advance monies to ADOT. *Id.* at § 3 (codified as A.R.S. § 11-269.03).

3. There are also exceptions for construction contracts and right of way acquisitions. *See* A.R.S. §§ 28-7000 and -7001.

The Honorable Betsy Bayless
Arizona Secretary of State

December 3 , 1999
No. I99-025 (R99-049)

Question Presented

You have asked whether the provisions of Arizona's open primary law, Ariz. Const. art. VII, § 10 and Arizona Revised Statutes ("A.R.S.") § 16-467, extend to a presidential preference election conducted pursuant to A.R.S. §§ 16-241 through -250.(1)

Summary Answer

Based on the specific language of the open primary provision of the Arizona Constitution and the statutes that implement it, as well as standard rules of statutory construction, the open primary provision does not extend to presidential preference elections.

Background

***History of Primary Elections in Arizona*.**

Article VII, §10 of the Arizona Constitution requires the Legislature to enact "a direct primary election law. . . for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress." A primary election determines which candidates will appear on the general election ballot as the nominee of a political party. *See* A.R.S. §§ 16-301, -501. This direct primary election requirement in article VII, § 10 replaced "the old convention practice of the political parties prior to statehood." *Board of Supervisors v. Harrington*, 85 Ariz. 163, 167, 333 P.2d 971, 974 (1958).

Until recently, the statutes governing Arizona's primary election established a "closed" primary in which only members of political parties that qualified for representation on the ballot could vote.(2) *See* former A.R.S. § 16-467 (amended by 1999 Ariz. Sess. Laws ch. 30). In 1998, the Legislature referred to the voters a proposed constitutional amendment -- Proposition 103 -- to allow a person registered "as no party preference" or as an independent or as a member of a political party that is not qualified for representation on the ballot to vote in "the primary." (3) Arizona Secretary of State, 1998 Publicity Pamphlet, Proposition 103 (hereinafter "1998 Publicity Pamphlet"). The voters approved Proposition 103 in the 1998 general election, and article VII, § 10 now reads:

The Legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress. Any person who is registered as no party preference or independent as the party preference or who is registered with a political party that is not qualified for representation on the ballot may vote in the primary election of any one of the political parties that is qualified for the ballot.

The Legislature then amended the statutes governing primary elections to comply with the new constitutional requirement. *See* 1999 Ariz. Sess. Laws ch. 30. Consistent with the new constitutional provision, the statutes now allow any Proposition 103 voter to designate, at the time of voting or requesting an early ballot, one of the political parties that will be on the ballot and to receive the ballot for that party. A.R.S. §§ 16-467, -542.

***History of Presidential Preference Elections in Arizona*.**

In 1992, the Legislature established a "presidential preference primary election." 1992 Ariz. Sess. Laws ch. 255 (codified as A.R.S. §§ 16-241 to -243). This election is to "give qualified electors the opportunity to express their preference for the presidential candidate of the political party indicated as their preference by the record of their registration." A.R.S. § 16-241(A). In 1995, the Legislature substantially amended the laws governing this new election, changing the date, adding many procedures, and dropping the word "primary" from

the title, thus renaming the election the "presidential preference election." 1995 Ariz. Sess. Laws ch. 248.

The presidential preference election is not denominated a "primary" election and, in fact, it differs significantly from a primary election. Unlike a primary election, the presidential preference election does not determine which candidate is placed on the general election ballot, nor do all parties that will have candidates on the general election ballot participate in Arizona's presidential preference election. Indeed, in 1996, Arizona's first presidential preference election, only one eligible party participated.[(4)] In addition, the presidential preference election is on a different date, *compare* A.R.S. § 16-241(A) *with* A.R.S. § 16-201, and no other election may appear on the same ballot as the presidential preference election. A.R.S. § 16-241(A). The Legislature has also established specific procedures for a presidential preference election regarding such matters as candidate qualifications for the ballot, party eligibility, early voting, ballot format, and polling places. *See* A.R.S. §§ 16-241 through-250. Other laws governing elections apply if they are not in conflict with the statutory provisions for the presidential preference election. A.R.S. § 16-241(C).

While the statutory provisions for the presidential preference election allow voters to express a preference for their party's presidential candidate, the presidential preference election does not actually select delegates to the parties' national presidential nomination conventions. Instead, each party selects convention delegates as provided by its bylaws. A.R.S. § 16-243(A). The delegates of parties participating in Arizona's presidential preference election are directed by the statute to use "best efforts" at the convention for their party's presidential candidate who received the greatest number of votes in Arizona's presidential preference election. A.R.S. § 16-243(B).[(5)]

Analysis

- **The Arizona Constitution's Open Primary Requirement Does Not Apply to Elections for the Office of President.**

Arizona's constitution requires a primary election for the nomination of candidates "for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress." Ariz. Const. art. VII, § 10. While the primary election requirement specifies most political offices in Arizona, it makes no mention of, and therefore excludes, the Office of President of the United States. See Pima County v. Heinfeld, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982) (the expression of one or more items in a class indicates an intent to exclude items of the same class that are not expressed).

Proposition 103 added another sentence to this constitutional requirement for direct primaries, specifying that Proposition 103 voters "may vote in the primary election of any one of the political parties that is qualified for the ballot." 1998 Publicity Pamphlet, Proposition 103. When article VII, § 10 of the constitution is read as a whole, the "primary" identified in the second sentence (added by Proposition 103) logically refers to those primary elections specified in the first sentence. Since the first sentence of § 10 does not include presidential preference elections, it follows that the second reference to "primary" does not either.

The conclusion that presidential preference elections are not within the ambit of Proposition 103 is supported by contrasting the Legislature's Proposition 103 language with the broader language in Proposition 106, a simultaneously proposed initiative that never made it to the ballot. 1998 Publicity Pamphlet, Proposition 106; see also Open Primary Elections Now v. Bayless, 193 Ariz. 43, 969 P.2d 649 (1998). If passed, Proposition 106 would have applied to "any primary election held pursuant to the constitution or laws of the State of Arizona or in which public funds are spent." See 1998 Publicity Pamphlet, Proposition 106. The Legislature was aware of Proposition 106 when it considered the language of Proposition 103, chose not to follow it, and adopted a norrower provision. See Hearing on SCR 1014: House of Representatives: Committee on Government Reform & States' Rights, 43rd Legis. 2-4 (May 18, 1998).

Thus, the language of this constitutional provision and its history support the conclusion that Proposition 103 applies only to those primary elections specified in article VII, § 10 and not to presidential preference elections.

B. The Statutes That Implement the Open Primary Provision Do Not Apply to a Presidential Preference Election. Even though the open primary amendment to the Arizona Constitution did not extend to presidential preference elections, the Legislature could have enacted an open presidential preference election by statute. To date, it has not done so. Instead, the Legislature retained the statutory language that says that the presidential preference election is for the purpose of giving voters the opportunity to express their preference "for the presidential candidate of the political party indicated as their preference by the record of their registration." A.R.S. § 16-241(A) (emphasis added). Extending the open primary provisions to the presidential preference election would be contrary to this clear legislative statement that voters participate in the presidential preference election based on party registration.

After the 1998 election, the Legislature changed the procedures for primaries to allow Proposition 103 voters to vote in the primaries for the offices specified in article VII, § 10. See 1999 Ariz. Sess. Laws ch. 30 (codified at A.R.S. §§ 16-467, -542) (the "open primary legislation"). It might be argued that the open primary legislation went beyond what the constitution required and opened the presidential preference election to Proposition 103 voters. Indeed, because the presidential preference election is to be "conducted and canvassed" according to the laws governing primary elections unless "otherwise provided" by the statutes governing the presidential preference election, A.R.S. § 16-241(C), the 1999 amendments arguably created some ambiguity on this issue.

When interpreting statutes, courts begin with the statutory language and may also consider the statute's "context, subject matter, historical background, effects, consequences, spirit and purpose." Mail Boxes, Etc. v. Indus. Comm'n, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995). Based on these factors, any argument that the open primary legislation went beyond Proposition 103 and extended the open primary requirements to the presidential preference election must be rejected for several reasons.

First, such an interpretation of the open primary legislation would conflict with the express language in A.R.S. § 16-241(A) regarding the purpose of the presidential preference election. Second, the open primary legislation did not amend any of the laws in the article governing the presidential preference election. For example, the open primary legislation amended the procedure for requesting early ballots in primary elections described in A.R.S. § 16-542(A)(6) to comply with Proposition 103, but it did not change the early ballot procedure for the presidential preference election set forth in A.R.S. § 16-246.

Third, extending the open primary legislation to the presidential preference election would ignore the many distinctions the Legislature has maintained differentiating presidential preference elections from primaries. For example, these elections have different dates, different procedures for qualifying for the ballot, and different ballot requirements. Compare A.R.S. §16-241(A) with A.R.S. § 16-201 (dates); A.R.S. § 16-242 with A.R.S. § 16-311 (qualifying for ballot); A.R.S. § 16-245 with A.R.S. §§ 16-462 , -464 (ballots). When the Legislature has wanted to make changes to the presidential preference statutes, it has expressly done so. See 1995 Ariz. Sess. Laws ch. 248. It did not do so in the open primary legislation.

Finally, nothing in the legislative history of the measure implementing Proposition 103 suggests that the Legislature intended to extend the open primary provision to the presidential preference election. To the contrary, the legislative record indicates an effort to comply with the new constitutional requirement, nothing more. See Hearing on HB 2184: House Committee On Federal Mandates & States Rights, 44th Legis., 1st Reg.Sess. 2-3 (January 21, 1999) (testimony that HB 2184 is to comply with and implement Proposition 103); Hearing on HB 2184: Senate Committee On Judiciary, 44th Legis., 1st Reg.Sess. 12 (March 9, 1999) (staff testimony that HB2184 implements Proposition 103); Staff on Arizona House of Representatives, 44th Legis., 1st Reg.Sess., Abstract for HB 2184 (1999) (describes HB 2184 as making changes to comply with Proposition 103).

The primary purpose of statutory construction is to determine the Legislature's intent. Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc., 177 Ariz. 527, 529, 869 P.2d 500, 503 (1994). In this case, the statutory language and legislative history indicate that the open primary provisions do not apply to the presidential preference election.

Conclusion

Based on the specific language of the open primary provision of the Arizona Constitution and the statutes that implement it, as well as standard rules of statutory construction, the open primary provision does not extend to presidential preference elections.

Janet Napolitano
Attorney General

1. **Your Opinion request and this Opinion refer to Arizona's new "open primary" requirement. The label "open" primary describes a variety of election formats. *See California Democratic Party v. Jones*, 169 F.3d 646, 650 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3154 (U.S. Sept. 2, 1999) (No. 99-401). Closed primaries limit participation to party members. *Id.* Open primaries generally allow any registered voter to vote any party's ballot. This is not true of Arizona's "open primary law." Some States, such as Arizona, have systems characterized as "semi-open" or "semi-closed." *See id.* Yet other States have "blanket" primaries in which all voters receive the same ballot, and voters are not limited to candidates from any single party. *Id.***

2. **The Legislature has also established a nomination process for general election candidates that does not involve the primary election. *See* A.R.S. § 16-341 (nominations "otherwise than by primary"). There are also non-partisan primary elections for some local offices, such as city council. *See* A.R.S. § 9-821.01 (city and town elections).**

3. In this Opinion, people registered as "no party preference," as independents, or as members of parties that have not qualified for the ballot will be collectively referred to as "Proposition 103 voters."

4. Parties eligible under State law to appear on the presidential preference ballot include those eligible for continued representation on the ballot under A.R.S. § 16-804 and new political parties eligible to appear on the ballot under A.R.S. § 16-801(A)(2). *See* A.R.S. § 16-244(A). In *Arizona State Democratic Committee v. Hull*, No. CV96-00909 (Maricopa County Super. Ct., February 1, 1996), the court held that presidential preference elections are different from primary elections and that political parties can choose whether or not to participate in them.

5. There are limits to a State's ability to impose requirements on party delegates that would violate party rules. In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981), the Supreme Court held that Wisconsin could not bind party delegates to honor the results of an open presidential primary when doing so violated national party rules.

6. Section 16-542, A.R.S., now specifically permits Proposition 103 voters to designate the ballot of one of the political parties when requesting an early primary ballot. However, the early ballot provision governing the presidential preference election reads as it has since its enactment, permitting "any elector who is eligible to vote in the presidential preference election" to request an early ballot. This language does not link eligibility to vote in the presidential preference election to eligibility to vote in the primary. The clearest statement in the article governing the presidential preference election regarding who is eligible to vote is the statement of purpose in A.R.S. § 16-241(A), which is based on party registration.

Susan Plimpton Segal
Gust Rosenfeld P.L.C.

November 24, 1999
No. I99-024 (R99-053)

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an education opinion for officials of four school districts in which you concluded that school districts can contract for architectural services for a time period of up to five years. While concurring with your conclusion, this Opinion clarifies that school districts must ensure that awarding particular architectural projects under a contract for a period of time will not diminish competitive bidding.(1)

Question Presented

Does the School Procurement Code allow a school district to enter into a contract with an architect for a fixed period of time or does it require the procurement of architectural services on a project-by-project basis only?

Summary Answer

A school district may contract with an architect either for a period of time of up to five years or for a specific project. However, a school district must ensure that awarding architectural contracts for a specific period of time will not diminish competitive bidding.

Background

In 1984, the Legislature enacted the Arizona Procurement Code, A.R.S. §§ 41-2501 to-2662. 1984 Ariz. Sess. Laws, ch. 251. The Procurement Code is intended to, among other things, "[e]nsure the fair and equitable treatment of all persons who deal with the procurement system of this state," "maximize to the fullest extent practicable the purchasing value of public monies of this state," "foster effective broad-based competition within the free enterprise system," and "[p]rovide safeguards for the maintenance of a procurement system of quality and integrity." *Id.* § 1. The Legislature also directed the State Board of Education to adopt a School Procurement Code consistent with the Arizona Procurement Code to govern procurement practices for school districts. A.R.S. § 15-213(A).

Regulations in the School Procurement Code specifically address the procurement of "Specified Professional Services" -- services of architects, engineers, land surveyors, assayers, geologists, and landscape architects. Arizona Administrative Code ("A.A.C.") R7-2-1117 through R7-2-1123; *see* A.A.C. R7-2-1001(83) (defining "specified professional services"); *see also* A.R.S. §§ 41-2571, -2578 (Arizona Procurement Code provisions regarding specified professional services). Although most procurements require that the price or fee be determined before the contractor is selected, when procuring architectural services and other "specified professional services," a school district negotiates the contractor's fee *after* the vendor has been selected. *See* A.A.C. R7-2-1122, -1123.

Although the regulations related to the procurement of "specified professional services" do not specifically address whether a school district may enter into a contract with an architect for a specified period of time,

other regulations in the School Procurement Code generally provide that a "contract for materials or services may be entered into for a period of time up to five years" under certain conditions.(2) A.A.C. R7-2-1093; *see also* A.R.S. § 41-2546 (parallel Arizona Procurement Code provision regarding multi-term contracts). These contracts for a specified period of time are called "multi-term contracts." *Id.* The School Procurement Code defines "services" as "the furnishing of labor, time or effort by a contractor which does not involve the delivery of a specific end product other than required reports and performance." A.A.C. R7-2-1001(79); *see also* A.R.S. § 41-2511(19) (Arizona Procurement Code definition of services).

Analysis

The same principles of construction that apply to statutes also apply to rules and regulations promulgated by an administrative body. *Marlar v. State*, 136 Ariz. 404, 410, 666 P.2d 504, 510 (App. 1983). A general comprehensive statute and a special statute dealing more specifically with part of the same subject should generally be read together, and harmonized if possible, to give effect to legislative intent. *See Lewis v. Arizona Dep't of Econ. Sec.*, 186 Ariz. 610, 615, 925 P.2d 751, 756 (App. 1996). In keeping with that guideline, the general statute remains applicable to all matters not dealt with in the specific statute. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 123, 471 P.2d 731, 735 (1970).

These principles require that the regulations governing the procurement of "specified professional services" be read in conjunction with the other regulations governing school procurement. Indeed, the regulations governing the procurement of specified professional services often specifically refer to other sections of the School Procurement Code. *See, e.g.*, A.A.C. R7-2-1117(A) (referring to regulations concerning sole source and emergency procurements); R7-2-1118(B) (referring to regulations regarding notice and invitation for bids); and R7-2-1120 (referring to regulations concerning cancellation and rejection of bids). Accordingly, A.A.C. R7-2-1093, which allows multi-term contracts for "materials and services," applies to *all* procured services, including "specified professional services." Architectural services and other "specified professional services" are a subset within the broader definition of "services." *See* A.A.C. R7-2-1001(79), (83). Thus, under the School Procurement Code, a school district may either enter into a multi-term contract of up to five years for architectural services or bid each project separately.

In determining whether to use a multi-term or a project specific contract, however, school districts must be mindful of the goals of the procurement statutes and regulations. Thus, before entering into a multi-term contract, school district governing boards must determine in writing that, among other things, the contract "will serve the best interests of the school district by encouraging effective competition or otherwise promoting economies in school district procurement." A.A.C. R7-2-1093(B)(2). In addition to assessing the impact on competitive bidding when initially determining whether to enter into a multi-term contract, a school district that has entered into such a multi-term contract with an architect must also determine as particular architectural projects arise whether a project is within the scope of the multi-term contract or whether the project should

be bid separately. This determination obviously requires a fact-specific analysis of a multi-term contract's scope of work and the specific project under consideration.

Conclusion

Under the School Procurement Code, in appropriate situations, school districts may enter multi-term contracts with a period of up to five years to obtain architectural services. School districts must, however, ensure that the use of a multi-term contract will not diminish competition.

Janet Napolitano
Attorney General

1. Under A.R.S. § 15-253(B), the Attorney General must "concur, revise or decline to review" opinions of county attorneys relating to school matters submitted for review. This provision also applies to private counsel's education law opinions. *See* Ariz. Op. Att'y Gen. I99-006.

2. Those conditions include that before entering into a multi-term contract, a school district must establish in writing that: 1) its estimated requirements cover the period of the contract and are reasonable and continuing; 2) such a contract will serve the best interests of the school district by encouraging effective competition or otherwise promoting economies in school district procurement; and 3) if monies are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled, and the contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the materials or services delivered under the contract or which are otherwise not recoverable. A.A.C. R7-2-1093(B). In addition, a school district must ensure that monies are available at the time the contract is executed for the first fiscal period covered by the contract. A.A.C. R7-2-1093(A).

J. Elliott Hibbs, Director
Arizona Department of Administration

November 09, 1999
No. I99-023 (R99-030)

Questions Presented

You have asked whether:

(1) the 1999 amendments to the Retiree Accumulated Sick Leave ("RASL") program, which brought university employees participating in a federal retirement system into RASL, apply to university employees who retired before the effective date of that legislation;

(2) the death benefit provisions of the RASL program apply to officers and employees who participated in an optional retirement program established by the Board of Regents and died before the effective date of the 1999 amendments; and

(3) the RASL program applies to an individual who leaves State employment and later applies for retirement or only to an officer or employee who retires directly from active employment status.

Summary Answer

1. RASL benefits are not available to university employees participating in a federal retirement system who retired prior to the effective date of the 1999 amendments to RASL.

2. RASL benefits are not available to the beneficiaries of a person who died before the effective date of the 1999 amendments to RASL and who participated in an optional retirement program established by the Board of Regents.

3. An officer or employee must apply for retirement immediately upon separation from State employment to be eligible to participate in RASL.

Background

Before 1985, State employees were not reimbursed for unused sick leave when they left State employment. That year, the Legislature enacted Arizona Revised Statutes ("A.R.S.") § 38-615, which provided that a State officer or employee "who has accumulated 1,000 or more hours of sick leave is eligible, on retirement, to receive $750." 1985 Ariz. Sess. Laws ch. 234, § 1. This established the RASL program, which at that time expressly applied to State officers and employees participating in the Arizona State retirement system (A.R.S. §§ 38-711 to -794), the public safety personnel retirement system (A.R.S. § 38-842), and optional retirement programs established by the Arizona Board of Regents pursuant to A.R.S. § 15-1628. *Id.* The Legislature subsequently amended the law to include a fourth group -- officers and employees participating in the newly created corrections officer retirement plan. 1988 Ariz. Sess. Laws ch. 309, § 1.

In 1997, the Legislature significantly increased the potential payment for unused sick leave. *See* 1997 Ariz. Sess. Laws ch. 291, § 1. The 1997

legislation provided payment on a graduated basis for up to 1,500 accumulated sick leave hours at 50 percent of the officer's or employee's current hourly rate. *Id.* It also created a retiree accumulated sick leave fund, administered by the Department of Administration, for payments for accumulated sick leave. *Id*. § 2.

The following year, the Legislature again amended A.R.S. § 38-615, limiting the maximum payment for unused sick leave to $30,000 and providing a death benefit to the beneficiary of a deceased officer or employee as follows:

If an officer or employee is eligible for normal retirement pursuant to Chapter 5, Article 2 [Arizona State retirement system], 4 [public safety personnel retirement system] or 6 [corrections officer retirement plan] of this title but has not retired at the time of the officer's or employee's death, the beneficiary of the officer or employee is eligible to receive payments.

1998 Ariz. Sess. Laws ch. 292, § 3. This death benefit provision did not include officers and employees who participated in an optional retirement program established by the Arizona Board of Regents.

In 1999, the Legislature amended A.R.S. § 38-615 again. 1999 Ariz. Sess. Laws ch. 300, § 9. These amendments rewrote the death benefit provision and added a fifth group of employees to the RASL program -- university officers and employees participating in a federal retirement system. *Id*.

Analysis

A. The RASL Benefit Is Not Available to University Employees Participating in a Federal Retirement System Who Retired Before the Effective Date of the 1999 Amendments to A.R.S. § 38-615.

The 1999 amendments to A.R.S. § 38-615, which became effective August 6, 1999, expanded the RASL program to include "an officer or employee of a university under the jurisdiction of the Arizona Board of Regents who participates in a federal retirement system." 1999 Ariz. Sess. Laws, ch. 300, § 9. You have asked whether university employees participating in a federal retirement system who retired prior to August 6, 1999, are eligible for compensation for unused sick leave.

As a general rule, statutes are not applied retroactively unless declared so by the Legislature. *See* A.R.S. § 1-244; *State v. Gonzales*, 144 Ariz. 512, 513, 687 P.2d 1267, 1268 (1984). The 1999 amendments to A.R.S. § 38-615 did not contain a retroactivity provision. Although there was a specific effort to make the federal retirees amendment retroactive, the Legislature did not approve the proposed retroactivity clause. *See* HB 2353, 44th Leg., 1st Reg. Sess. (Ariz. 1999) (Conference Committee Amendment).[(1)] Based on the statutory language and legislative history, university employees participating in a federal retirement system who retired prior to August 6, 1999, are not eligible for RASL. Therefore, the 1999 amendments apply only to those university employees in a federal retirement system who retire on or after the effective date of the 1999 amendments.

B. The RASL Benefit Is Not Available to the Beneficiary of a

University Officer or Employee Who Died Before the Effective Date of the 1999 Amendments to A.R.S. § 38-615.

You also asked whether RASL benefits are available to the beneficiary of a university officer or employee who died before the effective date of the 1999 amendments to the RASL. You advised that at least one university retirement system employee who had reached normal retirement age, but had not yet retired, died before the 1999 amendments became effective August 6, 1999. In 1998, the Legislature amended A.R.S. § 38-615 to provide a death benefit. 1998 Ariz. Sess. Laws ch. 292, § 3. The 1998 amendment provided that, if an employee with accrued sick leave who had reached normal retirement age died before retiring, the employee's beneficiary would receive the allowable payment for unused sick leave *Id*.[(2)] The 1998 amendments also provided that sick leave was payable to employees in three annual installments and that an employee's beneficiaries would receive any balance due if that retired employee died before receiving all three installment payments. *Id*.

The provision relating to retired employees who die before receiving their three installments applied to members of all retirement programs enumerated in A.R.S. § 38-615 because it applied to all employees under "this section." *Id.* However, the 1998 amendments regarding payments to beneficiaries of employees who, although eligible to retire, died before retiring, expressly applied only to the members of three of the retirement systems included in the RASL program -- the Arizona State retirement system, the public safety personnel retirement system, and the corrections officer retirement plan ("chapter 5, article 2, 4 or 6" of Title 38). *Id.* This death benefits provision did not include members of optional retirement programs established by the Arizona Board of Regents.

The expression of one or more items of a class in a statute indicates a legislative intent to exclude all items of the same class that are not expressed. *Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982). Here, the Legislature made the death benefit expressly applicable to three retirement programs but failed to include a fourth -- the university retirement plans. Additionally, a more recent, specific statutory provision governs over an older, more general provision. *Lemons v. Superior Court*, 141 Ariz. 502, 505, 687 P.2d 1257, 1260 (1984). Thus, the 1998 amendment creating the death benefit applied only to the three retirement plans specified, even though other portions of the statute applied to four retirement plans. For these reasons, the death benefit for employees eligible for retirement who die before retiring, as enacted in 1998, did not apply to participants in the university retirement programs.

The following year, the Legislature eliminated the language that restricted death benefits to only three of the four eligible retirement programs. Under the 1999 amendments, the beneficiaries receive a lump sum under the RASL "if an officer or employee dies before the officer or employee receives the total payment due to the officer or employee or if an officer or employee is eligible for normal retirement but has not retired at the time of the officer's or employee's death." 1999 Ariz. Sess. Laws ch. 300, § 9. Under these 1999 amendments, all officers and employees eligible for RASL are eligible for the death benefit. Therefore, people in university retirement plans who were not covered by the death benefits in the 1998

legislation are now covered because of the 1999 amendments to A.R.S. § 38-615.

However, as discussed previously, the 1999 amendments to the RASL are not retroactive because the 1999 legislation did not include a retroactivity clause. *See* A.R.S. § 1-244, *Gonzales*, 141 Ariz. at 513, 687 P.2d at 1268. Because the 1999 amendments are not retroactive, beneficiaries of university employees who died before the effective date of the 1999 amendments are ineligible for RASL payments. *See* 1998 Ariz. Sess. Laws ch. 292, § 3.

C. The RASL Program Is Only Available to Officers and Employees Who Apply for Retirement Benefits Immediately Upon Termination of Employment.

When interpreting statutes, words and phrases are to be given their ordinary meanings. *State v. Takacs*, 169 Ariz. 392, 397, 819 P.2d 978, 983 (App. 1991). When applied to A.R.S. § 38-615, this principle establishes that an officer or employee is ineligible for RASL if the officer or employee separates from State employment and later applies for retirement benefits.

Section 38-615, A.R.S., directs payment for accumulated sick leave "on retirement." This payment for accumulated sick leave on retirement is available to an officer or employee "who *has* at least 500 . . . hours of sick leave." A.R.S. § 38-615(A)(1) (emphasis added). Yet, Arizona Administrative Code R2-5-404(F) (1999), provides that "all sick leave credits are forfeited upon separation from State service." As a result, no officer or employee "has" accumulated sick leave if retirement is delayed until some time after separation from state service. The use of the present tense -- "has" -- together with the regulations regarding forfeiture of sick leave indicates an employee must retire immediately upon termination of employment to qualify for RASL.

This conclusion is further supported by the Legislature's use of the phrase "current hourly rate." The amount of payment for sick leave on retirement is equal to a specified "percent of the officer's or employee's salary at the officer's or employee's *current hourly rate* for each hour of accumulated sick leave." A.R.S. § 38-615(A)(1) (emphasis added). An employee who leaves State employment and later applies for retirement has no "current hourly rate" against which to measure sick leave payments.

Thus, the accumulated sick leave payments are available only to an officer or employee who "has" an accumulated sick leave balance and who has a "current hourly rate." Consequently, RASL can only apply to State employees going immediately from State employment into retirement.

Conclusion

Under the current law: (1) university employees in a federal retirement program who retired before August 6, 1999 are ineligible for RASL; (2) the beneficiaries of university officers and employees who were eligible for retirement but had not yet retired and died before August 6, 1999, are not eligible for RASL payments; and (3) only those State officers and employees who apply for retirement immediately upon separation from

State employment are eligible to participate in RASL.

Janet Napolitano
Attorney General

1. The Conference Committee Amendment included language making the amendments to A.R.S. § 38-615 "apply retroactively to July 1, 1998 to an officer or employee under the jurisdiction of the Arizona Board of Regents who participates in a federal retirement system." The Legislature did not adopt the Conference Committee Report.

2. The relevant language of these 1998 amendments to A.R.S. § 38-615 is as follows:

C. If an officer or employee who elects to receive payments pursuant to . . . this section dies before the officer or employee receives the total payment due to the officer or employee, the officer's or employee's beneficiary shall receive the balance due to the officer or employee.

D. If an officer or employee is eligible for normal retirement pursuant to chapter 5, article 2, 4 or 6 of this title but has not retired at the time of the officer's or employee's death, the beneficiary of the officer or employee is eligible to receive payments or coverage and may make the election prescribed in subsection A of this section.

1998 Ariz. Sess. Laws ch. 292, § 3.

Janis S. Merrill
Tri-District In-House Legal Counsel

October 26, 1999

No. I99-022 (R99-042)

Pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 15-253(B), you recently submitted for review an education opinion you prepared for the Superintendent of Tempe School District No. 3, in which you concluded that A.R.S. § 15-843 applies to student readmission requests. While concurring with your conclusion, this Opinion clarifies portions of the analysis to emphasize the rights of students and their parents to participate in these proceedings.(1)

Question Presented

What procedures must school district governing boards follow in connection with proceedings to consider readmission of students who have been expelled from school?

Summary Answer

School district governing boards must follow the procedures established by A.R.S. § 15-843 for all readmission decisions regarding previously-expelled students and comply with federal and State laws concerning the confidentiality of student records.

Background

***Privacy of Educational Records*.** Both federal and Arizona laws protect the privacy of students' educational records. The federal Family Educational Rights to Privacy Act of 1974 ("FERPA") protects a student's privacy interests in "education records," which are defined as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.(2) Schools receiving federal funds may not release education records or personally identifiable information from those records (except for "directory information," as defined in 20 U.S.C. § 1232g(a)(5)(A)) unless the student's parents or guardians have consented in writing to such disclosures. 20 U.S.C. §§ 1232g(b)(1) & (2)(A); 34 C.F.R. § 99.30 (specifying the information the written consent must include).

Section 15-141, A.R.S., specifically mandates compliance with FERPA. It provides that "[t]he right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in [FERPA] and federal regulations issued pursuant to such act." A.R.S. § 15-141(A). In addition, this section extends the protections described in FERPA to all educational institutions, regardless of whether they receive federal funds. A.R.S. § 15-141(B).

***Statutory Standards for Student Disciplinary Proceedings*.**

Student disciplinary proceedings are governed by A.R.S. § 15-843. In this statute, the Legislature focuses on protecting the privacy of the student while ensuring the student and his or her parents have access to the

proceedings.[3]

In A.R.S. § 15-843(A), the Legislature exempted school district governing board actions "concerning discipline, suspension or expulsion of a pupil" from most of the provisions of the Open Meeting Law, A.R.S. §§ 38-431 through -431.09. However, in connection with disciplinary proceedings, the governing board of a school district must "post regular notice" of the action as required by the Open Meeting Law and "take minutes of any hearing held by the governing board concerning the discipline, suspension or expulsion of a pupil." A.R.S. § 15-843(A).

Section 15-843(F), A.R.S., requires that the governing board be notified in advance of any expulsion actions to be considered. That provision further requires that the board decide in an executive session whether to hold a hearing or whether to refer the matter to a hearing officer, and whether to hold any hearing in an executive session. *Id.* If the board decides to hold a hearing concerning the matter, it must provide written notice "at least five working days prior to the hearing" to "all pupils subject to expulsion and their parents or guardians of the date, time and place of the hearing." *Id.* In addition, if the hearing is to be held in an executive session, the notice must indicate that the parents or guardians have the right to object in writing to the governing board's decision to hold the hearing in executive session.[4] *Id.* Notwithstanding the determination of the governing board, the parents or guardians of a pupil or an emancipated pupil may require that an expulsion hearing be held in an open meeting. A.R.S. § 15-843(G). The pupil, his or her parents or legal guardians, and legal counsel may attend the portion of "any executive session pertaining to the proposed disciplinary action" against the pupil. A.R.S. § 15-843(H). In addition, the same individuals must be given "access to the minutes and testimony of the executive session" and may record the session at the parents' or legal guardians' expense. *Id.*

***Consideration of Student Readmission Requests*.** A.R.S. § 15-841(D) allows school district governing boards to consider the readmission of students who have previously been expelled. Such consideration may take place either annually "or upon the request of any pupil or the parent or guardian," and involves a review of the reasons for the expulsion. *Id.* The Legislature has not established a specific statutory process that governing boards must follow in considering student readmission.

Analysis

A. Section 15-843, A.R.S., Applies to Readmission Actions.

By its terms, Section 15-843(A) unambiguously applies to all actions that "concern" the "discipline" of a student. Where legislative language is plain and unambiguous, the statutory text is applied as written. *See Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). Because "discipline" is not defined by statute, rules of statutory construction dictate that we give that term its ordinary meaning.[5] A.R.S. § 1-213; *Harrelson v. Industrial Comm'n*, 144 Ariz. 369, 374, 697 P.2d 1119, 1124 (App. 1984). "Discipline" is "training . . . that corrects, molds strengthens, or perfects . . . the mental faculties or moral character," and "to penalize for the sake of discipline." WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY 644, 645 (1993).

Keeping in mind that statutes should not be read to create illogical results (s*ee Canon School Dist. No. 50 v. W.E.S. Constr. Co. Inc.*, 177 Ariz. 526, 530, 869 P.2d 500, 504 (1994)), readmission determinations, which involve a review of the factual bases for the expulsion, fall within the ambit of disciplinary actions that the statute is meant to address. Readmission is part of the spectrum of punishment used by school district governing boards to maintain order and obedience within schools; in particular, it is the ending to punishment by expulsion. *See* A.R.S. § 15-840(i) (expulsion means "the permanent withdrawal of the privilege of attending a school unless the governing board reinstates the privilege of attending the school"). Thus, applying traditional rules of statutory construction leads to the conclusion that readmission hearings are actions concerning discipline and are therefore governed by A.R.S. § 15-843. Moreover, because a readmission request or review under A.R.S. § 15-841(D) is directly linked to an expulsion, the procedures outlined in A.R.S. § 15-843 that apply to expulsions also apply to readmissions.[(6)]

In A.R.S. § 15-843(A), the Legislature provided that an "action" concerning the readmission of a previously-expelled student is not subject to most of the requirements of the Open Meeting Law, although public notification and minutes are still required. Although exempt from most of the requirements of the Open Meeting Law, a hearing on a readmission request must be held in an open meeting upon the request of the student's parent or guardian. A.R.S. § 15-843(G). The statute also allows the student and his or her parents or guardians to attend executive sessions "pertaining to the proposed disciplinary action" and to have access to the minutes of those proceedings. A.R.S, § 15-843(H). Indeed, *all* board discussions concerning readmission requests that are held in executive session, except for those wherein the board is only receiving legal advice from its counsel, must be open to the student whose readmission is being considered, his or her parents or guardians, and legal counsel.[(7)] *Id.* This includes the initial executive session described in A.R.S. § 15-843(F)(2), at which the board decides whether to hold a hearing or refer the matter to a hearing officer and whether to hold any hearing in an executive session.[(8)] A decision by a board in an executive session under A.R.S. § 15-843(F)(2) to hold the hearing in executive session is, of course, subject to the right of the parent, guardian or emancipated student to require that the hearing occur in an open meeting under A.R.S. § 15-843(G). The school board must also notify parents and students of readmission procedures as required by A.R.S. § 15-843(M) and (N).

B. Federal and State Privacy Laws Apply to Readmission Actions.

In addition to complying with A.R.S. § 15-843, school district governing boards must also comply with FERPA and A.R.S. § 15-141(A) when making readmission determinations. Under both FERPA and A.R.S. § 15-141(A), student records are confidential, and except in a few statutorily-delineated special instances, only the most fundamental information regarding a student, denominated as "directory information" by FERPA, may be disclosed without prior written consent of a student's parents or guardians (or the student herself, if emancipated).[(9)]

FERPA allows the disclosure of information related to any disciplinary action taken against the student only when that action was related to conduct "that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community." 20 U.S.C. § 1232g(h); 34 C.F.R. § 99.36(b). Even in those circumstances, the disciplinary information may be disclosed only to teachers or school officials "who have been determined to have legitimate educational interests in the behavior of the student." *Id.*

Although A.R.S. 15-843(F)(2) gives the school district governing board the authority to determine whether to hold hearings or discussions in executive session, rather than in an open meeting, the board must ensure that the hearing protects the confidentiality of student records as required by FERPA and A.R.S. § 15-141(A). Unless the parent, guardian or emancipated student requires that the hearing occur in an open meeting under A.R.S. § 15-843(G), this will require an executive session to discuss the student's records. To satisfy the requirements of FERPA and A.R.S. § 15-141, school district governing boards must require that a request to hold a readmission (or an expulsion) hearing in a public meeting be in writing and signed by the student's parent or guardians. *See* 20 U.S.C. § 1232g(b)(1) and (2)(A); 34 C.F.R. § 99.30.

Conclusion

School district governing boards should follow the disciplinary procedures established by A.R.S. § 15-843 in connection with student readmission requests, including those procedures governing expulsion hearings. In addition, the school district governing board must ensure compliance with FERPA and A.R.S. § 15-141, which protect the confidentiality of education records.

Janet Napolitano
Attorney General

1. Under A.R.S. § 15-253(B), the Attorney General must "concur, revise or decline to review" opinions of county attorneys relating to school matters submitted for review. Although this provision expressly applies to opinions of county attorneys, it also pertains to private counsel's education law opinions. *See* Ariz. Op. Att'y Gen. I99-006.

2.FERPA contains four narrowly crafted exceptions to the general definition of "education records." *See* 20 U.S.C. § 1232g(a)(4)(B). None are applicable to the issue addressed in this opinion.

3.The Legislature's focus on parental participation and student privacy is also reflected in the laws governing a school board's review of a teacher's decision to promote or retain a student in a grade in common school or pass or fail a student in a high school course. *See* A.R.S. § 15-432(11). That statute allows the board to conduct its review in executive session but permits a parent to require that the review be conducted in an open meeting. *Id.*

4. Should a pupil's parents or guardians disagree among themselves about whether a hearing regarding expulsion should be held in executive session, Section 15-843(G)(1) allows the governing board to decide in an executive session whether to hold the hearing in an executive session or in an open meeting.

5. The other terms used in Section 15-843(A), "expulsion" and "suspension," are defined in A.R.S. § 15-840.

6. The procedures in A.R.S. § 15-843 protect a student's due process rights. *See Tiffany v. Arizona Interscholastic Ass'n, Inc*., 151 Ariz. 134, 136, 726 P.2d 231, 233 (App. 1986) (noting that the U.S. Supreme Court has held that a student's entitlement to a public education is a property right protected by the due process clause); *accord Kelly v. Martin*, 16 Ariz. App. 7, 9, 490 P.2d 836, 838 (1971) ("with respect to discipline of students in public educational institutions involving the possible imposition of serious sanctions such as a suspension or expulsion, the requiremnts of procedural due process under the Fourteenth Amendment are applicable").

7. Section 15-843(H), A.R.S., does not prevent the governing board from receiving legal advice from its counsel outside of the presence of the student, his or her parents and guardians and legal counsel for the student. *See* A.R.S. § 12-2234 (codifying attorney-client privilege). However, just as public bodies cannot use the presence of an attorney to circumvent the Open Meeting Law requirements for open deliberations, governing boards cannot use the right to confidential communications with counsel to undermine the rights of students and their parents to be present at executive sessions under A.R.S. § 15-843(H). *See City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (1990) ("mere presence of an attorney at an executive session cannot be used to circumvent the Open Meeting Law"); *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App. 1995) (discussions of what action to take based on legal advice must occur in public). Therefore, notwithstanding the presence of counsel for the school district, once a governing board begins to discuss the merits of readmission requests or what action they intend to take on the requests, the discussion must again include the students at issue and their parents or guardians and legal counsel. *See id.*

8. This conclusion that the student and his or her parents and legal counsel must be permitted to attend all executive sessions on readmission issues (except for those limited to legal advice) is consistent with previous advice from this Office in a matter that led to your opinion. In particular, after receiving a complaint from a parent alleging she was not going to be permitted to attend an executive session concerning the readmission of her son, attorneys from this Office properly objected to such a process. The procedures for public notice and parental access to all aspects of the proceedings are central to the statute and cannot be disregarded.

9. "Directory information" includes a student's name, address, telephone number, date and place of birth, fields of study, participation in school activities, dates of attendance, degrees and awards received, and any other information that "would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3.

The Honorable Mary Hartley
Arizona State Senate

October 19, 1999
No. I99-021 (R99-026)

Questions Presented

You have asked the following questions:
(1) Whether a school district may require a non-profit corporation that leases school property for extended-day resource programs and other supplemental education programs to provide equipment, furniture, and supplies to the district as a term of the lease, and whether a non-profit corporation may charge students for their programs.

(2) Whether a school district may charge parents a fee for providing a half-day kindergarten program to supplement the half-day program paid for by State aid and deposit the fees with other district funds, and if so, whether the school district is required to set aside funds for parents who cannot afford the fees for the portion of the kindergarten program that is not paid for by State aid.

Summary Answers

1. A school district may charge a non-profit corporation that leases district facilities to provide educational programs a reasonable fee for the use of the facilities, and the fee may be paid in whole or in part with goods or services. The non-profit corporation may charge students for its programs.

2. School districts are authorized to charge parents a fee for extended-day kindergarten programs by Arizona Revised Statutes ("A.R.S.") § 15-342(24), which authorizes fees for optional educational programs and extracurricular activities, and A.R.S. § 15-1142, which authorizes school districts to establish community school programs. However, school districts cannot commingle those fees with other school district funds. State law does not require fee waivers for extended-day kindergarten programs that are offered as community school programs, but if such programs are offered as an extracurricular activity under A.R.S. § 15-342(24), school districts must give school principals discretion to waive all or part of the fee for the program if it would create an economic hardship for a pupil.

Analysis

A. Leases of School Property.

Your first question concerns leases of school property. School districts may lease "school buildings, grounds, buses, equipment and other school property to any person, group or organization" for any civic purpose that is in the interest of the community, including extended-day resource programs. A.R.S. § 15-1105(A). Extended-day resource programs are activities offered on school property before or after normal school hours for kindergarten through eighth grade. The activities may include "physical conditioning, tutoring, supervised homework or arts activities." A.R.S. § 15-1105(E). Therefore, pursuant to A.R.S. § 15-1105, a district may lease district property to a non-profit corporation for extended-day resource programs.

In leasing school property, the district must charge a "reasonable use fee," which may be waived in limited circumstances in the discretion of the district governing board, or by the superintendent or chief administrative officer with the approval of the governing board. A.R.S. §§ 15-1105(A), (B).(1) This "reasonable use fee" may include "goods contributed or services rendered by the person, group or organization to the school district." *Id*. This statutory language would permit a district to require a non-profit corporation to provide furniture, equipment and supplies as part of the lease, provided that the terms of the lease were "reasonable." Any funds generated from such leases may be used to pay outstanding district bond debt or to reduce school district taxes, or it may be deposited in the district's "civic center school fund." A.R.S. §§ 15-1102(A), -1105(D).

Although statutes establish requirements regarding what a district may charge a group for the use of school property, there are no statutes addressing what a non-profit organization leasing school property may charge the students for participation in the programs it offers. Nothing in state law prohibits these non-profit organizations from charging students for participation in their programs, and nothing in state law prohibits the non-profit organization from passing rent costs along to students.

B. Extended-Day Kindergarten Programs.

Your second question addresses extended-day kindergarten programs. School districts are required only to provide kindergarten students with instruction for one-half of the school day, which corresponds with the funding school districts receive from the State to support kindergarten programs. A.R.S. § 15-901(A)(2)(a)(i); *see also* A.R.S.§ 15-703(B) (requiring school districts to establish a kindergarten program unless they file an exemption and can demonstrate that a kindergarten program is not in the best interest of the district). Districts cannot charge students to participate in this state-funded program. *See* Ariz. Op. Att'y Gen. I94-004 (fees prohibited absent specific statutory authorization); *see also* Ariz. Const. art. XI, § 6 (requires free common schools; other state educational institutions must be "as nearly free as possible").

Many school districts supplement the half-day kindergarten program paid for by the State by offering optional educational activities to kindergarten students.(2) Fees for those supplemental kindergarten programs are authorized as fees for optional extracurricular programs under A.R.S. § 15-342(24), or as fees for participation in community school programs under A.R.S. § 15-1142.(3) *See generally* Ariz. Op. Att'y. Gen. I98-007 (addressing the availability of tax credit under A.R.S. § 43-1089.01 for fees for extended-day kindergarten programs). The decision to offer programs to supplement the district's required, free educational kindergarten programs, either as an extracurricular activity or as a community school program, is left to each individual school district.(4)

If a district offers extended-day kindergarten as a community school program, any fees the district collects are kept in a community school program fund that is separate from other district funds. A.R.S. § 15-1143. This separation is required because community school monies may be used only for the operation of the community school program. *Id*. Nothing in

the community school statutes addresses the issue of waiving fees for participation in community school programs. Therefore, State law does not require fee waivers for extended-day kindergarten programs that are offered as community school programs, although a school board could establish waivers under its authority to "establish tuition and fee charges for community school programs." A.R.S. § 15-1142(4).

If an extended-day kindergarten program is offered as an extracurricular activity under A.R.S. § 15-342(24), different fee provisions apply. As is true of community school programs, any fees charged by the district under A.R.S. § 15-342(24) may be used only to pay for the costs of operating the program. *See* A.R.S. § 15-342(24) (fee limited to actual costs of extra-curricular activities). Moreover, fees for extracurricular programs must be adopted at a public meeting after notice has been provided to all parents of pupils enrolled at schools in the district. A.R.S. § 15-342(24). In addition, school districts must give school principals the discretion to waive all or part of any fee assessed for extracurricular activities and programs if the fee creates an economic hardship for a pupil. *Id*. Thus, for extended-day kindergarten programs that a district offers as an extracurricular activity, rather than as a community school program, some fee waivers may be required.

Conclusion

A school district may lease its facilities to a non-profit corporation to provide extended-day resource programs for students and may require the non-profit organization to provide the district with equipment, furniture and supplies as part of the terms of the lease. The non-profit corporation may also charge students for participation in the extended-day resource programs.

School districts may charge parents a fee for extended-day kindergarten programs under their authority to charge fees for extracurricular activities or under the statutes authorizing community school programs. However, school districts cannot commingle those fees with other district funds. State law does not require fee waivers for extended-day kindergarten programs that are offered as community school programs, but if such programs are offered as an extracurricular activity under A.R.S. § 15-342(24), school districts must give school principals discretion to waive all or part of the fee for the program if it would create an economic hardship for a pupil.

Janet Napolitano
Attorney General

1. The uncompensated use of school property is allowed by any school related group or by any organization whose membership is open to the public and whose activities promote the educational function of the school district as determined in good faith by the school district's governing board, or the superintendent or chief administrative officer with the approval of the governing board, including extended-day resource programs, except as provided in § 15-511. A.R.S. § 15-1105(B).

2. School districts are without statutory authority to operate a day-care

facility to provide merely custodial, rather than educational, services. Ariz. Op. Att'y Gen. I81-014. Charter schools are established to provide both a learning environment to improve pupil achievement and academic choices for parents and pupils, and similarly they may not provide strictly custodial services. *See* A.R.S. § 15-181(A).

3.A "community school program" is a program that involves people in the development of an educationally oriented community. The community school serves the purposes of academic and skill development for all citizens, furnishes supervised recreational and avocational instruction, supplies remedial and supplemental education, furnishes meeting places for community groups and provides facilities for the dissemination of a variety of community related services, including extended-day resource programs as defined in § 15-1105. A.R.S. § 15-1141(3).

A.R.S. § 15-342(24) authorizes fees for extra-curricular programs for "common and high school pupils." Common school pupils include preschool children with disabilities and children who attend kindergarten and grades one through eight. A.R.S. §15-901(A)(4); *but see Carpio v. Tucson High School Dist. No. 1*, 111 Ariz. 127, 128, 524 P.2d 948, 949 (1974) (for the purposes of Article XI of Arizona's Constitution, common schools are "those grades between kindergarten and high school").

4. Although school districts may charge fees for extended-day kindergarten, they certainly are not required to do so.

The Honorable Ruth Solomon
Arizona State Senate

October 6, 1999

No. I99-020 (R99-005)

Questions Presented

You have asked whether the spouse of a public agency officer or employee is prohibited from selling equipment, materials, supplies, or services to that public agency except pursuant to a contract awarded after public competitive bidding.

Summary Answer

The Legislature has prohibited a public agency officer or employee from selling equipment, materials, supplies, or providing services to that public agency except pursuant to a contract awarded after public competitive bidding. This prohibition does not apply to the spouses of public agency officers or employees. However, the public agency officer or employee cannot be involved in any manner with decisions associated with a spouse's contract and must disclose the spouse's interest in the contract as required by Arizona's conflict of interest statutes.

Background

In 1968, the Arizona Legislature adopted a series of statutes governing conflicts of interest by public officers and employees.(1) 1968 Ariz. Sess. Laws ch. 88 (codified as Arizona Revised Statutes ("A.R.S.") §§ 38-501 through -511). This comprehensive legislation applied to the State as well as all political subdivisions. A.R.S. § 38-502(5) and (6). It was intended to protect the public from self-dealing by public officers and employees. *See Maucher v. City of Eloy*, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985).

Arizona's law has two distinct provisions addressing conflicts of interest that may arise in public contracting. The first concerns contracts in which a public officer or employee or a relative of a public officer or employee has a "substantial interest."(2) A.R.S. § 38-503(A). If a public officer or employee or a relative of the officer or employee has a "substantial interest" in "any contract, sale, purchase or service" to the public agency, the public officer or employee must

disclose the interest and refrain from participating in any manner on issues relating to the contract, sale, or purchase. A.R.S. § 38-503(A).

Additionally, the Legislature has established more restrictive prohibitions on certain contracts involving public officers and employees and their agencies. For these situations, the Legislature determined that disclosure and refraining from participation were not sufficient to fulfill the purposes of the conflict of interest statutes. Specifically, the legislative limitation provides that "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) There are limited exceptions to this prohibition for school districts and other political subdivisions. A.R.S. § 38-503(C)(1) and (2).

Analysis

Arizona's conflict of interest statutes include the spouse of a public officer or employee within the definition of "relatives" who are covered by certain portions of the laws. *See* A.R.S. § 38-502(9).(4)

Under A.R.S. § 38-503(A):

Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency, shall make known the interest in the official records of such public agency and shall refrain from

voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

Thus, under A.R.S.§ 38-503(A), if an employee's or public officer's spouse has a substantial interest in a contract, the public officer or employee must disclose that interest and refrain from any involvement concerning such a contract.

In contrast, the limitation on contracting between public officers and employees and their agencies in A.R.S. § 38-503(C) is more narrowly drafted. Unlike subsections A and B of A.R.S. § 38-503, subsection C refers only to public officers or employees and does not refer to "relatives." Moreover, subsection C does not mention the public officer's or employee's spouse. This further contrasts with the language in subsection D of this statute that specifically applies to school district and community college district governing board members and their spouses but no other relatives.[5] In addition, one "remote interest" is "that of a public school board member when the relative involved is not a dependent . . . or a spouse." A.R.S. § 38-502(10)(h). Thus, where the Legislature intended to include spouses, it expressly did so. The failure to include spouses in A.R.S. § 38-503 (C) indicates the Legislature did not intend that section to apply to spouses. *See Banks v. Arizona State Bd. of Pardons and Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035 1039 (App. 1981) (where Legislature included a term in one portion of statute and excluded it elsewhere, courts will not read in the excluded term).

Although a spouse is not expressly mentioned in A.R.S. § 38-503(C), it could be argued that the contracting restriction should apply to spouses because Arizona is a community property state and the public officer or employee has an equal undivided interest in community assets resulting from a spouse's contract. *See Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986). It is well established that, in a community property state, a public officer or employee has an interest in a contract executed by his or her spouse. *See Beakley v. City of Bremerton*, 105 P.2d 40, 41-42 (Wash. 1940) (city attorney violated Washington's prohibition against city employees having "an interest" in city contract when he hired spouse); Ariz. Op. Att'y Gen. I63-59-L (statute barring employee from having "an interest" in a real estate license precludes employment of person whose spouse holds a license). Nevertheless, the statutory language and history of the conflict of interest provision do not support the conclusion that the Legislature intended A.R.S. § 38-503(C) to apply to spouses of public officers and employees.

In addition to not including spouses in the language of A.R.S. § 38-503(C), the Legislature provided only that the public officer or employee cannot "supply" equipment, material, supplies, or services unless the contract is let after public competitive bidding. In contrast, the prior prohibition on contracts applied to any contract in which the public officer was "interested directly or indirectly." *See* A.R.S. § 38-446 (1956) (repealed by 1968 Ariz. Sess. Laws ch. 88). The Legislature repealed the broad restrictions prohibiting contracts in which the public officer had an interest and replaced them with A.R.S. § 38-503(C), which limits the prohibition to situations in which an officer or employee supplies equipment, material, supplies, or services. Courts will presume the Legislature knows existing law when it enacts a statute and that a change in a statute indicates the Legislature intends to change the law. *See State v. Garza Rodriguez*, 164 Ariz. 107, 111, 791 P.2d 633, 637 (1990). By replacing a statute based on a public officer's or employee's "interest" with a statute based on a public officer or employee supplying equipment, materials, or services, the Legislature narrowed the scope of the statute. "Supply" means to provide or furnish. Webster's Third New International Dictionary 2297 (1993). "Supply" is an active verb, requiring some affirmative action to deliver or transfer the product or service. *DeMore v. Dieters*, 334 N.W.2d 734, 737 (Iowa 1983). The existence of an interest in the proceeds of a contract under community property laws is not enough to establish that the public officer or employee is "supplying" the product or services under the language of A.R.S. § 38-503(C).

Both the language and legislative history of the conflict of interest statutes support the conclusion that the prohibition on contracts absent public competitive bidding established in A.R.S. § 38-503(C) applies only to the public officers or employees. It does not apply to contracts with spouses of a public officer or employee unless the contract is a device or

subterfuge to evade the prohibition in A.R.S. § 38-503(C). *See* McQuillan, *supra.* note 1, § 29.97 (courts will not permit schemes or devices to evade prohibition on contracting with public agency); *cf*. Ariz. Op. Att'y Gen. I86-036 (A.R.S. § 38-503(C) does not apply to corporations unless the corporation is the alter ego of the public officer or employee or was formed for the purpose of evading the requirements of this subsection). Although not subject to the public competitive bidding requirement in A.R.S. § 38-503(C), a contract with a spouse of a public employee or officer remains subject to A.R.S. § 38-503(A), requiring the officer or employee to disclose the interest and to refrain from voting or participating in the matter.[(6)]

Conclusion

No public officer or an employee of a public agency may supply equipment, materials, supplies, or services to that agency unless public competitive bidding procedures are followed. This does not apply to spouses of public officers and employees. Although spouses of public officers or employees are not subject to the public competitive bidding requirements established in A.R.S. § 38-503(C), the public officer or employee must disclose any substantial interest his or her spouse may have in a contract and refrain from any participation in the matter.

Janet Napolitano
Attorney General

1. The 1968 conflict of interest legislation repealed other laws on that subject, including a requirement that members of the Legislature and state, county, city, town, or precinct officers not be interested "directly or indirectly in any contract or in any sale or purchase made by them in their official capacity, or by any body or board of which they are a member." A.R.S. § 38-446 (1956) (repealed by 1968 Ariz. Sess. Laws ch. 88). This broad prohibition against public officers having any interest in a contract with the public body of which the person was a member had been the law in Arizona since before statehood. *See* Ariz. Civ. Code §§ 217 through 219, 99 (1901). It was based on the principle that public officers "must have no personal interest in transactions with the government which they represent." *State ex rel. Smith v. Bohannan*, 101 Ariz. 520, 522, 421 P.2d 877, 879 (1966). This philosophy was consistent with common law principles that prohibited a member of a public body from contracting with that body. *See* 7 Samuel Williston & Richard A.Lord, A Treatise on the Law of Contracts § 16.11 (4th ed. 1997); 10A E. McQuillan, et al. , The Law of Municipal Corporations § 29.97 (3d ed. 1999). While the 1968 legislation repealed similar prohibitions for school board members and governing boards of special districts, it included those individuals within the comprehensive conflict of interest laws codified at A.R.S. §§ 38-501 through -503. 1968 Ariz. Sess. Laws ch. 88.

2. A "substantial interest" is defined as "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). A "remote interest" includes ten specific types of interests, including, for example, that of a nonsalaried officer of a nonprofit corporation, that of a landlord or tenant of a contracting party, that of an attorney of a contracting party, that of a member of a nonprofit cooperative marketing association, and that of a public officer or employee who owns less than three percent of the shares of a corporation for profit, provided that the total income from the corporation does not exceed five percent of the total annual income of the public officer or employee. A.R.S. § 38-502(10)(a)-(e).

3. The conflict of interest laws define "public competitive bidding" 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). The reference to title 41, chapter 4, article 3 is out-dated because, after this definition was adopted, the Legislature enacted the procurement code that currently governs public purchasing. 1984 Ariz. Sess. Laws ch. 251 (codified as A.R.S. Title 41, ch. 23).

4. "Relative" includes "the spouse, child, child's child, parent, grandparent, brother or sister of the whole or half blood, and their spouses and the parent, brother, sister or child of a spouse." A.R.S. § 38-502(9).

5. Section 38-503(D), A.R.S. , prohibits the governing board of a school district or a community college district from employing a person who is a governing board member or who is the spouse of a member of the governing board.

6. Moreover, public officers and employees should avoid any appearance of impropriety. Contracts with a public officer's or employee's spouse that are not subject to public bidding may raise questions about whether there was improper influence in letting the contract even though the public officer or employee made the required disclosures and was not involved in the decision making.

Ronald W. Dalrymple, Executive Director
Arizona Board of Technical Registration

September 28, 1999
No. I99-019 (R99-029)

Questions Presented

You have asked whether designing a golf course (i) constitutes the practice of landscape architecture as defined by Arizona Revised Statutes ("A.R.S.") § 32-101(B)(18), and (ii) requires the use of an Arizona registered professional.(1)

Summary Answer

Designing a golf course involves the practice of landscape architecture as defined by A.R.S. § 32-101(B)(18), and requires the use of a registered professional.

Background

Arizona law requires that any person practicing landscape architecture in this State have a certificate of registration from the Board of Technical Registration ("Board"). A.R.S. § 32-121.(2) It is a Class 2 misdemeanor for any person who is not properly registered with the Board to practice or hold himself or herself out as qualified to practice landscape architecture. A.R.S. § 32-145. The purpose of this registration is to "provide for the safety, health and welfare of the public." A.R.S. § 32-101(A).

To qualify for a professional registration as a landscape architect, a person must be of "good moral character or repute," have the required amount of education and experience, and pass an examination. A.R.S. § 32-122.01. *See also* Arizona Administrative Code ("A.A.C.") R4-30-101 (defining "good moral character and repute"). The Board is required to waive the examination under certain circumstances.(3) A.R.S. § 32-126(A); A.A.C. R4-30-203. The Board has the authority to discipline registered professionals for, among other things, gross negligence, incompetence, "or other misconduct in the practice of the registrant's profession." A.R.S. § 32-128(B).(4)

Analysis

The practice of landscape architecture involves certain professional services that are performed "in connection with the development of land and incidental water areas." A.R.S. § 32-101(B)(18). The services include "consultations, investigation, reconnaissance, research, planning, design or responsible supervision." *Id.* To be classified as landscape architecture subject to the registration requirements, the "dominant purpose" of these services must be:

> [t]he preservation, enhancement or determination of proper land uses, natural land features, ground cover and planting, naturalistic and esthetic values, the settings of and approaches to buildings, structures, facilities or other improvements, natural drainage, and the consideration and the determination

> of inherent problems of the land relating to erosion, wear and tear, light or other hazards.

Id.[(5)]

According to your opinion request, designing a golf course requires reshaping natural land features, integrating natural ground cover into a design, determining appropriate new ground covers and plantings, addressing the control of water flow, designing appropriate water delivery systems, designing safe golf cart pathways and entries and exits to tee areas and greens, designing fairways that meet client needs and provide adequate safety zones for golfers in adjacent fairways, addressing issues related to erosion and environmental concerns and, finally, integrating these and other components into a golf course design.

Designing a golf course, as described in your opinion request, would involve services embraced by the statutory definition of landscape architecture. *See* A.R.S. § 32-101(B)(18). To design a golf course, a person develops plans that involve extensive landscaping of an area. The work requires consideration of problems related to erosion, wear and tear, appropriate ground cover, and other tasks specifically listed in the definition of landscape architecture. Therefore, under A.R.S. § 32-121, a person who performs such work is practicing landscape architecture and must be a registered professional.

Arizona first began requiring the registration of landscape architects in 1968, two years after the Arizona Court of Appeals held that, under the law then in existence, a golf course designer need not be a registered architect. *See* 1968 Ariz. Sess. Laws ch. 92; *Jackling v. Snyder*, 3 Ariz. App. 63, 65-66, 411 P.2d 822, 824-25 (1966). Because the registration requirements for landscape architects are intended to protect the health, safety and welfare of the public, those provisions should be liberally construed to accomplish their objectives. *See State v. Sanner Contracting Co.*, 109 Ariz. 522, 524, 514 P.2d 443, 445 (1973) (measure whose purpose is to protect health and welfare is entitled to liberal construction to accomplish its objective). Applying the registration requirement to the design of golf courses helps ensure that the person doing the work is qualified and subject to a disciplinary system to protect against professional misconduct.

Although a registered professional must perform the work that falls within the statutory definition of landscape architecture, some aspects of golf course design may not be included in this definition. For example, a professional golfer whose expertise is the game of golf, not the technical area of landscape architecture, might participate in the design of the golf course with regard to issues such as enhancing the difficulty of the course. The primary purpose of this work is to develop a golf course that achieves certain recreational goals; its "dominant" purposes are not the technical issues that are the focus of the statutory definition of landscape architecture. Professional golfers who participate in the design of a golf course in this manner may be identified as golf course designers, but may not hold themselves out as qualified to practice landscape architecture unless they are registered professionals. *See* A.R.S. § 32-145(1) (prohibits non-registrant from holding himself or herself out as qualified to practice

landscape architecture and other professions within the Board's jurisdiction). Although a person whose work focuses only on the recreational aspect of golf course design need not be registered, a registered professional must remain responsible for the technical aspects of the project that are included within the definition of landscape architecture.[(6)]

Conclusion

The design of a golf course involves the practice of landscape architecture, as defined by A.R.S. § 32-101(18). Therefore, designing a golf course in Arizona requires the use of a registered professional.

Janet Napolitano
Attorney General

1. The terms "registered professional" or "registrant," as used in this Opinion, mean a licensed architect, assayer, engineer, geologist, land surveyor, or landscape architect as defined by A.R.S. § 32-101(B)(2), (5), (10), (14), (16), and (19).

2. The Board also has jurisdiction over architects, assayers, engineers, geologists and land surveyors. A.R.S. § 32-101(A). Before practicing any of these professions in Arizona, a person must receive a certificate of registration from the Board. A.R.S. § 32-121.

3. The Board is required to waive the examination requirement for any person who: (1) is registered and in good standing in another state or foreign country which has registration requirements that are "substantially identical" to Arizona's; (2) holds a "certificate of qualification in good standing issued by a national bureau of registration or certification," such as the Council of Landscape Architectural Registration Boards, or (3) has been a professional registrant in another state or foreign country for at least ten years. A.R.S. § 32-126(A); A.A.C. R4-30-203.

4. Disciplinary action may include: (1) revocation of a certificate of registration; (2) suspension of a certificate of registration for up to three years; (3) imposition of administrative penalties of up to $2,000 per violation; (4) imposition of restrictions on the scope of the registrant's practice; (5) imposition of peer review and professional education requirements; (6) imposition of probation requirements that may include restitution payments to clients and others; and (7) issuance of written reprimands. A.R.S. § 32-128(A).

5. The practice of a landscape architect is distinct from the practice of a licensed landscape contractor. While a registered professional landscape architect, among other things, designs and plans landscaping (A.R.S. § 32-101(B)(18)), licensed contractors may not design and plan landscaping. A contractor is synonymous with the term "builder." A.R.S. § 32-1101(A)(3). Landscaping and irrigation contractors, whether residential or commercial, may treat, condition, prepare and install topsoil; plan all decorative vegetation; excavate, trench, bore, backfill, and grade as necessary for installation of landscaping and irrigation systems; install slabs, walkways, decks, and walls, with exceptions; and install, repair and maintain irrigation systems. *See* A.A.C. R4-9-102.

6. Whether, and to what extent, registered professionals other than landscape architects may participate in the design of golf courses is beyond the scope of this Opinion. The services of several of the professions subject to the jurisdiction of the Board overlap. *See, e.g.,* A.R.S. § 32-101(B)(11) and -101(B)(21)(e) (setting, resetting or replacing points to guide the location of new construction is the practice of both land surveying and engineering). For example, an engineer could lawfully design the grading and drainage plan for a golf course. *See* A.R.S.

32-101(B)(11). Additionally, a registrant "may engage in [the] practice in another [profession] . . . only to the extent that the person is qualified and to the extent that the work may be necessary and incidental to the work of the registrant's profession on a specific project." A.R.S. § 32-143. The determination of whether a specific project is within the scope of a registrant's practice is a question the Board must determine on a case-by-case basis.

The Honorable Lisa Graham Keegan **September 16, 1999**
Superintendent of Public Instruction **No. I99-018 (R99-031)**

Questions Presented

You have asked (1) whether Arizona Revised Statutes ("A.R.S.") § 15-352 exempts public school district governing boards from "reconstituting previously formed school councils"[(1)] if the school council includes representation by more than one teacher and more than one parent; and (2) whether school district governing board decisions must be reevaluated if the decisions were based upon recommendations made by a school council whose membership is inconsistent with A.R.S. § 15-351.

Summary Answer

1. Pursuant to A.R.S. § 15-352(A), school councils formed before September 16, 1994, the effective date of the legislation requiring school councils, do not need to be reconstituted if those school councils include representation by more than one teacher and more than one parent or guardian of a pupil enrolled at the school. However, school councils formed on or after September 16, 1994, and school councils formed before that date that have not complied with the membership requirements in A.R.S. § 15-352(A) must comply with A.R.S. § 15-351.

2. Because school councils make recommendations that school district governing boards may accept or reject, governing boards are not required to reevaluate decisions based on school council recommendations, despite the fact that the school council membership is inconsistent with A.R.S. § 15-351. The governing board should, however, take into account the composition of the school council when it considers and weighs the recommendations made.

Background

In 1994, the Legislature mandated that each public school establish a school council. 1994 Ariz. Sess. Laws , 9th Spec.Sess., ch.2, § 3 (codified as A.R.S. § 15-351; effective September 16, 1994). The Legislature required each public school to have a school council by December 31, 1995. *Id*. at § 23. The purpose of school councils is to provide individuals who are affected by the outcome of decisions made at the school site with an opportunity to be a part of the decision-making process. A.R.S. § 15-351(A). The statute allows a local school district governing board to delegate to the school council the responsibility of developing a curriculum or any other responsibilities "reasonably necessary to accomplish decentralization." A.R.S. § 15-351(B).

The school council membership requirements in A.R.S. § 15-351(B) provide for a diverse cross-section of educators, parents, community members, and pupils. Additionally, the membership of a school council must reflect the ethnic composition of the local community. A.R.S. § 15-351(B).

Prior to the enactment of A.R.S. § 15-351, several school districts formed school councils. *Minutes of Joint House and Senate Committees on Education*, 41st Legis., 1st Reg. Sess., 3-12 (Ariz. 1993). Those councils, while consisting of individuals interested in education issues, did not necessarily comply with the membership requirements of Section 15-351.

Analysis

A. A.R.S. § 15-352 Exempts Governing Boards from Reconstituting Previously Formed School Councils If Those School Councils Include Representation by More Than One Teacher and More Than One Parent or Guardian of a Pupil Enrolled at the School.

Section 15-351(B), A.R.S., requires that school councils be comprised of the following members: (1) parents of pupils enrolled in the school district who are not employed by the school district, (2) teachers, (3) noncertified employees, (4) community members, and (5) pupils (if the school is a high school). However, the statutory mandate in A.R.S. § 15-351(B) is qualified, providing that a school council shall consist of the enumerated members "*except as provided in section 13-352*." A.R.S. § 15-351(B) (emphasis added). That section, entitled "Exemptions," provides that school district governing boards are "not obligated to reconstitute previously formed school councils . . . if the existing school councils include representation by more than one teacher and more than one parent or guardian of a pupil enrolled at the school."[(2)] A.R.S. § 15-352(A).

The cardinal rule of statutory interpretation is to determine and give effect to legislative intent. *Phoenix Newspapers, Inc. v. Superior Ct.*, 180 Ariz. 159, 161, 882 P.2d 1285, 1287 (App. 1993). If the plain language of the statute is unambiguous, then the statute should be enforced according to its clear language. *McPeak v. Industrial Comm'n*, 154 Ariz. 232, 234, 741 P.2d 699, 701 (App. 1987).

Section 15-352(A) exempts school councils formed before school councils were legislatively mandated from the membership requirements in A.R.S. § 15-351 as long as the council membership includes more than one teacher and more than one parent. However, if membership on a school council subject to A.R.S. § 15-352(A) changes, and the council no longer includes more than one teacher and more than one parent, the council must comply with the requirements of A.R.S. § 15-351(B). New members cannot be appointed to the council to bring a school council into compliance with A.R.S. § 15-352(A). Instead, the council must be reconfigured to comply with the more extensive requirements of A.R.S. § 15-351. For example, if a school established a school council in May 1994, and that council's membership included two teachers and two parents, that council could continue to operate after the effective date of the legislation mandating school councils without modifying its membership because it complied with A.R.S. § 15-352(A). However, if at some later date one of the teachers or parents resigned from the council, the council membership would then need to comply with A.R.S. § 15-351. This interpretation is consistent with the law's purpose of ensuring that people affected by decisions about public schools have the opportunity to provide input into the decision-making process, while recognizing the legislative intent not to disrupt the operation of school councils that existed

before state law required school councils. Moreover, although a school board is not obligated to reconstitute a previously formed school council that complies with A.R.S. § 15-352, nothing in the statutes prohibits a board from doing so.

B. Governing Boards May Consider School Council Recommendations Even If the School Council Membership Was Improper.

As a general rule, school districts may delegate to subordinate boards or officers only those powers that are administrative or ministerial in nature. *Godbey v. Roosevelt School Dist. No. 66*, 131 Ariz. 13, 19, 638 P.2d 235, 241 (App. 1981). Decisions involving judgment or discretion on the part of the school district may *not* be delegated unless such right to delegate has been expressly authorized by the Legislature. *Id.* School district governing boards have the exclusive right to manage and control the affairs of the school district, unless that authority has been granted to another entity by specific legislation. *Board of Ed. v. Scottsdale Ed. Ass'n*, 17 Ariz. App. 504, 511, 498 P.2d 578, 585 (1972). When decisions involving judgment or discretion are made, "[t]he school board alone makes the rules and it alone enforces them." *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 443, 747 P.2d 602 (App. 1987).

Although A.R.S. § 15-351(B) allows governing boards to delegate certain responsibilities to school councils, the governing board retains the authority to make final, binding decisions regarding school district business.[(3)] The board is free to accept or reject the recommendations of a school council, regardless of whether the school council's membership complies with Section 15-351. All final decisions rest with the governing board and cannot be delegated to or exercised by the school council. Moreover, nothing in the statutes bars a governing board from considering recommendations of a school council that does not meet the requirements of A.R.S. § 15-351(B), and the statutes do not permit any legal challenges to a board's decision based on the composition of school councils offering input on those decisions. Consequently, although recommendations made by a school council whose membership does not comply with A.R.S. § 15-351 should be accorded less weight by the governing board, the board may still consider those school council recommendations. Therefore, governing boards are not required to revisit decisions made in accordance with recommendations from a school council whose membership does not comply with A.R.S. § 15-351, but nothing prevents a governing board from revisiting such a decision if the governing board deems it appropriate.

Although the legislation does not identify any penalties if a school council is improperly constituted such that statutorily mandated constituencies are unrepresented, governing boards would be well advised to review the membership of all school councils on a regular basis to verify they comply with the membership requirements in the law. This is necessary to ensure that the school boards receive the input contemplated by the school council legislation.

Conclusion

Section 15-352, A.R.S., exempts school district governing boards from "reconstituting previously formed school councils," provided that the

school councils include more than one teacher and more than one parent. Accordingly, school councils formed prior to the effective date of A.R.S. § 15-351, though not in strict compliance with the membership requirements set forth in that statute, need not be reconfigured if they comply with A.R.S. § 15-352. A governing board does not need to revisit decisions it made based on recommendations by a school council whose membership does not comply with A.R.S. § 15-351, although the governing board should consider the makeup of the school council when weighing and considering the recommendation.

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1. Although they are sometimes referred to as "site councils," this Opinion uses the term "school councils" to reflect the statutory language.

2. Sections 15-351 and 15-352, A.R.S., have different language regarding parent members of school councils. Section 15-351 expressly prohibits a parent representative from being employed by the school district, but Section 15-352 does not include the same restriction. Thus, on a council subject to the membership requirements in A.R.S. § 15-351, if a parent member at any time becomes employed by the school district, that member can no longer serve as a parent representative on the council because the statute expressly requires representation on the council by parents who are not employed by the school district. A.R.S. § 15-351(B)(1). However, because A.R.S. § 15-352 does not include the same restriction, a parent member who is subsequently hired by the district may remain as the parent representative on a council whose membership is governed by A.R.S. § 15-352. *See Banks v. Arizona State Bd. of Pardons and Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035, 1039 (App. 1981) (where Legislature has included a term in certain places and excluded it elsewhere, court will not read excluded term into the statutes).

3. The delegable responsibilities include the development of a curriculum and "any additional powers that are reasonably necessary to accomplish decentralization." A.R.S. § 15-351(B). On these issues, governing boards may delegate to school councils only the authority to consider issues and make recommendations to the board; governing boards cannot delegate their decision-making authority. *See* A.R.S. § 15-341(A)(1) (governing boards shall "[p]rescribe and enforce policies and procedures for the governance of the schools . . . "); A.R.S. § 15-341(A)(6) (governing boards shall "[p]rescribe the curricula and criteria for the promotion and graduation of pupils. . ."); *Godbey v. Roosevelt School Dist*., 131 Ariz. at 19, 638 P.2d at 241. This interpretation is consistent with the legislative intent - that school councils provide *input* into board decisions. A.R.S. § 15-351(A).

The Honorable Carol Springer

August 27 , 1999
As ammended 12/29/99

Arizona State Treasurer

No. I99-017 (R99-024)

Questions Presented

You have asked (1) whether a school district may receive state monies for charter schools, and, if so, whether those monies may be commingled with other district monies held by the county treasurer; (2) whether warrants may be issued for charter school expenses, and, if so, whether the warrants may be registered or paid for by credit line; (3) if such warrants may be issued, whether they are legal purchases for the State Treasurer pursuant to Arizona Revised Statutes ("A.R.S.") § 35-313(A)(13); and (4) whether the interest on such warrants would be tax exempt.

Summary Answer

1. State monies for charter schools sponsored by school districts may be commingled with school district monies, but monies for charter schools sponsored by the State Board of Education ("Education Board") or the State Board for Charter Schools ("Charter Board") must be kept separate from school district monies.

2. Warrants cannot be issued to pay for the expenses of charter schools operated by a private person or private organization.

Because of the conclusion that warrants cannot be issued to pay for the expenses of charter schools, it is not necessary to answer questions three and four.

Background

In 1994, the Legislature created a hybrid public school in Arizona known as a charter school. 1994 Ariz. Sess. Laws, 9th Sp. Sess., ch. 2, § 2. The Legislature created charter schools to provide a learning environment that will improve pupil achievement and provide additional academic choices for parents and pupils. A.R.S. § 15-181(A). Charter schools are public schools established by a contract between an authorized sponsor and a public body, a private person, or a private organization. A.R.S. §§ 15-101(3), -183(B). The Legislature authorized the Education Board, the Charter Board, and school district governing boards to sponsor charter schools. A.R.S. §§ 15-101(3), -183(C).

Analysis

A. State Monies for School District-Sponsored Charter Schools May Be Commingled with School District Monies, But Monies for Charter Schools Sponsored by the Education Board or Charter Board Must Be Kept Separate from School District Monies.

Because charter schools are public schools, they are eligible to receive state financial support appropriated by the Legislature. A.R.S. § 15-185.[(1)] However, the method by which a charter school applies for and receives state financial support depends on whether a charter school is sponsored by (i) a school district governing board or (ii) by the Education Board or the Charter Board. *See* A.R.S. § 15-185(A) and (B).

District-sponsored charter schools apply for and receive state aid directly through their sponsoring districts. School districts apply for state aid based on their total student enrollments as calculated by their "average daily membership," which is defined in A.R.S. § 15-901(A)(2). The total average daily membership for any sponsoring district includes the average daily membership of each sponsored charter school. A.R.S. § 15-185(A)(3)(a). The budget and financial assistance calculations for any sponsoring district thereby reflect the enrollments of sponsored charter schools. School districts are responsible *only* for charter schools they sponsor; they are not responsible for charter schools sponsored by the Education Board or the Charter Board that may be located within the district boundaries. A.R.S. § 15-185(A)(2).

By contrast, charter schools sponsored by the Education Board or the Charter Board are responsible for calculating their own base support levels and the additional assistance to which

they are entitled. A.R.S. § 15-185(B)(1) and (5). Based on those calculations, the charter school obtains financial aid directly from the State.

The method by which state financial aid is distributed to charter schools also depends on their sponsorship. Funding for district-sponsored charter schools is distributed by the State to the appropriate county treasurer and from the county treasurer to the district sponsor, which is then responsible for distributing the appropriate amount of financial aid to the charter schools it has sponsored. A.R.S. §§ 15-973(B)(10), -303. School districts receive their state aid in the form of a lump sum payment, which includes monies attributable to both the sponsoring district and its public schools and to the district-sponsored charter schools. Consequently, the funds are already "commingled" when the school district receives the lump sum payment.[(2)]

Because they are responsible for their own aid applications, Education Board and Charter Board sponsored charter schools receive their state funding directly. A.R.S. § 15-185(B). Funds for Education Board and Charter Board sponsored charter schools are allocated specifically for the charter school. The State distributes funds directly to the charter schools. A.R.S. § 15-185(B)(5) and (8). The funds are not and may not be commingled with school district funds.

B. Warrants May Not Be Issued to Pay for the Expenses of a Charter School.

Warrants are used by government entities for properly drawing money from their treasuries to pay their debts and expenses. *See Roe v. Roosevelt Water Conservation Dist.*, 41 Ariz. 197, 203, 16 P.2d 967, 970 (1932). Warrants are orders to the treasurer, clerk, or other officer entrusted with the disbursement of the funds of the State, a county, a municipality, or a political subdivision to pay a specified sum to a specified person, usually out of a particular fund or appropriation or out of funds not otherwise appropriated. *See generally* 64 Am. Jur. 2d *Public Securities and Obligations* § 19 (1972). Colloquially speaking, warrants are a government's version of personal checks.[(3)]

Pursuant to A.R.S. §§ 15-996(3) and (5), county treasurers are expressly authorized to pay or register warrants issued on behalf of school districts. In addition, the county school superintendent is expressly authorized to issue warrants on behalf of the county's school districts. A.R.S. §§ 15-304, -996(5), -999. *See also* A.R.S. § 15-914.01 (large school districts may, with approval of the Education Board, approve, prepare and issue warrants). In contrast, the Legislature has never expressly authorized any entity to issue, pay, or register warrants on behalf of charter schools. The express authority for warrants issued on behalf of school districts, and the absence of any similar authority with respect to charter schools, indicates that the Legislature did not intend to authorize warrants to be issued on behalf of charter schools. *See Banks v. Arizona State Bd. of Pardons and Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035, 1039 (App. 1981) (where the Legislature has included a term in certain places and excluded it elsewhere, courts will not read excluded term into the statute).

That charter school expenses cannot be paid by warrant is one of several ways in which Arizona statutes recognize the distinct nature of charter schools, particularly with regard to debts and expenses. For example, charter school sponsors and the State are not liable for the debts or financial obligations of a charter school or charter school operators. A.R.S. § 15-183(Q). Also, charter schools may pledge, assign or encumber their assets to be used as collateral for loans or extensions of credit. A.R.S. § 15-183(T). These provisions highlight the independent financial responsibility of charter schools, which are public schools financed with public funds, but may be operated by public bodies, private persons, or private organizations. A.R.S. § 15-183(B). Although charter school expenses may not ordinarily be paid for by warrant, if a public body operates the charter school, as allowed pursuant to A.R.S. § 15-183(B), the public body may use warrants to pay for the expenses of its charter school, just as the public body may use warrants to pay for other expenses related to its activities. The use of warrants by these operators is unrelated to their status as charter school operators, but instead is allowed because they are public bodies. Because warrants cannot be issued for charter schools, it is not necessary to

answer the additional questions raised in your request for an opinion.

Conclusion

Because a school district that sponsors a charter school receives its state financial assistance in the form of a lump sum payment, including state aid for both the sponsoring district and the district-sponsored charter schools, the charter school monies are already "commingled" with the district monies when the district receives the lump sum payment. In contrast, Education Board or Charter Board sponsored charter schools, having no relationship to a school board, receive their funding directly from the State. In that case, school district monies are not and cannot be commingled with charter school monies.

Although warrants may be issued for school districts, warrants cannot be issued to pay for the expenses of charter schools. Although county treasurers and the State Treasurer may pay or register warrants for a school district that sponsors charter schools, they may not pay or register warrants that will be used to pay for the expenses of a charter school operated by a private person or private organization.

_____

Janet Napolitano
Attorney General

1)The amount of state aid provided to charter schools is computed based on the charter contract (if the charter school is sponsored by a school district governing board) or according to a specific formula that includes base support and additional assistance. A.R.S. § 15-185(A) and (B).

2) The charter of a district-sponsored charter school must include a description of how the school district intends to fund the charter school. A.R.S. § 15-185(A)(1). Thus, while the charter school funds are "commingled" with district monies, allocation of the monies is determined by the contract between the district sponsor and the charter school.

3) However, unlike personal checks, warrants generally do not "bounce." For example, if there are insufficient funds to pay a warrant drawn by a government entity on a county treasury, and if a revolving line of credit has not been obtained by the government entity, the county treasurer endorses the warrant "not paid for lack of funds" and keeps a register of when the warrant was presented for payment. A.R.S. §§ 11-605,-635. As money becomes available to redeem unpaid warrants, the county treasurer redeems the unpaid warrants in the order in which they were originally registered. A.R.S. §§ 11-636 through -640; *see also* A.R.S. § 35-185.01 (procedures applicable to warrants issued on the State treasury).

The Honorable Gordon Alley
Presiding Judge
Superior Court, Pima County

August 20, 1999

I99-016 (R99-035)

Question Presented

You have asked whether Arizona Revised Statutes ("A.R.S.") § 13-3102(A)(4), which bans a person classified as a "prohibited possessor" from possessing a deadly weapon, prohibits a person convicted of a misdemeanor who is on unsupervised probation from participating in target practice with a firearm. You have also indicated that this question does not arise from a specific case but has been a matter of concern in many justice courts.

Summary Answer

A person on probation for a misdemeanor conviction may not possess a firearm during the term of probation, regardless of whether the probation is supervised. A.R.S. §§ 13-3102(A)(4) and 13-3101(6)(d). This statutory prohibition does not exempt possession of firearms for target practice.

Background

Arizona's Criminal Code includes several statutes concerning the possession, sale and use of deadly weapons, which include firearms.[(1)] *See* A.R.S. §§ 13-3101 to 13-3115. Many of the prohibitions relating to weapons are included in A.R.S. § 13-3102, which establishes the offense of "misconduct involving weapons." This statute specifies that a person commits misconduct involving weapons by "knowingly . . . possessing a deadly weapon if such person is a prohibited possessor." A.R.S. § 13-3102(4). The purpose of the law regarding prohibited possessors is to restrict firearm possession to "secure the safety of the state's citizens." *State v. Olvera*, 191 Ariz. 75, 77, 952 P.2d 313, 315 (App. 1997).

A "prohibited possessor" includes a person [w]ho is at the time of possession serving a term of probation, parole, community supervision, work furlough, home arrest or release on any other basis, or who is serving a term of probation or parole pursuant to the Interstate Compact under title 31, chapter 3, article 4.

A.R.S. § 13-3101(6)(d).[(2)] The Legislature added A.R.S. § 13-3101(6)(d) to the definition of "prohibited possessor" in 1993, and expanded it to cover probation in 1994. *See* 1993 Ariz. Sess. Laws ch. 13, §1 and 1994 Ariz. Sess. Laws ch. 236, § 8.[(3)]

Probation is a judicial order allowing a criminal defendant time "to perform certain conditions and thereby avoid imposition of sentence." *State v. Muldoon*, 159 Ariz. 295, 298, 767 P.2d 16, 19 (1988). Arizona has various types of probation, including intensive probation, supervised probation (sometimes referred to as "standard probation"), and unsupervised

probation. *See* A.R.S. § 13-901(A). In justice courts and municipal courts, where misdemeanor cases are generally heard, access to supervised probation is limited by statute.[5] A.R.S. § 12-251(A).[6] Generally, the type of probation is left to judicial discretion. *See* A.R.S. § 13-901(A).

Analysis

It is illegal for a prohibited possessor to knowingly possess a deadly weapon. A.R.S. § 13-3102(A)(4). A violation of this provision is a Class 4 felony. A.R.S. § 13-3102(J). A "prohibited possessor" includes, among others, a person who is "at the time of possession serving a term of probation . . . ." A.R.S. § 13-3101(6)(d).

The cardinal rule of statutory construction is to ascertain the Legislature's intent. *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984). If statutory language is clear and unambiguous, the text of the statute establishes legislative intent. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). Here, the prohibited possessor law encompasses anyone who is serving "a term of probation, parole, community supervision, work furlough, home arrest or release on any other basis." A.R.S. § 13-3101(6)(d). The statute does not specify certain types of probation. Therefore, based on its language, A.R.S. § 13-3101(6)(d) applies to supervised as well as unsupervised probation.

The statute also makes no distinction based on the type of offense committed. Commenting on the scope of A.R.S. § 13-3101(6)(d), the Arizona Supreme Court has noted that this provision prohibits petty offenders from possessing weapons while on probation. *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 125, 945 P.2d 1251, 1256 (1997). The court's comment in *Strohson* supports the conclusion that A.R.S. § 13-3101(6)(d) applies to all persons on probation regardless of the offense. The primary difference between felons and misdemeanants under the prohibited possessor definition is that felons remain prohibited possessors until their civil rights are restored, but misdemeanants are prohibited possessors only during any term of imprisonment or while serving on probation, parole, or some other release.[7] See A.R.S. § 13-3101(6)(b)-(d). This is a temporary limitation to further the Legislature's purpose of protecting the public.[8] *See Olvera*, 191 Ariz. at 77, 952 P.2d at 315.

Finally, there is no statutory exception allowing people on parole or probation, or other prohibited possessors, to participate in target practice. In contrast, the statute does include several other specific exceptions and limitations. *See* A.R.S. § 13-3102(D)-(I) (exceptions for museums and educational institutions from the prohibition against possessing prohibited or defaced weapons; exception to the law prohibiting entry into a public establishment or event while carrying a deadly weapon for shooting ranges, shooting events or hunting areas; exception to ban on guns on school grounds for weapons used for firearm safety courses or specific, approved school programs or, under certain circumstances, for unloaded firearms carried within a means of transportation). Moreover, the statute prohibiting minors from possessing firearms includes specific exceptions for

participation in hunting or shooting events or marksmanship practice at established ranges, and for transportation to these activities within certain hours. *See* A.R.S. § 13-3111(B)(1) and (3). The Legislature established no similar exceptions or limitations that apply to prohibited possessors. Specifically, there is no exception that would allow a person who is on probation to engage in target practice.

Conclusion

Under A.R.S. §§ 13-3101(6)(d) and -3102(A)(4), a person on supervised or unsupervised probation because of a misdemeanor conviction is a prohibited possessor and may not knowingly possess a firearm until the person completes the term of probation. This statutory prohibition precludes a person from participating in target practice while on probation.

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1. A "deadly weapon" is "anything designed for lethal use. The term includes a firearm." A.R.S. § 13-3101(1).

2. A "prohibited possessor" also includes a person: (1) "[w]ho has been found to constitute a danger to himself or to others pursuant to court order . . . and whose court ordered treatment has not been terminated" by the court, (2) who has been convicted of a felony or adjudicated delinquent and whose civil right to possess or carry a gun or firearm has not been restored; or, (3) "[w]ho is . . . serving a term of imprisonment in any correctional or detention facility." A.R.S. §§ 13-3101(6)(a), (b) and (c).

3. In 1993, a Department of Corrections representative testified that inmates were prohibited possessors, but persons on parole, work furlough and home arrest were not, and that legislation adding §13-3101(6)(d) was necessary to "plug that loophole." *See Parolees; Prohibited Possessor: Hearing on H.B. 2149 Before the House Comm. On Public Institutions*, 41st Legis. 1st Reg. Sess. (Ariz. 1993)(statement of Gene Moore, Assistant Director, ADC). *See also State v. Johnson*, 171 Ariz. 39, 827 P.2d 1134 (App. 1992) (former prohibited possessor statute did not apply to a person on parole). The 1994 amendment adding probation was included in a larger measure characterized as a technical correction bill. *See* Senate Fact Sheet, H.B. 2117, 41st Legis. 2d Reg. Sess. (Ariz. 1994).

4. This opinion focuses on the application of A.R.S. § 13-3101(6)(d) to probation imposed as a result of a criminal conviction and does not explore its possible application to juvenile probation that is imposed as a result of a delinquency adjudication.

5. *See* Ariz. Const. art. 6, § 32(C) ; A.R.S. § 22-301 (criminal jurisdiction justice courts); A.R.S. § 22-402 (jurisdiction of municipal courts).

6. Section 12-251(A), A.R.S., limits probation services in justice courts to "persons who are convicted of violating 28-1381 or 28-1382 (driving under the influenc) or Title 13, chapter 14 (sex offenses), 35.1 (sexual exploitation of childre) or 36 (family offenses)." In municipal courts, supervised probation requires an intergovernmental agreement between the appropriate county and municipality. *Id.*

7. Although the State law prohibition may last for a limited time, a person convicted of a misdemeanor under State law that falls within the federal definition of a "misdemeanor crime of domestic violence" may remain subject to federal prohibitions against possession of firearms or ammunition after completing probation. *See* 18 U.S.C. § 922(g)(9); *U.S. v. Lewitzke*, 176 F.3d 1022 (7th Cir. 1999).

8. In 1999, the Legislature considered amendments that would have limited A.R.S. § 13-

3101(6)(d) to persons on probation for felony convictions or misdemeanor domestic violence convictions, but these measures were not enacted. *See* House of Representatives Judiciary Committee Amendments to S.B. 1292, 44th Leg. 1st Reg. Sess. (Ariz. 1999); Senate Judiciary Committee Amendments to H.B. 2346, 44th Leg. 1st Reg. Sess. (Ariz. 1999); H.B. 1396, 44th Leg., 1st Reg. Sess. (Ariz. 1999) (House engrossed version).

The Honorable John Huppenthal **July 30, 1999**

Arizona State Senate **No. I99-015 (R99-010)**

Question Presented

You have asked whether the Arizona Board of Regents may authorize State universities to engage in design-build construction projects. A design-build project is one that combines the architectural design with construction in a single bid proposal.

Summary Answer

The Legislature has required the Arizona Board of Regents ("ABOR") to adopt procurement procedures that are "substantially equivalent" to the policies and procedures prescribed in Arizona's procurement code. Because a design-build project would be a significant departure from the policies and procedures prescribed in the procurement code, the ABOR is without legal authority to authorize it.

Background

In 1984, the Legislature enacted the Arizona procurement code, which is codified in Title 41, Ch. 23, of the Arizona Revised Statutes ("A.R.S."). The Legislature also then adopted a policy statement identifying the purposes of the code. 1984 Ariz. Sess. Laws ch. 251, § 1. The purposes included making the procurement laws among the various State agencies as consistent as possible and fostering competition within the free enterprise system. *Id*. The Legislature exempted the ABOR from the procurement code. However, it required the ABOR to adopt rules that are "substantially equivalent to the policies and procedures prescribed" in the code. A.R.S. § 41-2501(E).

In 1996, and again in 1998, the Legislature authorized a pilot program permitting the Department of Transportation, the Department of Administration, and certain counties and cities to combine architectural design and construction in a single bid proposal for a limited number of projects. 1996 Ariz. Sess. Laws ch. 146 and 1998 Ariz. Sess. Laws ch. 278.[(1)] The Legislature referred to this concept as "design-build". *Id*. Neither of these design-build authorizations amended the procurement code. Instead, they were enacted either as session laws or amended specific procurement legislation for the Department of Transportation. In addition to authorizing a limited design-build pilot program, the 1998 legislation established a legislative study committee to examine the use of design-build contracting. Among other things, the committee is to consider "whether the design-build process should be authorized on a continuing basis." 1998 Ariz. Sess. Laws ch. 278. The study committee's final report is to be completed by December 31, 2001, and the legislative authorization for the pilot program will lapse on December 31, 2002. *Id*.

Analysis

A. The Board of Regents' Authorization of the University's Design-Build Renovation Project Is Inconsistent With A.R.S. § 41-2501(E).

The Legislature required the ABOR to adopt procurement rules that are "substantially equivalent to the policies and procedures prescribed in" the procurement code. A.R.S. § 41-2501(E). Generally, the best evidence of a statute's meaning is its language. *Jenkins v. First Baptist Church*, 166 Ariz. 243, 245, 801 P.2d 478, 480 (App. 1990). Because the Legislature has not defined substantially equivalent, reference is made to the common and approved use of the language. A.R.S. § 1-213. ("Words and phrases shall be construed according to the common and approved use of the language."). "Substantially equivalent" means equal "in essential and material requirements." *See State ex rel. Polaroid Corp. v. Denihan*, 517 N.E.2d 1021, 1022 (Ohio App. 1986); *Indiana Bd. of Chiropractic Examiners v. Chamberlain*, 495 N.E.2d 794, 797 (Ind. App. 1986).

The design-build program authorized by the ABOR is not substantially equivalent to the policies and procedures prescribed in the procurement code. The procurement code establishes different methods for awarding construction contracts and contracts for architectural services. *See* A.R.S. § 41-2533 (construction contracts are normally awarded to the lowest bidder after competitive sealed bidding process) and A.R.S. § 41-2578(D)(1) (architectural services normally awarded to the "highest qualified firm" after competitive process). These distinctly separate processes are not consistent with a design-build contract, which combines design and construction.

Additionally, laws must be read together to give meaning to all provisions. *State ex rel. Church v. Arizona Corp. Comm'n,* 94 Ariz. 107, 110-111, 382 P.2d 222, 224 (1963). If the procurement code already authorized the use of design-build projects, the 1996 and 1998 design-build legislative authorization would not have been necessary. The limited legislative authorization for design-build projects on a pilot basis by specifically designated entities has no effect on ABOR's authority. It neither changed the procurement code, nor authorized ABOR to initiate design-build pilot projects.

Finally, although deference is ordinarily given to the rule-making expertise of State agencies, that deference ends when the rule operates outside of an agency's statutory authority. *See Dioguardi v. Superior Court*, 184 Ariz. 414, 417, 909 P.2d 481, 484 (App. 1995). Here, the legislative standard for ABOR procurement rules is that they must be "substantially equivalent to the policies and procedures prescribed" in the procurement code. A.R.S. § 41-2501(E). The procurement code does not authorize design-build programs or provide for waivers from the code to allow design-build projects. Consequently, the ABOR's waiver of its procurement standards, given the legislative directive in A.R.S. § 41-2501(E), and absent a true emergency, is outside the ABOR's statutory authority. *See Canon School Dist. No. 50 v. W. E. S. Constr. Co.*, 177 Ariz. 526, 528, 869 P.2d 500, 502 (1994) (if rules conflict with enabling legislation, the rules must yield to the statute); *Fullen v. Industrial Comm'n*, 122 Ariz. 425, 428, 595 P.2d 657, 660 (1979) (an agency has only the power to promulgate rules vested in it by its enabling legislation).

B. The Board of Regents Is Subject to Legislative Restrictions On Procurement Matters

It has been suggested that the Arizona Constitution and the ABOR's enabling legislation allow the ABOR to engage in design-build construction projects absent specific legislative authorization. This is not the case. Neither the constitution nor statutes governing the ABOR nullify the requirements of A.R.S. § 41-2501(E).

The Arizona Constitution grants the ABOR authority over the "general conduct and supervision" of State universities. ARIZ. CONST. Art. XI, § 2. This constitutional provision has been interpreted as preventing the Legislature from displacing the ABOR's supervisory power over university and ABOR employees. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949)(Legislature cannot place non-teaching university employees under supervision of state civil service board); *Arizona Board of Regents v. State Dep't of Admin.*, 151 Ariz. 450, 728 P.2d 669 (App. 1986)(Legislature cannot place ABOR employees within state civil service system). The constitutional powers of the ABOR, however, are not so broad as to allow universities to enter contracts or expend public monies without regard to statutory limits imposed by the Legislature. *See, e.g., Board of Regents v. Frohmiller*, 69 Ariz. 50, 208 P.2d 833 (1949)(rejecting argument that the ABOR's constitutional powers precluded legislation that permitted State Auditor to disapprove claims from payment arising from university contracts). In addition, the Arizona Supreme Court has expressly recognized the Legislature's authority to define the ABOR's power with regard to construction projects. *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960). When resolving a dispute between the ABOR and the City of Tempe over a construction project, the Arizona Supreme Court noted:

> The problem remains to resolve the conflict presented by the Board's and the City's assertions of apparently overlapping powers over university construction. It is not disputed that the ultimate power to resolve this controversy rests in the Legislature which concededly may assign exclusive jurisdiction to the Board or to the City.

Id. at 305, 356 P.2d at 402. For these reasons, the Legislature acted within its authority by directing in A.R.S. § 41-2501(E) that the ABOR adopt procurement rules that are "substantially equivalent" to the procurement code. The constitutional powers given the ABOR in Article XI, § 2 of the Constitution do not allow the ABOR to disregard this statutory requirement.

Finally, although A.R.S. §§ 15-1625 and -1626 give the ABOR broad administrative authority, these general provisions do not trump the legislative limitations in A.R.S. § 41-2501(E). The various statutes must, if possible, be interpreted to harmonize and give effect to all their provisions. *See Pima County v. Maya Constr. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988). Therefore, the general powers described in A.R.S. §§ 15-

1625 and -1626 should not be interpreted to render meaningless the requirements of A.R.S. § 41-2501(E).

Conclusion

The Legislature has adopted a procurement code that does not generally authorize the combining of architectural design and construction into a single contract. In A.R.S. § 41-2501(E), the Legislature directed the ABOR to adopt procurement procedures that are substantially equivalent to the policies and procedures of the procurement code. Although the Legislature has authorized limited pilot programs for some State agencies and political subdivisions to engage in design-build contracting, it neither changed the procurement code nor authorized either the ABOR or the universities to initiate design-build pilot projects. Therefore, the ABOR must abide by the legislative restrictions in A.R.S. § 41-2501(E) and may not participate in design-build programs without legislative authority.

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1. In 1999, the Legislature increased the number of cities and counties eligible to combine architectural design and construction in a single bid proposal. 1999 Ariz. Sess. Laws ch. 207.

The Honorable Lisa Graham Keegan **July 6, 1999**
Superintendent of Public Instruction **No. I99-014 (R99-016)**

Question Presented

You have asked whether the Arizona Department of Education is required to use the Arizona Department of Administration for its personnel administration or whether it may independently administer personnel functions pursuant to State personnel statutes and rules with the oversight and review of the Department of Administration.

Summary Answer

The Department of Education is subject to the direction and control of the Director of the Department of Administration ("Director") for personnel administration. The Director, however, may delegate that authority to the Superintendent of Public Instruction ("Superintendent").

Background

The Arizona Constitution provides, in part, that the State Board of Education ("Education Board") and the Superintendent are responsible for the "general conduct and supervision of the public school system." Ariz. Const. art. XI, § 2. The constitution further requires that the powers and duties of both the Education Board and the Superintendent be "prescribed by law." *Id.*, art. XI, §§ 3 and 4, and art. V, § 9. The Legislature has charged both the Education Board and the Superintendent with administration of the Department of Education. Arizona Revised Statutes Annotated ("A.R.S.") § 15-231. The Education Board is the policy determining body of the Department of Education while the Superintendent is responsible for all Department administrative, executive, and ministerial functions. A.R.S. § 15-234(B)(1) and (2).

The Director has general responsibility for the direction and control of personnel administration for offices or positions in "State service." A.R.S. § 41-761. The term State service means "all offices and positions of employment in state government except offices and positions exempted by the provisions of this article." A.R.S. § 41 -762(2). The duties of the Director include adopting rules for personnel and personnel administration, developing and administering a program of personnel administration for State service that conforms with the personnel rules, establishing offices that are necessary to maintain an effective and economical personnel administration program, and deputizing employees in various State agencies to perform certain functions of personnel administration.[(1)] A.R.S. § 41-763(2), (3), (4), and (6). Although the term "State service" is broadly defined, the Legislature has codified several exemptions to the Director's authority over personnel administration, including officers and employees of State universities, personnel of the Arizona State Schools for the Deaf and the Blind, and patients and inmates employed in State institutions. A.R.S. § 41-771(A)(5) and (6). The employees of the Department of Education, however, are not currently exempt from the Director's personnel

administration system.

Analysis

The cardinal rule of statutory construction is to ascertain the intent of the Legislature. *McIntyre v. Mohave County*, 127 Ariz. 317, 318, 620 P.2d 696, 697 (1980). Likewise, as a general rule, a State agency's powers and duties are defined by the Legislature. *Arizona Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 232, 928 P.2d 653, 656 (App. 1996); *see also Boyce v. City of Scottsdale*, 157 Ariz. 265, 267, 756 P.2d 934, 936 (App. 1988) ("The powers and duties of administrative agencies . . . are strictly limited by the statute creating them"). Here, because A.R.S. §§ 41-761 and -763 provide that the Director is responsible for the direct control of personnel administration, and employees of the Department of Education are not included in the statutory exemptions to this authority, the Department of Education is subject to the Director's administration of its personnel matters. *See Southwestern Iron & Steel Industries v. State*, 123 Ariz. 78, 79, 597 P.2d 981, 982 (1979) ("the expression of one or more items of a class indicates an intent to exclude all items of the same class that are not expressed").

The Department of Education differs from the Board of Regents with regard to the Director's authority over personnel matters. Article XI, § 2 of the Constitution gives the Board of Regents authority over "the general conduct and supervision" of the State universities. Arizona courts have construed this constitutional provision as precluding the Legislature from giving agencies other than the Board of Regents authority over personnel administration for employees of the Board or the universities. *See Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949) (legislation giving civil service board authority over personnel administration for certain university employees violated Article XI, § 2); *Arizona Board of Regents v. Department of Administration*, 151 Ariz. 450, 728 P.2d 669 (App. 1986)(Article XI, § 2 precludes the Director from exercising powers under A.R.S. § 41-761 over employees of the Board of Regents).

Although Article XI, § 2 gives the Superintendent and the Education Board authority over "the general conduct and supervision" of the public school system, other constitutional provisions indicate that the Legislature may permissibly give the Director authority over personnel administration for the Department of Education. Article XI, §§ 3 and 4 and Article V, § 9, expressly provide that the powers and responsibilities of both the Education Board and the Superintendent shall be "as prescribed by law." Consistent with these constitutional provisions, the Legislature may limit the powers and responsibilities of the Education Board and the Superintendent by including Department of Education employees within the Director's general authority over State personnel administration.

Finally, although the Legislature has generally granted exclusive authority over State personnel administration to the Director, it has also empowered the Director to delegate that power. Specifically, A.R.S. § 41-703(11) provides that the Director shall "[d]elegate the administrative functions, duties and powers as the director deems necessary to carry out the efficient operation of the department." Unless the Director, in his discretion, voluntarily delegates personnel administration authority over Department

of Education employees to the Superintendent, the authority remains with the Director of the Department of Administration.

Conclusion

The Department of Education is subject to the direction and control of the Director of the Department of Administration for personnel administration. The Director, however, may delegate that authority to the Superintendent of Public Instruction.

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1. The Director's functions in the personnel system encompass, in part, preparing registers of candidates to fill vacancies, providing agencies with hiring lists of available candidates, setting probationary periods, establishing, altering, and abolishing employment classifications, and approving salary plans. *See* Arizona Administrative Code R2-5-204, -205, -213, -301, and -302.

The Honorable Carol Springer **June 4, 1999**
Arizona State Treasurer **No. I99-013 (R99-023)**

Question Presented

You have requested an Opinion regarding your selection of the fifth member of the Clean Elections Commission pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 16-955(C). Specifically, you have asked whether the latest slate of candidates for selection (the "sixth slate"), prepared by the Commission on Appellate Court Appointments (the "Appellate Commission"), is legally constituted and whether you may obtain more than one additional slate of candidates from the Appellate Commission.[(1)]

Summary Answer

The sixth slate is legally constituted and you may not obtain additional slates unless it would be impossible to select an eligible candidate from the sixth slate.

Background

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

The Act charges the Appellate Commission with responsibility to nominate five slates of three candidates each. The Governor selects a candidate from one of the slates, and then the highest-ranking official holding a statewide office, who is not a member of the same political party as the Governor, selects a candidate from another one of the slates (*i.e.*, the second State official to make a selection has only four slates of candidates from which to choose). The selection process continues in a similar manner -- the second highest-ranking official holding statewide office who belongs to the same political party as the Governor selects from the three remaining slates, the second highest-ranking official holding a statewide office who does not belong to the same political party as the Governor makes a selection from the two remaining slates, and the final selection from the last slate is made by the third highest-ranking official holding a statewide office who belongs to the same political party as the Governor. A.R.S. § 16-955(C). Of the five Commissioners selected, no more than two may be members of the same political party or residents of the same county. A.R.S. § 16-955(A). The five initial Commissioners serve terms of differing lengths, with one term expiring each year beginning on January 31, 2000. A.R.S. § 16-955(C).

As State Treasurer and a member of the same political party as the Governor, you are responsible for making the fifth and final Commission selection. Of the four Commission members already chosen, two are members of the Democratic party, one is a member of the Republican party, and one is a

member of the Green party. Two are from Maricopa County. On the slate you were initially provided, there was only one non-Maricopa County candidate, and that candidate was a Democrat. Therefore, none of the candidates on that slate was eligible to serve on the Commission. The Appellate Commission subsequently developed a sixth slate of eligible nominees for your consideration.

Analysis

A. The Sixth Slate is Legally Constituted.

Section 16-955(C), A.R.S., provides that "Initially, the Commission on Appellate Court Appointments shall nominate five slates, each having three candidates, before January 1, 1999." The statute assumes that all five Commissioners will be chosen from the initial five slates and does not contemplate a situation in which a slate contains no eligible candidates (due to the characteristics of the previously chosen candidates). The issue is whether A.R.S. § 16-955(C) authorizes the creation of, and the selection from, a sixth slate.

The fundamental rule of statutory construction is to ascertain and give effect to the legislative intent. *See Mardian Constr. Co. v. Superior Court*, 113 Ariz. 489, 492, 557 P.2d 526, 529 (1976). The language of a statute is the most reliable evidence of its intent. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983) (citations omitted). To arrive at the legislative intent, statutory provisions are considered in the context of the entire statute and effect is given to all of the statute's provisions. *Pinto Valley Copper Corp. v. Arizona Dep't of Economic Security*, 146 Ariz. 484, 486, 706 P.2d 1251, 1253 (App. 1985) (citations omitted). When interpreting a statute, a court will look to the statute as a whole and attempt to harmonize all of its sections to avoid an absurd result. *Epstein v. Industrial Comm'n.*, 154 Ariz. 189, 194, 741 P.2d 322, 327 (App. 1987) (citations omitted).[(2)]

An examination of A.R.S. § 16-955 reveals that the voters intended that five members be appointed to the Commission and that vacancies be filled timely. A.R.S. § 16-955(A), (D), and (F). Section 16-955(C), A.R.S. contains deadlines to compile the initial slates and for the initial selection by the Governor.[(3)] The statutory scheme demonstrates the voters' intention that five members sit on the Commission and that replacements, due to term expiration or other reason, be promptly named.

Although there may be ambiguity about the procedure for selecting a Commissioner where all candidates on the remaining slate are ineligible, a pragmatic construction is required where a technical construction would lead to an absurdity. *See State v. Weible*, 142 Ariz. 113, 118, 688 P.2d 1005, 1010 (1984). If we were to conclude that the statute did not allow the creation of the sixth slate, the result would be a Commission of only four members and the deprivation of a State official's selection power. Given the comprehensive selection procedure implemented by the voters, there is no indication in A.R.S. § 16-955(C) that the voters intended to tie the hands of the Appellate Commission or State officials by precluding a reconstituted slate in a situation such as the present one. That result would directly conflict with the voters' express direction that there be five Commissioners appointed by five State officials. To avoid an absurd interpretation that could not have been

contemplated by the voters, a conclusion that A.R.S. § 16-955 impliedly authorizes the Appellate Commission to create, and a State official to select from, a new slate (or slates) when the slate (or slates) initially presented contains only ineligible candidates is appropriate and necessary. *See City of Phoenix v. Superior Court*, 144 Ariz. 172, 177, 696 P.2d 724, 729 (App. 1985) (citations omitted).

B. The Appellate Commission Correctly Presented Just One Slate of Candidates.

Your second question is whether you could request more than one new slate of candidates from the Appellate Commission. Under the existing set of facts, the Appellate Commission was correct in presenting just one slate. You may not obtain additional slates.

As previously noted, the procedure in A.R.S. § 16-955(C) authorizes the Governor to select from one of the slates and the second selecting State official to choose "from another one of the slates." The statute explicitly provides that the third selecting State official shall choose "from one of the three remaining slates," that the fourth selecting State official shall choose "from one of the two remaining slates," and that the fifth selecting State official shall choose "from the last slate." A.R.S. § 16-955(C). Here, the State Treasurer is the fifth and final State official to select. Asking the Appellate Commission to provide more than one additional slate because of candidate ineligibility in the fifth slate would give you more slates from which to select than the statute contemplates and would be inconsistent with the intent of the voters.[(4)] Thus, only one slate of eligible candidates is required and authorized to cure your inability to select candidates from the original fifth slate.

Conclusion

The Clean Elections Act impliedly and necessarily authorizes the Commission on Appellate Court Appointments to create, and a State official to select from, a new sixth slate of candidates for the Clean Elections Commission when the slate initially presented to the State official contains only ineligible candidates. Under the circumstances, the sixth slate created by the Appellate Commission is legally constituted, and a State official may not obtain yet another slate from which to choose.

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1. Your letter mentions your concern about the effect that Proposition 105 may have on this situation. Proposition 105 was a constitutional amendment that limits the Legislature's power to repeal or amend initiative or referendum measures. Ariz. Const. art. IV, pt. 1, § 1(6)(b), (c), and (d). Proposition 105 is not implicated here because there has been no legislative modification of the law.

2. The same rules of construction that apply to legislative enactments apply to initiatives. 2A Norman J. Singer, Sutherland Statutory Construction § 48.19 (5th ed. 1992).

3. Likewise, A.R.S. § 16-955(D) requires that the Appellate Commission

prepare a slate of candidates each subsequent year by January 1. Section 16-955(F), A.R.S., provides that in the event a Commissioner does not complete the specified term, the Appellate Commission must prepare a slate of candidates "as soon as possible in the first thirty days after the Commissioner vacates his or her office," and a replacement must be selected within thirty days of nomination of the slate.

4. The procedure established for appointments in subsequent years also supports this conclusion. When a Commissioner is replaced in the future, due to term expiration or another reason, the statutes require that the Appellate Commission prepare one slate of three candidates for the vacancy. A.R.S. § 16-955 (D) and (F).

Melvin Young, Vice-Chairperson **May 14, 1999**
Arizona Board of Appraisal **No. I99-012 (R99-014)**

Question Presented

The Arizona Board of Appraisal ("Board") has asked whether (i) the recent appointment to the Board of a third member of the Appraisal Institute is authorized by Arizona Revised Statutes Annotated ("A.R.S.") § 32-3604(D) and, (ii) if the appointment is not authorized, what actions the Board should take to avoid potential challenges to the decisions in which the appointee participated?

Summary Answer

The Board's enabling legislation prohibits "more than two persons from the same professional appraisal organization or association" from serving on the Board concurrently. A.R.S. § 32-3604(D). Although the Appraisal Institute has multiple chapters throughout Arizona, members of the Appraisal Institute belong to the "same professional appraisal organization or association." Accordingly, the appointment to the Board of a third member of the Appraisal Institute is inconsistent with A.R.S. § 32-3604 (D). Notwithstanding the inconsistency, Arizona courts have held that the acts of *de facto* officers are valid. This common law principle should shield the decisions of the Board if challenged for noncompliance with A.R.S. § 32-3604 (D). The Board, however, may also wish to ratify its decisions in an abundance of caution.

Background

Congress enacted the Financial Institution Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") as a result of the crisis in the savings and loan industry and the concurrent threat to the federal deposit insurance fund. Public Law 101-73, § 101, 103 Stat. 183, 187. In FIRREA, Congress enlisted both federal and state law to respond to the problems it identified and mandated that the States promulgate appraisal licensing and certifying systems consistent with FIRREA. *See* 12 U.S.C. §§ 3346 through 3348. The federal body that monitors State appraiser certifying licensing agencies to ensure compliance with FIRREA is the Appraisal Subcommittee of Federal Financial Institutions Examination Council ("Appraisal Subcommittee"). Public Law 101-73, § 1103, 103 Stat. 183, 512. The Appraisal Subcommittee was established to "provide that Federal financial and public policy interests in real estate transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision." 12. U.S.C. § 3331.

In 1990, the Arizona Legislature established the Board of Appraisal to implement FIRREA. 1990 Ariz. Sess. Laws ch. 313, § 1. The Board has nine members: four State certified or licensed appraisers, four public members, and a registered property tax agent. A.R.S. § 32-3604 (B). Section 32-3604, A.R.S., contains multiple limitations on the qualifications of Board members. *See, e.g.,* A.R.S. § 32-3604 (B) (2) (prohibits public members

from being "related within the third degree of consanguinity or affinity to any real estate appraiser"); 32-3604 (E) (restricts public members from being "engaged in the practice of appraising or be[ing] the owner or employee of any proprietary business involving appraisal education or testing of appraisers") . One of those limitations is found in subsection D, which provides, in part: "Not more than two persons from the same professional appraisal organization or association may serve on the board concurrently."

You have indicated that the Board's most recent appointee is a member of the Appraisal Institute-Phoenix Chapter, and that the Board's current membership includes two members of the Appraisal Institute, a property tax agent and a certified general appraiser, who are members of the Phoenix and Tucson Chapters, respectively.

Analysis

A. The Newest Board Appointment Is Inconsistent With A.R.S. § 32-3604(D).

The issue of whether the recent Board appointment complies with A.R.S. § 32-3604 (D) depends on whether the new appointee belongs to the same professional association or organization as the two current Board members. Standard principles of statutory construction lead to the conclusion that the newest appointment is inconsistent with A.R.S. § 32-3604 (D). [(1)]

One of the fundamental goals of statutory interpretation is to implement the Legislature's intent. *Canon Sch. Dist. v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). In interpreting a statute, the plain and natural meaning of the language is followed to discover that intent. *State v. Arthur*, 125 Ariz. 153, 155, 608 P.2d 90, 92 (App. 1980). Where legislative language is plain and unambiguous, the statutory text is applied as written. *See Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).

Here, A.R.S. § 32-3604 (D) directly precludes more than two persons from the same professional appraisal organization or association from serving on the Board concurrently. The terms "organization" or "association" are not defined in statute. When a term is not specifically defined by statute, it is given its ordinary meaning. A.R.S. § 1-213; *Harrelson v. Industrial Comm'n*, 144 Ariz. 369, 374, 697 P.2d 1119, 1124 (App. 1984). An "association" is "an organization of persons having a common interest." Webster's Third New International Dictionary 132 (1993). "Organization" means "a group of people that has a more or less constant membership." *Id*. at 1590. The Appraisal Institute meets both definitions. The Appraisal Institute was organized to set and enforce membership and ethics standards, to maintain educational standards, to promote research and appraisal related information, and to work on legislative and regulatory matters. Appraisal Institute Bylaws art. II, § 1 (1998). The Appraisal Institute is governed by a national Board of Directors with final authority over all matters relating to the Institute. *Id.* at art. X, § 1 (1998). The Bylaws authorize the Board of Directors to establish chapters of the Appraisal Institute that are subject to the control of the national organization. *Id.* at art. XVI; s*ee also,* Appraisal Institute Model Chapter Bylaws art. II. The Appraisal Institute and its committees establish criteria for membership and determine admission of

each member to the organization. Appraisal Institute Regulations 1, 2, 4, and 7. The Appraisal Institute, its staff, and committees receive and process all disciplinary complaints, conduct investigations, and determine sanctions. *Id*. at 4, 6, and 7. The Appraisal Institute regulations govern all chapter functions including dues, fees, elections, meetings, committees, and revocation of chapter charters. Appraisal Institute Bylaws art. XVI, §§ 3 and 4. The Institute also controls all financial operations and assets of its chapters. Appraisal Institute Bylaws art. XVI, § 1 ("[e]ach Chapter shall exist solely by reason of the charter granted to it by the Appraisal Institute and shall hold all its property and assets in trust for the Appraisal Institute"). Under Regulation 8, the national Appraisal Institute invoices national and chapter dues to its members (remitting chapter dues to the local chapter) and prohibits chapters from charging dues other than those authorized by the national Board of Directors or national Executive Committee. Appraisal Institute Regulation 8, art. VIII, §§ 2 and 7. According to the same Regulation, membership in a chapter automatically terminates if the individual ceases to be a member of the Appraisal Institute. *Id*. In summary, the Bylaws, Model Chapter Bylaws, and Regulations of the Appraisal Institute reflect that (i) those who hold membership in the Appraisal Institute belong to the national organization and individual chapters, (ii) the Appraisal Institute exercises direct and fundamental control over its chapters, and (iii) the chapters are neither separate nor autonomous from the Appraisal Institute. Accordingly, the conclusion is inescapable that the appointment of a third member of the Appraisal Institute to the Board, regardless of chapter affiliation, is inconsistent with A.R.S.§ 32-3604(D).

Although it is not necessary to look beyond the legislative language to identify the Legislature's intent in this case, the history of the Board's enabling legislation also provides support for this conclusion. In 1990, a representative of the Arizona Appraisal Coalition spoke in support of H.B. 2333 (the legislation that created the Board) and provided a handout for consideration. *Hearing on H.B. 2333 before the Committee on Tourism, Professions and Occupations, and Commerce,* 39th Leg. (February 26, 1990). The handout included guidelines for state certification and licensing of real estate appraisers developed by the Appraisal Subcommittee. *Id.* at attachment 9. The guidelines provided, in part:

> The subcommittee believes it is preferable that the certification and licensing function be established as a totally independent regulatory agency answerable to the governor or a cabinet level officer who has no regulatory responsibility for realty related activities. Such a structure would provide maximum insulation for the agency from influences of any industry or organization whose members have a direct or indirect financial interest in the outcome of the agency's decisions (hereinafter "affected industry").
>
> . . . .
>
> If the agency is directed by a board or commission, the members of that board should represent the broad public interest, and the statute, regulation, or order creating that body should not permit a majority of the board to come from or be dominated by any one industry or profession. Moreover, after its initial

establishment, the composition of the board should continue to remain free from domination by any one industry or profession.

Id. at 2, 4. In its 1997 Annual Report, the Appraisal Subcommittee further clarified its position on the necessary independence of the state body established to license and regulate appraisers. The Subcommittee recognized that "[a] state agency, board or commission . . . should reflect the interests of the state's entire community of appraisers and the general public and not the interests of any professional appraiser organization." 1997 Appraisal Subcommittee Ann. Rep. at 32. Although three Appraisal Institute Board members could not control the decisions of the nine member Board, the Appraisal Subcommittee's policy concerns are consistent with the limitations in A.R.S. § 32-3604.

B. The Common Law Principle of *De Facto* Public Officers Validates the Previous Board Actions in Which the Appointee Participated.

Although the recent appointee has signed an oath of Office and has participated in Board decisionmaking,[(2)] Arizona courts have applied in cases of this type a common law principle to validate the acts of *de facto* public officers. *See Johnson v. Maehling*, 123 Ariz. 15, 18 - 19, 597 P.2d 1, 4 - 5 (1979) (deputy registrars whose appointments were irregular served as *de facto* public officials because the irregular appointment procedure was not known to the public); *McCluskey v. Hunter*, 33 Ariz. 513, 535, 266 P. 18, 26 (1928) (*de facto* Colorado River Commission's actions were as binding on the State and third parties as if the Commissioner had received a commission and qualified by taking the oath of office). The Arizona Supreme Court has defined *de facto* officer and identified four situations in which the concept would be applied. *Rogers v. Frohmiller*, 59 Ariz. 513, 521, 130 P.2d 271, 274 (1942) (quoting *State v. Carroll,* 38 Conn. 449, 9 Am. Rep. 409 (1871)). The *Rogers* opinion provides:

> An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised,
>
> First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.
>
> Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.
>
> Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

> Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.

Id.

Applying this test, the available facts indicate that the new appointee has been acting as a *de facto* Board member because the appointee performed under color of a known appointment which would be rendered void because the appointee was not eligible to hold the position to which appointed and the defect was unknown to the public. *See Johnson*, 123 Ariz. at 19, 597 P.2d at 5 (voter signatures collected by *de facto* deputy registrars are valid). Consequently, the Board's decisions in which the appointee participated should survive challenge for noncompliance with A.R.S. § 32-3604 (D). In an abundance of caution, however, the Board may wish to consider ratifying the decisions in which the appointee participated. Your assigned Assistant Attorney General representative is available to assist you on the process of ratification.

Of course, after the issuance of this Opinion, the appointee is no longer eligible for *de facto* status. The only action which would cure the current eligibility defect would be resignation from the Appraisal Institute.

Conclusion

The appointment of a third member of the Appraisal Institute to the Board is inconsistent with A.R.S. § 32-3604(D), which prohibits more than two members from any professional organization or association serving concurrently. Any Board decisions in which the appointee participated could be challenged because the appointee was not eligible to hold the position to which appointed, however, the common law principle establishing the status of a *de facto* officer should apply to validate the appointee's participation in Board decisionmaking. The Board may also wish to ratify such decisions in an abundance of caution.

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1. The Appraisal Institute is a voluntary association. Should the appointee relinquish her membership in the Appraisal Institute, the appointment would no longer be inconsistent with A.R.S. § 32-3604 (D).

2. Because the appointee has not been confirmed by the Senate, there is no need to consider a removal action under A.R.S. § 12-2041. It is hoped that this Opinion will provide the information necessary to allow those involved to reach an appropriate resolution, which could include either rescinding the appointment or having the appointee resign from the Appraisal Institute.

The Honorable Jean Hough McGrath **May 11, 1999**
Arizona House of Representatives **No. I99-011 (R99-009)**

Question Presented

You have requested a formal legal opinion regarding implementation of the Arizona constitutional provision that university instruction be furnished "as nearly free as possible" to Arizona residents. Ariz. Const. art. XI, § 6. In particular, you have asked (i) whether the Arizona Constitution imposes any practical limits on the Arizona Board of Regents' (the "ABOR") decision to raise tuition revenue, (ii) how one can determine when tuition is not "as nearly free as possible," (iii) whether justification is necessary for the ABOR to fix resident tuition, and (iv) whether the ABOR may raise tuition rates simply to stay in line with other public universities?

Summary Answer

In interpreting the Arizona constitutional requirement that instruction be furnished "as nearly free as possible," the Arizona Supreme Court has held that a State university does not violate the constitutional requirement when it imposes fees that are neither excessive nor unreasonable. Whether tuition is unreasonable or excessive cannot be determined as a matter of law, but is an issue of fact to be evaluated in light of all relevant circumstances. The ABOR has statutory responsibility to fix resident tuition and fees taking into account the universities' programs, the legislatively approved budget, and other sources of revenue. One of the circumstances that the ABOR may consider when determining whether tuition is unreasonable are the tuition and fees at other public universities, although this factor may not be the sole basis for raising tuition.

Background

As a condition to Arizona's admission to the Union, Congress required that Arizona establish and maintain a public school system. Enabling Act, §§ 20, 37 Stat. 570 (1910). Accordingly, since statehood, the Arizona Constitution has provided that "the University and all other State educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible." Ariz. Const. art. XI, § 6.

The Legislature delegated to the ABOR the task of setting university tuition rates. Arizona Revised Statutes Annotated ("A.R.S.") § 15-1626(A)(5). The ABOR must make a budget request to the Legislature and prepare an annual operating budget for each university based on appropriated general fund monies and available tuition, fees, and other revenues. A.R.S. § 15-1626(A)(6) and (12).

In establishing tuition and fees, the ABOR makes a yearly review of many factors including: the availability, ratios, and types of student financial aid; student demographics (including status profiles); and the cost of education

per-student at Arizona's universities. Arizona Board of Regents Report of the Commission on Student Costs and Financial Assistance 15 (December 1994). According to ABOR policy, one of the factors the ABOR evaluates prior to setting tuition and fees is the State Expenditure Authority Per Student ("SEAPS"). Arizona Board of Regents' Executive Summary 8 (November 19-20, 1998). The SEAPS represents the average State operating expenditure (excluding capital outlay) for a full-time equivalent student for a fiscal year. *Id.* For 1998-99, the SEAPS for Arizona's three universities was $9,330.00. *Id*. In 1998-99 resident students paid 23.1% of the SEAPS for tuition and fees, a reduction of roughly two percentage points since 1993-1994. *Id*. at attachment J.

To assist the tuition setting process, the ABOR established a Commission on Student Costs and Financial Assistance in 1994 and in 1996 assembled the Study Group on Tuition Setting Process. Arizona Board of Regents, Summary Report on the Commission on Student Costs and Financial Assistance (Campbell Commission) and the Study Group on the Tuition Setting Process (Amos Study Group) at 20 (September 24-25, 1998). These entities assisted the ABOR in examining policy issues associated with student costs and financial aid. *Id.* The Summary submitted to the ABOR provided as follows:

The Commission and the Study Group reaffirmed the Board's policy on maintaining a position within the lower 1/3 of resident tuition among the other 49 states' senior public institutions, thus keeping with the Arizona Constitution that "instruction be as nearly free as possible." The Study Group recommended a process in which the state operating budget request process and revenues generated from tuition increases are viewed within the framework of achieving objectives from the universities' strategic plans. This recommendation of tying university priorities as outlined in the strategic plans to tuition revenue increases justifies tuition increases to students, parents, and the Legislature. This recommendation was incorporated into the universities' budget request process.

Id. at 21.

In 1998-99, the ABOR-Central Office compiled statistics on the annual tuition and fees of the fifty state senior public universities. The Arizona university system (including the University of Arizona, Arizona State University, and Northern Arizona University) is ranked forty-eighth lowest in resident tuition and required fees within the fifty states. Arizona Board of Regents Executive Survey, item 2, 15 (November 19-20, 1998).

Analysis

The Constitution, case law, and Arizona statutes provide limited guidance on the standards the ABOR must follow to comply with the constitutional directive that university instruction in Arizona be furnished "as nearly free as possible."[(1)] Ariz. Const. art. XI, § 6. Constitutional provisions are interpreted liberally to carry out the purposes for which they were adopted. *Laos v. Arnold*, 141 Ariz. 46, 47, 685 P.2d 111, 112 (1984). Although article XI evinces the framers' desire to establish a public education system from common schools through the university, the record of discussions on the standard in article XI that instruction be furnished "as nearly free as

possible" generated no comment on the convention floor. John D. Leshy, The Arizona State Constitution at 16 (1993). Thus, the framers of our Constitution provided little direct guidance of how they intended article XI to be interpreted. From the language of article XI, one can infer that the framers supported an educated citizenry and wished to insure that public education at the university level be available and financially accessible to Arizona residents. In 1935, the Arizona Supreme Court considered the constitutional language that instruction be "as nearly free as possible," and held that a State university does not violate the constitutional requirement when it imposes fees that are neither excessive nor unreasonable. *Board of Regents v. Sullivan*, 45 Ariz. 245, 263, 42 P.2d 619, 625 (1935); *accord Board of Regents v. Harper*, 108 Ariz. 223, 225, 495 P.2d 453, 456 (1972) (the Supreme Court determined that *Sullivan* settled the contention of when university tuition was as nearly free as possible in rejecting the argument that the one-year residence requirement for resident tuition violated the Constitution); *see also* Leshy at 251.

Whether tuition is unreasonable or excessive is a factual inquiry and cannot be determined as a matter of law. *Cf. Gusick v. Boies*, 72 Ariz. 233, 237, 233 P.2d 446, 448 (1951) (in deciding when bail is excessive the Court should consider the circumstances of each case). In evaluating when university charges are unreasonable or excessive, reference is made to the ordinary meaning of those terms. *Cf.* A.R.S. § 1-213, (provides that words and phrases "shall be construed according to the common and approved use of the language"); *Sierra Tucson, Inc. v. Pima County*, 178 Ariz. 215, 219, 871 P.2d 762, 766 (App. 1994) (when a word is left undefined in a statute it is to be given its ordinary meaning unless the context requires otherwise). The ordinary meaning of "excessive" is "exceeding the usual, proper, or normal." Websters third new international dictionary 792 (1993). "Unreasonable" is defined as "evidencing indifference to reality or appropriate conduct." *Id.* at 2507. Such standards are necessarily subjective.

The Legislature has the power and responsibility to enact laws to establish and maintain the public school system. Ariz. Const. art. XI, § 6. The Legislature also has the authority to determine the particulars of all aspects of the public school system, including funding. *See Board of Regents v. Sullivan*, 45 Ariz. at 256, 42 P.2d at 623-24; *Roosevelt Elem. Sch. Dist. v. Bishop*, 179 Ariz. 233, 240, 877 P.2d 806, 813 (1994); *cf.* ("The Enabling Act imposed upon the state the responsibility to create and exclusively control a public school system."). The ABOR's administrative powers, established in A.R.S. § 15-1626, are very broad and include fixing tuition and fees and graduating them in the categories of resident, nonresident, and students from foreign countries. A.R.S. § 15-1626(A)(5). The ABOR's enabling legislation also contains broad authority to adopt annual operating budgets for Arizona's three universities which are comprised of appropriated general fund monies, tuition, registration fees, and other revenue approved by the ABOR. A.R.S. § 15-1626(A)(12). These legislative standards neither structure nor limit the ABOR's application of sound judgment in establishing the educational mission for Arizona's universities, approving the cost of the programs, and setting tuition based on these considerations, as long as the tuition is not unreasonable or excessive.

Your final question is whether the ABOR may raise tuition rates simply to stay in line with other public universities. The ABOR has neither statutory

nor constitutional authority to raise tuition solely in an attempt to be competitive with other public universities. Comparison with other public universities, however, may offer insight into the reasonableness of Arizona's resident tuition.

Conclusion

The Arizona Constitution does not specify how to determine whether tuition is "as nearly as free as possible." The Arizona Supreme Court has interpreted "as nearly free as possible" to mean that the ABOR may not set fees that are excessive or unreasonable. Whether tuition is unreasonable or excessive cannot be determined as a matter of law but is an issue of fact to be evaluated in light of all relevant circumstances. The Legislature has provided the ABOR with discretion to set university tuition rates taking into account existing programs, the legislatively approved budget, and sources of revenue. Without more specific legislative guidance, the ABOR has broad responsibility to establish the educational mission for Arizona's universities, approve the costs of the programs, and set tuition based on these considerations, as long as the tuition is not unreasonable or excessive.

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[1] Although the Constitution prohibits charging tuition in the common schools, it permits tuition at the university level. The Arizona Supreme Court has interpreted "common schools" to include those grades between kindergarten and high school. *Carpio v. Tucson High Sch. Dist. No. 1*, 111 Ariz. 127, 128, 524 P.2d 948, 949 (1974).

The Honorable Betsey Bayless **April 13, 1999**
Arizona Secretary of State **No. I99-010 (R99-011)**

Question Presented

In light of the recent United States Supreme Court decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636 (1999), you have asked (i) whether the Arizona Secretary of State has the duty or authority to modify the circulator affidavit on initiative petition forms required by Arizona Revised Statutes Annotated ("A.R.S.") § 19-112; (ii) if so, what changes should the Secretary of State make to the forms; and (iii) if not, whether the Secretary of State may nevertheless accept initiative petitions that the circulators themselves amended to try to comply with *Buckley*?

Summary Answer

The Secretary of State has neither the duty nor the authority to modify the circulator affidavit on petition forms required by A.R.S. § 19-112. Nevertheless, the Secretary of State should accept petitions altered by the circulators, but only if the changes are limited to removing the words "2. Circulator must be a qualified elector of this state" (from the Instructions for Circulator) and "qualified elector" (from the affidavit on petitions). In addition, the Secretary of State's Office should advise individuals who request petitions that the Office will accept petitions with the changes described above.

Background

In *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S.Ct. 636 (1999), the United States Supreme Court held that a Colorado statute that required that initiative petition circulators be registered to vote violated the First Amendment. The Colorado statute provided: "No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a *registered elector* and at least eighteen years of age at the time the section is circulated." Colo. Rev. Stat. § 1-40-112(1)(1998) (emphasis added). Arizona has a similar statute: "No . . . person other than a qualified elector shall circulate an initiative or referendum petition and all signatures verified by any such person shall be void and shall not be counted in determining the legal sufficiency of the petition." A.R.S. §19-114(A).[(1)]

Colorado law also required that the initiative petition be attached to a signed, notarized, and dated affidavit of the registered elector who circulated the petition "that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors . . . ." Colo. Rev. Stat. § 1-40-111(2)(1998). Similarly, Arizona law requires that petition forms contain the circulator's affidavit avowing that he or she is a qualified elector. A.R.S. § 19-112(D).

In evaluating the statutory mandate that circulators be registered voters, the Court noted that because petition circulation involves interactive communication about political change it is "core political speech." *Buckley*, 119 S.Ct. at 639-40 (citing *Meyer v. Grant*, 486 U.S. 414, 422-25 (1988)). As a result, First Amendment protection is "at its zenith." *Id.* Moreover, although the Court recognized the States' authority to regulate their elections

to ensure that they are "fair and honest," *Buckley*, 119 S.Ct. at 640 (quoting *Storer v. Brown*, 415 U.S. 724, 731 (1974)), it determined that a State's legitimate interest in policing violations could be achieved by means other than requiring petition circulators to be registered voters.[(2)] *Buckley*, 119 S.Ct. at 644. As a consequence, the Court struck down Colorado's voter registration requirements for initiative petition circulators as unconstitutional, concluding that it was not narrowly tailored to advance a compelling interest. *Id.*

Analysis

A. The Secretary of State Has Neither the Duty Nor the Authority to Change the Wording of the Circulator's Affidavit.

The *Buckley* case presents a dilemma for the Secretary of State.[(3)] Like the Colorado law held unconstitutional in *Buckley*, Arizona law requires that petition circulators be registered to vote. A.R.S. § 19-114. Although no court has considered the constitutionality of the Arizona statute, it is indistinguishable from the Colorado statute evaluated in *Buckley* and would likely fail to satisfy constitutional standards if challenged. In light of the apparent invalidity of the Arizona statute, you have asked whether you should amend the wording of the circulator's affidavit to comply with *Buckley*.

The powers and duties of the Secretary of State are prescribed by the Arizona Constitution and statutes. Ariz. Const. art. V §§ 1(C) and 9; *see also* A.R.S. §§ 41-121 (general powers of secretary of state); 16-142 (Secretary of State's responsibilities under National Voter Registration Act of 1993); and 16-151 (Secretary of State's duty to distribute voter registration forms). Neither the constitution nor the Secretary of State's enabling legislation authorizes her to amend, correct, or alter forms whose substance is specified in statute, as is the affidavit form required of initiative petition circulators. A.R.S. § 19-112(D). Only the Legislature has the power to amend statutory provisions. *See Murphy v. Board of Med. Examiners*, 190 Ariz. 441, 447-448, 949 P.2d 530, 536-537 (App. 1997) (citing *Coleman v. Industrial Comm'n*, 14 Ariz. App. 573, 575, 485 P.2d 296, 298 (1971)) (courts leave to the Legislature the consideration of consequences flowing from statutory standards and the resolution of policy conflicts). Despite the apparent unconstitutionality of the Arizona statute, neither the constitution nor the Secretary of State's enabling legislation empowers the Secretary of State to alter the circulator's affidavit. Accordingly, the Secretary of State should continue to use the affidavit language mandated by A.R.S. § 19-112 on petition forms until (and unless) the statute is revised to comply with *Buckley*.[(4)]

An answer to your second questions is unnecessary because the Secretary of State is without the duty or the power to amend the circulator affidavit on initiative petition forms required by A.R.S. § 19-112(D).

B. The Secretary of State Should Accept Initiative Petitions That Are Amended to Remove "2. Circulator Must Be a Qualified Elector of This State" (From the Instructions for Circulator), and "Qualified Elector" (from the Affidavit).

Your final question concerns how your Office should handle petitions circulated by unregistered voters. Currently, Arizona law requires that those petitions be disqualified and the signatures on those petitions not be counted. *See* A.R.S. §§ 19-121 through -121.02[(5)] Such a result, however, would conflict with *Buckley*.

It is basic to our republican form of government that when a State's statute conflicts with the Federal Constitution, the State statute is invalid and cannot be enforced. U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding"); *accord M'Culloch v. Maryland*, 17 U.S. 316, 399-400 (1819); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (state law that conflicts with federal law is "without effect"); *see also* Ariz. Const. art. 2, § 3 ("The Constitution of the United States is the supreme law of the land"). Thus, the U.S. Supreme Court's decision in *Buckley* controls, notwithstanding the State statute to the contrary. Based upon the Supremacy Clause, the Secretary of State may not continue to enforce the current statutory requirement that petition circulators be registered voters. Accordingly, if the Secretary of State is presented with petitions that circulators amend to remove the instruction that reads "2. Circulator must be a qualified elector of this state," and the avowal from the affidavit that the circulator is a "qualified elector," the Secretary of State should accept those petitions, notwithstanding Arizona law to the contrary.

Similarly, any consequences that would otherwise flow from failing to comply strictly with the requirement of petitions being circulated by registered voters should not be enforced. For example, after petitions are circulated, signed, and filed with the Secretary of State, the petitions are presumed to be valid and in compliance with the constitutional and statutory requirements. *Kromko v. Superior Court* 168 Ariz. 51, 58, 811 P.2d 12, 19 (1991). The presumption of validity of the signatures is destroyed if there is either not strict compliance with the legal standards for filing referendum petitions or not substantial compliance with the law for filing initiative petitions. *Id.*; *see also Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991). It would be unreasonable to advise a state officer to ignore an unconstitutional statute, while simultaneously requiring petition filers to comply with the unconstitutional statute or lose the presumption that the signatures gathered are valid. *Cf. Arizona Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 233, 928 P.2d 653, 657 (App. 1996) (laws must be given sensible construction that accomplishes legislative intent and which avoids absurd results).

The prudent course of action is for the Secretary of State's Office to follow *Buckley* and accept petitions amended to remove references that the circulator be a qualified elector until (and unless) the Legislature adopts corrective legislation. To the extent that a citizen seeks a writ of mandamus to force the Secretary of State to disqualify otherwise valid signatures because a petition was circulated by an unregistered voter, such an action should fail.[(6)] "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Board of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973). Mandamus "does not lie if the public officer is not specifically required by law to perform the act." *Id*. Additionally, a public

officer cannot be required to enforce an unconstitutional law. *See* Ariz. Att'y Gen. Op. I95-014; *cf. State ex rel. Woods v. Block*, 189 Ariz. 269, 278, 942 P.2d 428, 437 (1997) (a state agency was prohibited from exercising its purported powers because it was created by an unconstitutional statute). Conversely, if the Secretary of State attempted to disqualify petitions solely because they were circulated by unregistered voters, an aggrieved party would be entitled to injunctive relief preventing the Secretary of State from disqualifying those signatures. *Kerby v. Griffin*, 48 Ariz. 434, 62 P.2d 1131 (1936) (courts have authority to issue injunctions for failure to comply with initiative and referendum statutes). In view of *Buckley* and the legal consequences that derive from its application to Arizona law, you should accept initiative petitions that are amended to remove the references to "qualified elector" in the instructions for circulator and the affidavit.

Conclusion

The Secretary of State has neither the duty nor authority to modify the circulator affidavit on petition forms required by A.R.S. § 19-112(D) until corrective legislation is enacted to comply with *Buckley*. The Secretary of State nevertheless should accept petitions that remove the words "2. Circulator must be a qualified elector of this state" (from the Instructions for Circulator) and "qualified elector" (from the affidavit on petitions).

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[1] A "qualified elector" is a person who is qualified to register to vote and is properly registered to vote. A.R.S. §§ 16-101 and -121. Although *Buckley* addressed the circulation of initiative petitions, its reasoning affects the circulation of referendum, nomination, and recall petitions, as well. *See*, *e.g.*, A.R.S. §§ 19-112 (signatures and verifications), -121.01 (removal of petition and ineligible signatures), -121.04 (disposition of petitions), -205 (signatures and verification), -205.02 (prohibition on circulating petitions), -212 (nomination petition), 16-315 (instructions for circulators), and -321 (signing and qualifying nomination petition).

[2] In reviewing challenges to state election laws, the Court applies a flexible standard of review depending on the severity of the restriction imposed. The Court recently described the standard of review for election cases as follows:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, this court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens [on plaintiffs' rights] must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)(citations omitted).

[3] Actually, the same dilemma exists for county and local election officials in Arizona, and the analysis in this Opinion would apply to them as well when they perform their duties relating to election petitions. *See* A.R.S. §§ 19-141, -215.

[4] House Bill 2656, which is presently before the Legislature, contains proposed legislative amendments to the statutes referenced herein.

[5] Under A.R.S. § 19-121.01(A)(1)(d), within fifteen business days of filing initiative or referendum petitions with the Secretary of State, the Secretary must remove petition sheets with incomplete or unsigned affidavits. The signatures on those sheets are not counted toward the number necessary to place the measure on the ballot. *Id.* From a random sample of signatures chosen by the Secretary of State, the appropriate county recorder verifies the voter registration of the signors and disqualifies circulators who are not registered voters. A.R.S. § 19-121.02(A)(10). If the circulator is disqualified, then all signatures obtained by that circulator are disqualified in the county recorder's certification sent to the Secretary of State. A.R.S. § 19-121.02(B).

[6] Likewise, if the Secretary of State ignores Arizona law and accepts the affidavit of a person who is not a qualified elector, any action to enjoin the certification and placement of the measure on the ballot (as required by A.R.S. § 19-122(C)) should also fail based on the *Buckley* opinion and the Constitution's supremacy clause.

The Honorable Betsey Bayless **April 2, 1999**
Arizona Secretary of State **No. I99-009 (R98-009)**

Question Presented

Whether Arizona Revised Statutes Annotated ("A.R.S.") § 16-918 imposes a duty on the Secretary of State to (i) assess financial penalties for late campaign finance report filings, and (ii) refer the matter to the Attorney General's Office for possible criminal prosecution, when the individual who is responsible for filing the campaign finance report initially files a "no activity" report, but later amends the report to reflect contributions and expenditures.

Summary Answer

The Secretary of State has authority to assess financial penalties if she determines that the individual responsible for filing a campaign finance report failed to make a good faith effort to ascertain if the false "no activity" report was accurate at the time of filing. Further, the Secretary of State needs to refer the filing or signing of a false "no activity" report to the Attorney General for criminal investigation only if she has reason to believe that the responsible party filed the "no activity" report, or the authorized individual signed the report, knowing that it contained a material, false statement.

Background

The Legislature has mandated that political committees, candidates' campaign committees, and exploratory committees (collectively, "committees") periodically file campaign finance reports disclosing contributions received and disbursements made during the reporting period. A.R.S. § 16-913(A) - (C) and (J). The responsibility for filing the report falls on the treasurer of a political committee, or on a candidate in the case of a candidate's campaign committee, or on the designating individual in the case of an exploratory committee. *See* A.R.S. §§ 16-913(D) and -918(B). Pursuant to A.R.S. § 16-905(G), the designating individual is the person who has established an exploratory committee. For ease of reference, this Opinion uses the designation "responsible party" to include a treasurer of a political committee, a candidate in the case of a candidate's campaign committee, or the designating individual in the case of an individual's exploratory committee. *See* A.R.S. §§16-913(J) and -918(A), (B).

Statewide and legislative candidate committees must file their reports with the Secretary of State. A.R.S. § 16-916.(1) When a committee neither receives contributions nor makes disbursements during the time frame encompassing a particular campaign finance report, either the committee treasurer or the candidate may file a form indicating that there has been "no activity." A.R.S. § 16-913(D). Any report filed pursuant to A.R.S. § 16-913, however, must "be signed by the committee treasurer or the candidate or the designating individual if the treasurer is unavailable and shall contain the certification of the signer under penalty of perjury that the report is true and complete." A.R.S. § 16-913(I).

If a committee fails to timely file the required campaign finance report, then the political committee, the candidate (of a candidate's campaign committee), or the designating individual (of an exploratory committee) is

liable to pay a ten dollar per-day late penalty. A.R.S. § 16-918(B). A failure to file occurs if (1) the report is not filed timely, (2) the report is filed, but not signed, or (3) a "good faith effort is not made to substantially complete the report . . . ." A.R.S. § 16-918(D). The Secretary of State may not accept a campaign finance report unless the penalties are paid. A.R.S. § 16-918(B).

Once the Secretary of State determines that there may have been a failure to file a campaign finance report, she must send written notice to "the political committee and the candidate, in the case of the candidate's campaign committee, or to the designating individual, in the case of an individual's exploratory committee" within fifteen days. A.R.S. § 16-918(A). If the responsible party fails to file the report within fifteen days after receiving the notice, the penalty increases to $25.00 a day for each subsequent day that the filing is late. At this point, the Secretary of State must notify the Attorney General pursuant to A.R.S. § 16-924. *See* A.R.S. § 16-918(C).[(2)]

Analysis

A. The Secretary of State Has Statutory Authority to Assess Financial Penalties Only After Determining That a Responsible Party Filed a False "No Activity" Report Without Making a Good Faith Effort to Determine Whether Activity Occurred.

You have asked whether the Secretary of State must charge late fees when an individual responsible for filing a campaign finance report files a "no activity" report and then files an amended report indicating that there had, in fact, been contributions or disbursements during the reporting period. The Secretary of State should not routinely assess a late fee every time there is a discrepancy between the original report and the amended report. Assessing financial penalties is authorized by statute only if the responsible party filed a false "no activity" report without making a good faith effort to determine whether the committee received or disbursed funds during the relevant reporting period. *See* A.R.S. §§16-913 and -918(E)(3) ("there is a failure to make and file a campaign finance report" if "[a] good faith effort is not made to substantially complete the report"). Violators of A.R.S. § 16-913 are subject to the civil and nomination or election penalties prescribed in A.R.S. § 16-918. A.R.S. § 16-913(J).

1. Determining Whether a Filing Violation Occurred

If, after reviewing the original "no activity" and amended reports, the Secretary of State cannot determine whether the responsible party was unaware that the committee received or disbursed funds when the "no activity" report was filed, the Secretary of State should evaluate available facts and may request that the responsible party provide additional information and documentation to justify the discrepancy. The Secretary of State may wish to consider whether the committee has a pattern of filing amended reports, the reasons for and significance of the amendment, and the verbal or written justification provided by the responsible party or committee. In accordance with the standards in A.R.S. § 16-918, the Secretary of State should then evaluate the available information to determine if the responsible party violated A.R.S. § 16-913. Subsection 16-918(D)(3)

requires a "good faith effort" to substantially complete the report mandated by A.R.S. § 16-913. Section 16-918(E), in turn, provides a "good cause" defense to an enforcement action brought pursuant to that section.

In deciding whether the responsible party made a good faith effort to provide an accurate and complete original report, the Secretary of State must evaluate the circumstances surrounding each case. *See*, *e.g., Lake Havasu City v. Mohave County*, 138 Ariz. 552, 560, 675 P.2d 1371, 1379 (App. 1983) ("[a]n act is done in good faith when it is reasonable under the circumstances"); *Geomet Exploration, Ltd. v. Lucky McUranium Corp.*, 124 Ariz. 55, 60, 601 P.2d 1339, 1343 (1979) ("good faith may be defined as honesty of purpose and absence of intent to defraud"); NLRB v. Stanislaus Implement and Hardware Co., 226 F.2d 377, 380 (9th Cir. 1955) ("'[g]ood faith' is a state of mind which can be resolved only through an application of the facts in each particular case"). Among the factors the Secretary of State may consider in making this good faith determination are whether the responsible party (i) intended to conceal or defraud, (ii) was dilatory in filing the amended report, (iii) filed the initial false "no activity" report without efforts to ascertain whether there was activity during the relevant period, and (iv) included minor or major changes in reporting contributions and expenditures on the amended report.[(3)]

Additionally, the Secretary of State should consider whether illness or absence from the State or other factors contributed to the responsible party's failure to ascertain and provide an accurate account of a committee's financial activity during the reporting period. *See* A.R.S. § 16-918(E) (the "good cause" constituting a defense to an enforcement action under this section includes "an illness or absence from this state at the time the campaign finance report was due or the written notice of delinquency was delivered if the illness or absence reasonably prevented the treasurer, designating individual or candidate from filing the report or receiving written notice"). The good cause defense, however, by its terms, would not apply to a "no activity" filing that the responsible party knew was false.

2. Assessing Financial Penalties for Amended Filings

If, after evaluating the original filing, the amended report, and the available facts, the Secretary of State believes that the original "no activity" report was filed in bad faith, she should send written notice to the political committee and to the candidate (or the designating individual) that the complete and accurate campaign finance report required by A.R.S. § 16-913 was delinquent. *See* A.R.S. § 16-918(A). The Secretary of State must send this notice by certified mail within fifteen days after determining that a responsible party may have failed to file a complete and accurate campaign finance report. *Id.* The notice must adequately describe the nature of the failure and provide a statement of the penalties identified in A.R.S. § 16-918(A).

Because the Secretary of State cannot accept a campaign finance report until penalties owed under either A.R.S. §§16-918 or -924 are paid, filing an amended report will not stop the financial penalties from accruing unless the penalties are paid at that time. *See* A.R.S. § 16-918(B). Thus, the financial penalties for filing a false "no activity" report accrue at ten dollars a day from the day after the report was initially due through the date that the late penalty is paid (up to a maximum of four hundred and fifty dollars). *Id.*

If the penalty is not paid within fifteen days after receiving a notice of delinquency, the Secretary of State should notify the Attorney General of the violation, who may, in turn, serve the responsible party with a compliance order.(4) *See* A.R.S. §§16-918(C) and -924(A). If the penalty is not paid within fifteen days, the fine increases to twenty-five dollars a day (up to a maximum of one thousand dollars).(5) *Id.*

3. Challenging an Assessment of Financial Penalties

If a committee or responsible party contests the Secretary of State's assessment of financial penalties under A.R.S. § 16-918, the procedural rights provided in the Uniform Administrative Appeals Procedures Act ("Act"), A.R.S. §§41-1092 to -1092.12, are available, including notice, a hearing, and an informal settlement conference. If the Secretary of State refers the matter to the Attorney General pursuant to A.R.S. § 16-924(A), the procedural rights in A.R.S. § 16-924 are applicable to the extent that those rights are not inconsistent with or do not diminish any right provided in the Act. *See* A.R.S. §§ 41-1092.02(D) ("notwithstanding any other administrative proceeding or judicial review process established in statute or administrative rule, this article applies to all appealable agency action and to all contested cases") and 41-1002(B) (the procedural rights created by the administrative procedure chapter are "in addition to those created and imposed by other statutes" and "[t]o the extent that any other statute would diminish a right created or duty imposed by the [administrative procedure] chapter, the other statute is superseded by this chapter").

B. The Secretary of State Has a Duty to Make Criminal Referrals to the Attorney General If the Secretary of State Has Reason to Believe That the Responsible Party Who Filed, or the Authorized Individual Who Signed, the "No Activity" Report Knew That It Contained a Material, False Statement.

You also asked whether the Secretary of State should report the filing of a false "no activity" report to the Attorney General for possible criminal prosecution. Again, before making a criminal referral to the Attorney General, the Secretary of State should evaluate the circumstances surrounding the filing of the allegedly false report.

Because A.R.S. § 16-913(I) requires that each campaign finance report be signed by the "committee treasurer or the candidate or the designating individual if the treasurer is unavailable" and contain the signer's certification "under penalty of perjury" that the report is true and complete, signing a false report may constitute perjury. A person commits perjury by making "a false sworn statement in regard to a material issue. . . **believing it to be false**."[(6)] A.R.S. § 13-2702(A)(1) (emphasis added). The Secretary of State should evaluate the evidence to determine if the signer certified a false sworn statement that was material and believed to be false. Similarly, a person may commit a fraudulent scheme and practice or engage in the presentment of a false instrument for filing when the person files a campaign finance report with the Secretary of State that contains false information. *See* A.R.S. §§ 13-2311 and 39-161. Therefore, the Secretary of State need only refer the filing of a false "no activity" report to the Attorney General for criminal investigation if she has reason to believe that the responsible party filed the "no activity" report or the authorized individual signed the report knowing that it contained a material, false statement.

Conclusion

The Secretary of State has authority to assess financial penalties when the individual responsible for filing the campaign finance report files a false "no activity" report if the Secretary of State determines that the person who filed the report filed it without making a good faith effort to ascertain that it was accurate at the time of filing. Further, the Secretary of State needs to refer the filing or signing of a false "no activity" report to the Attorney General for criminal investigation only if she has reason to believe that the responsible party filed the "no activity" report, or the authorized individual signed the report, knowing that it contained a material, false statement.

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[1] Committees for county and school candidates must file their reports with the county recorders and committees for city and town candidates must file with the city and town clerks. *Id.* Although this Opinion addresses the Secretary of State's duties in relation to false campaign finance reports filed by statewide and legislative candidates committees, county recorders and town clerks have the same duties with respect to false campaign finance reports filed by county, city, and town candidates.

[2] The county attorney must be notified for a violation regarding a county office, and the city or town attorney must be notifed for a violation regarding a city or town office. *Id.*

[3] Although not controlling in Arizona, the Secretary of State may consider the standard for violation of fereral election law. Under the Federal Elections Campaign Act of 1971 ("FECA"), 2 U.S.C. § § 431 to 455, if the Federal Elections Commission ("Commission") determines that there has been a "knowing and willful" failure to file a campaign finance report, the

responsible party is liable for civil penalities. 2 U.S.C. § 437g(a)(5)(b). In contrast, a committee will be deemed in compliance with the FECA "[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required. . . ." 2 U.S.C. § 432(i). The FECA, therefore, allows the Commission discretion to impose civil penalties after evaluting whether the committee exercised its best efforts to comply with FECA requirements.

[4] In the case of a violation regarding a county office, the county recorder should notify the county attorney; in the case of a violation regarding a city or town office, the city or town clerk should notify the city or town attorney. *Id.*

[5] "In addition to the enforcement actions prescribed by this section, a person who was a candidate for nomination or election to any local or state office and who after written notice pursuant to this section failed to make and file a campaign finance report as required by this chapter is not eligible to be a candidate for nomination or election to any local or state office for five years after the last failure to make and file a campaign finance report occurred." A.R.S. § 16-918(F).

[6] A material issue is one "which could have affected the course of outcome of any proceeding or transaction." A.R.S. § 13-2701(1).

The Honorable Carol Springer **March 17, 1999**
Arizona State Treasurer **No. I99-008 (R99-007)**

Question Presented

Does Article X, § 7 of the Arizona Constitution, which requires separate funds for individual beneficiaries of the Permanent Land Fund, allow the Treasurer to commingle monies from the Permanent Land Fund in an investment pool?

Summary Answer

The separate funds of the Permanent Land Fund are "trust monies." The Treasurer has authority to commingle trust monies in an investment pool. Using the practice of fund accounting, the Treasurer can comply with the provisions of Article X, § 7 of the Arizona Constitution by maintaining the Permanent Land Fund monies in separate funds and preventing the removal of monies from one fund and deposit into another. The 1998 amendments to Article X, § 7 do not affect the Treasurer's authority with respect to investment pools.

Background

At the time of statehood, Arizona was given 10.75 million acres to hold in trust for lease and sale to produce revenues to support public schools and other public institutions.1 ARIZONA STATE LAND DEPARTMENT, 1997-98 ANNUAL REPORT 32 (1998) ("Annual Report"). This program is known as the Permanent Land Fund which is composed of revenues earned from the sale of State trust land and the sale of minerals and natural products such as sand, gravel, and water. *Id.* at 10. The corpus of the Fund is invested and the interest income is transferred to the Expendable Fund for use by the beneficiaries. *Id.* The State Treasurer manages the Fund which has grown from one hundred million dollars in 1978 to approximately eight hundred eighty two million dollars in 1998. *Id.* The authority over the Permanent Land Fund emanates from three sources: the Arizona Enabling Act, the Arizona Constitution, and Arizona statutes.

The Permanent Land Fund was initially authorized by the Arizona Enabling Act. June 20, 1910, c. 310, 36, U.S. Stat. 557, 568-579, Sec. 28 (the "Enabling Act"). Under the original terms of the Enabling Act, Arizona was to establish separate funds for each beneficiary of the Permanent Land Fund. The language of the Enabling Act was rescripted in Article X, § 7 of the Arizona Constitution.

The Enabling Act was amended in 1957 to remove the requirement that each Permanent Land Fund beneficiary have a separate fund. Pub. L. No. 85-18, 71 Stat. 457 (August 28, 1957). No corresponding change was made to the Arizona Constitution in 1957. Consequently, although the Enabling Act eliminated the directive that the State Treasurer maintain separate funds for each beneficiary, the Arizona Constitution continued to impose that limitation.

In November 1998, Arizona voters approved Proposition 102, which amended Article X, § 7 of the Arizona Constitution to permit Permanent Land Fund monies to be invested in safe, interest bearing securities and

prudent equity securities. ARIZ CONST. art. X, § 7(C). The amendment provides authority and guidelines for the Treasurer and a board of investment to invest Permanent Land Fund monies in equity securities. Currently, the Enabling Act is silent on the allowable investment instruments in which Permanent Land Fund monies may be invested.

In anticipation of the passage of Proposition 102, the Arizona Legislature enacted Arizona Revised Statutes Annotated ("A.R.S.") § 35-314.01 to authorize the Treasurer to invest the Permanent Land Fund monies in interest bearing securities and equities. This statute was to become operative upon the passage of Proposition 102. On December 10, 1998, Governor Hull proclaimed Proposition 102 to be law. ARIZ. CONST. art. IV, § 1 (5); A.R.S. § 16-651. This action, in turn, made A.R.S. § 35-314.01 operative.

Analysis

All monies held by the Treasurer are "treasury monies." A.R.S. § 35-310(4). Those treasury monies entrusted to the Treasurer for preservation and investment are "trust monies." A.R.S. § 35-310(5). The monies of the Permanent Land Fund, which are held by the Treasurer and are the subject of a trust created by the Enabling Act, are "trust monies." The Enabling Act at § 28. With respect to Permanent Land Fund monies, the Treasurer has the authority to (i) invest the monies (Enabling Act, ARIZ CONST. art. IV, § 1 (5), and A.R.S. § 35-313(A)); (ii) contract with investment managers and advisors to invest the monies (A.R.S. § 35-318(A)); and (iii) invest in investment pools. A.R.S. § 35-316. Because Arizona's Enabling Act does not yet authorize investments in equities, principles of trust law require those empowered to invest Permanent Land Fund monies to act as fiduciaries.2 *Kadish v. Arizona State Land Department*, 155 Ariz. 484, 487-88, 747 P.2d 1183, 1186-87 (1987), *aff'd* 490 U.S. 605 (1989) (the State holds trust land and its proceeds, the Permanent Land Fund, in trust and must act with the fiduciary duty of a private trustee and not just as a good business manager).

The Department of Administration is the agency responsible to account for monies held by the Treasurer, including Permanent Land Fund monies. A.R.S. § 35-131(B). In that capacity, the Director of the Department of Administration has created an accounting system for all monies held by the Treasurer: the Arizona Accounting Manual (1993) (the "Manual"). A.R.S. § 35-131(A). The Manual contains procedures for "fund accounting." It provides that "[v]arious types of legal provisions require the establishment of funds. Funds may be created pursuant to constitutional provisions or Arizona Revised Statutes." GOVERNMENTAL ACCOUNTING STANDARDS BOARD, CODIFICATION OF GOVERNMENTAL ACCOUNTING AND FINANCIAL REPORTING STANDARDS, SEC. 1300.105; Manual § I, page A-1.

The practice and standards of fund accounting permit the commingling of monies from funds, while preserving the separate nature of the funds. The standards for fund accounting provide as follows:

> Each fund must be accounted for in a separate self balancing set of accounts for its assets, liabilities, equity, revenues, expenditures or expenses (as appropriate), and transfers. This requirement of a

> complete set of accounts for each fund refers to identification of accounts in the accounting records, and does not necessarily extend to physical segregation of assets or liabilities.

GOVERNMENTAL ACCOUNTING STANDARDS BOARD, CODIFICATION OF GOVERNMENTAL ACCOUNTING AND FINANCIAL REPORTING STANDARDS, SEC. 1300.109; Manual § 1, page A-1.

The Treasurer is guided by the fund accounting procedures established by the Department of Administration to preserve the separate nature of each fund of the Permanent Land Fund and to prevent the removal of monies from one fund and deposit into another.

Conclusion

The separate funds of the Permanent Land Fund are trust monies. Provided the Treasurer complies with the practice of fund accounting to preserve the individual nature of the separate funds of the Permanent Land Fund, and monies from one fund are not removed and deposited into another, the Treasurer has the authority to invest Permanent Land Fund monies in an investment pool.

Colonel Michael M. Haran
Staff Judge Advocate, Arizona National Guard

March 11, 1999
No. I99-007 (R99-003)

Question Presented

Pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 26-177 ("[t]he attorney general shall, upon request of the adjutant general or the state judge advocate of the national guard, give opinions upon legal questions pertaining to military affairs of the state"), you have asked whether purchases by the Property and Fiscal Officer ("PFO") of the Arizona National Guard would qualify for the fifty percent reduction of the tax base from the gross proceeds or gross income on sales of tangible property, as provided in A.R.S. § 42-5061(L).

Summary Answer

If the PFO, or other federally warranted officers, use federal funds to purchase tangible personal property that directly becomes federal property, the sale should be considered made to the United States, and would thus qualify for the tax reduction authorized by A.R.S. § 42-5061(L).

Background

A. The National Guard's Property and Fiscal Officer

The National Guard is the modern militia reserved to the states by Article I, section 8, clauses 15 and 16 of the United States Constitution. *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159. In 1916, Congress materially altered the status of the militia by constituting them as the National Guard and providing that they be uniformed, equipped, and trained in much the same way as the regular army. *Id.* at 46-47. Congress also specifically authorized federal equipment to be allocated to the Guard. *Id*. at 47; 32 United States Code Annotated ("U.S.C.") §§ 701 to 714.

The Arizona National Guard is considered a state organization, except when the President of the United States activates it for service. *Williams v. Superior Court*, 108 Ariz. 154, 158, 494 P.2d 26, 30 (1972). This dual federal/state role creates multiple sources of funding. For example, the National Guard may receive an allocation of federal property, 32 U.S.C. § 702, or it may purchase or lease property with funds appropriated by the State. A.R.S. § 26-231. A National Guard member who by gross negligence or willfulness destroys, loses, or allows state or federal property to be lost or destroyed must reimburse the State or the federal government for the cost of the property. A.R.S. § 26-233.

Federal law provides that the governor of each state appoint a PFO for the National Guard. 32 U.S.C. § 708. Arizona law contains a complementary provision. *See* A.R.S. § 26-234 ("[t]he governor shall, subject to approval of the secretary of defense or a designated subordinate, recommend for appointment an officer of the state as acting property and disbursing officer of the United States"). The PFO is an active duty federal officer subject to federal control, and does not fall within the State command. Pursuant to statute, the PFO must "receipt and account for all funds and property of the

United States in the possession of the National Guard for which he is property and fiscal officer." 32 U.S.C. § 708(b)(1). You have advised us that the PFO, and other federally warranted officers acting under the authority of the PFO, use money appropriated directly from the federal government, employ federal procurement processes, and are responsible for overseeing federal assets located within Arizona.

B. State Taxation of Federal Activities

A state cannot impose a tax directly on the United States but, in the absence of express preemption by federal law, a state may tax persons doing business with the United States. Arizona *Dept. of Revenue v. Blaze Constr. Co.*, No. 97-1536, 1999 WL 100899 at *3 (U.S. Mar. 2, 1999). The legal incidence of the Arizona transaction privilege tax is on the seller of tangible personal property or the person engaged in contracting, so the tax may be imposed on persons doing business with the United States. *Arizona State Tax Common v. Garrett Corp.*, 79 Ariz. 389, 393, 291 P.2d 208, 210-11 (1955); *Tucson Mechanical Contracting, Inc. v. Arizona Dept. of Revenue*, 175 Ariz. 176, 179-80, 854 P.2d 1162, 1165-66 (App. 1992).

Arizona's transaction privilege tax includes several exemptions or deductions for transactions with the United States. *See* Arizona Transaction Privilege Tax Ruling TPR 95-16 (May 30, 1995). One of these is contained in A.R.S. § 42-5061(L) (formerly A.R.S. § 42-1310.01(L)), which allows a fifty percent reduction of the tax base for sales of tangible personal property directly to the government of the United States, or its departments or agencies.

Analysis

Determining whether a PFO's purchase falls within the tax base reduction authorized by A.R.S. § 42-5061(L) requires evaluation of whether the sale is made directly to the United States or to the Arizona National Guard, a state organization. The distinction is important because of the differing tax consequences. Sales to the State, its agencies, and political subdivisions are generally not exempt from taxation, A.A.C. R15-5-181(A), whereas Arizona law plainly allows a reduction in the tax base for sales of tangible personal property to the United States, or its departments or agencies. *See* A.R.S. § 42-5061(L) ("[t]here shall be deducted from the tax base fifty percent of the gross proceeds or gross income from any sale of tangible personal property made directly to the United States government, or its departments or agencies . . .") .

Federal law provides for the appointment of a "federal" officer, the PFO, to be located at the National Guard with specific responsibilities to oversee "federal" property and funds. 32 U.S.C. § 708. To the extent the PFO, or other federally warranted officers, purchase property with federal funds that directly becomes federal property, the tax reduction in A.R.S. § 42-5061(L) would apply. *See Jenkins v. First Baptist Church,* 166 Ariz. 243, 245, 801 P.2d 478, 480 (App. 1990) (if statutory language is clear and unambiguous, it will determine the statute's construction). While the National Guard itself is a state organization (and is therefore not entitled to any favorable tax treatment merely because of its close federal connection), sales of tangible

personal property to the National Guard are not subject to the reduction in the tax base authorized by A.R.S. § 42-5061(L) because the sale would not be directly to the United States government, or its departments or agencies.

Conclusion

When sales of tangible personal property are made directly to the United States government, or its departments or agencies, through the PFO or other federally warranted officers, those sales qualify for the fifty percent reduction of the tax base from the gross proceeds or gross income authorized in A.R.S. § 42-5061(L). Sales to the National Guard (a state organization) are not subject to the reduction in tax base authorized by A.R.S. § 42-5061(L) because the sale is not made directly to the United States government, or its departments or agencies.

Appendix A

Sec. 708. Property and fiscal officers

(a) The Governor of each State or Territory and Puerto Rico, and the commanding general of the National Guard of the District of Columbia, shall appoint, designate or detail, subject to the approval of the Secretary of the Army and the Secretary of the Air Force, a qualified commissioned officer of the National Guard of that jurisdiction who is also a commissioned officer of the Army National Guard of the United States or the Air National Guard of the United States, as the case may be, to be the property and fiscal officer of that jurisdiction. If the officer is not on active duty, the President may order him to active duty, with his consent, to serve as a property and fiscal officer.

(b) Each property and fiscal officer shall -

1. receipt and account for all funds and property of the United States in the possession of the National Guard for which he is property and fiscal officer; and
2. make returns and reports concerning those funds and that property, as required by the Secretary concerned.

(c) When he ceases to hold that assignment, a property and fiscal officer resumes his status as an officer of the National Guard.

(d) The Secretaries shall prescribe a maximum grade, commensurate with the functions and responsibilities of the office, but not above colonel, for the property and fiscal officer of the United States for the National Guard of each State or Territory, Puerto Rico, and the District of Columbia.

(e) The Secretary of the Army and the Secretary of the Air Force shall prescribe joint regulations necessary to carry out subsections (a)-(d).

(f) A property and fiscal officer may intrust money to an officer of the National Guard to make disbursements as his agent. Both the officer to whom money is intrusted, and the property and disbursing officer intrusting the money to him, are pecuniarily responsible for that money to the United States. The agent officer is subject, for misconduct as an agent,

to the liabilities and penalties prescribed by law in like cases for the property and fiscal officer for whom he is acting.

Appendix B

A.R.S. § 22-234 Property and disbursing officer; appointment;

(A) The governor shall, subject to approval of the secretary of defense or a designated subordinate, recommend for appointment an officer for the state as acting property and disbursing officer of the United States. The officer appointed shall have served in the armed forces of the United States or the national guard, and shall have knowledge of military supply, procurement and administration. He shall qualify by furnishing a bond in an amount and with sureties as required by the secretary of defense of the United States, conditioned upon faithful performance of his duties and safekeeping and proper disbursement of federal property and funds entrusted to his care.

(B) The property and disbursing officer shall

1. Receive, store and account for all funds and property belonging to the United States in possession of the national guard.
2. Make returns and reports concerning such funds and property as required by the secretary of defense.
3. Render such accounting of federal funds entrusted to him for disbursement as required by the United States.

March 5, 1999
No. I99-006(R99-002)

Question Presented

Pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 15-253(B) (school district attorneys shall submit their opinions relating to school law matters to the Attorney General for review), on January 5, 1999, you submitted for review a twenty-six page legal opinion that you issued to the Amphitheater School District regarding use of an open "call to the audience" at governing board meetings.[(1)] In particular, your opinion addressed five questions:

1. Whether use of an open call to the public violates Arizona's Open Meeting Law, A.R.S. §§ 38-431 to -431.09 ("OML")?

2 If an open call to the public is allowed, may members of the public body[(2)] respond to public comments about a matter not on the agenda?

3. If an open call to the public is used, may a public body place restrictions on speakers?

4. If restrictions are placed on speakers during an open call to the public, in what manner may the restrictions be enforced?

5. Do alternatives to an open call to the public exist that would allow the public to raise matters of concern?

Summary Answer

Pursuant to A.R.S. § 15-253(B) (the Attorney General may concur, revise, or decline to review school law opinions issued by school district attorneys)[(3)]:

1. Your opinion is revised to reflect that a properly conducted open call to the public does not violate the OML.

2. Your opinion correctly concludes that if a public body uses an open call to the public, then members of the public body may not respond to or discuss the items raised, other than to individually direct staff to review the item or ask to have it placed on a future agenda.

3. Your opinion correctly concludes that a public body may impose on speakers reasonable time, place, and manner restrictions, and that any content-based restrictions must be narrowly tailored to effectuate a compelling state interest.

4. Your observation that A.R.S. § 13-2911 allows disruptive meeting attendees to be removed merits concurrence, but your evaluation and conclusion regarding enforcing restrictions on speakers during an open call to the public are not reviewed because particularized facts may affect the analysis.

5. Because the OML allows public bodies to use open calls to the public to receive public input about matters of concern, your discussions about alternatives to an open call to the public are not reviewed.

Background

Arizona's Open Meeting Law requires that "[a]ll meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01(A). To give meaning to the public's right to attend, a public body must post a public notice of its meetings at least twenty-four hours in advance. A.R.S. § 38-431.02(A), (C), and (D). To allow members of the public to decide whether they want to attend a particular meeting and to permit members of the public body to prepare themselves for meetings, the required notice must include an agenda of the matters to be discussed or decided at the meeting.[(4)] A.R.S. § 38-431.02(G). In particular,

[a]gendas required under this section shall list the specific matters to be discussed, considered, or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.

A.R.S. § 38-431.02(H) (emphasis added). The Legislature has explicitly declared that "[i]t is the public policy of this state . . . that notices and agendas be provided for . . . meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. § 38-431.09.

While the OML grants members of the public an absolute right to *attend* public meetings, the OML neither requires nor prohibits participation by the public in the discussions and deliberations of a public body. Ariz. Att'y Gen. Op. Nos. I78-001 and I83-049. As your opinion notes, the Amphitheater Governing Board currently allows members of the public to address items identified on its meeting agendas, and the Board is now considering adding an open call to the public as well. If such an open call is used, audience members may then address the Board on any item of concern involving District business, even if the item does not appear on the agenda for that meeting. With an open call to the public, therefore, the Board may be presented with comments, concerns, or questions regarding non-agenda items.

Analysis

1. Public Bodies May Use an Open "Call to the Public."

After noting that you "found no authority which [definitively] establishes that an open call to the audience would or would not be permissible" under the OML, your opinion speculates (at 6) that while "Arizona courts could clearly go either way on this issue . . . it is more likely that an open call to the audience would be viewed as a violation of the Open Meeting Law. . . ." You reached this conclusion by relying upon an exceptionally expansive interpretation of one word: "consider." That interpretation is wrong.

Accordingly, that portion of your opinion is revised to conclude that a *properly conducted* open call to the audience will not violate the OML.

The cardinal rule of statutory construction is to ascertain the Legislature's intent. *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984). If statutory language is clear and unambiguous, the text of the statute will establish legislative intent. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). Here, the Legislature has not unambiguously decreed whether the OML permits open calls to the public. To find legislative intent in such a situation, the context of the statute, the language used, the subject matter, the historical background, the effects and consequences, and the spirit and purpose of the law provide tools to uncover the Legislature's intent. *Arizona Newspapers Ass'n, Inc. v. Superior Court*, 143 Ariz. 560, 562, 694 P.2d 1174, 1176 (1985). Additionally, because the OML is without a specific provision addressing calls to the public, a determination of legislative intent necessarily requires a review which encompasses the entire statutory scheme. *See State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) ("[i]f reasonably practical, a statute should be explained in conjunction with other statutes . . . [and] the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes").

Historically, Arizona has always favored an open government and informed citizenry. *Arizona Newspapers Ass'n*, 43 Ariz. at 564, 694 P.2d at 1178. In 1962, the Arizona Legislature adopted the OML to ensure that the public's business was conducted openly, and that the public would be able to attend and listen to the deliberations and proceedings. 1962 Ariz. Sess. Laws ch. 138, § 2. The legislative directive for interpreting the OML also powerfully supports this concept of openness:

It is the public policy of this state . . . that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discusssed or decided. Toward this end, any person or entity charged with the interpretations of this article shall take into account the policy of this article and shall construe any provision of this article in favor of open and public meetings.

A.R.S. § 38-431.09.

In enacting the OML, the Legislature did not demonstrate an intent to preclude the public from bringing matters to the public body's attention during a meeting where the public body invited comment by including an open call on the agenda.[(5)] Rather, the Legislature enacted the OML "to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). The interests of the public in having "open and public meetings," as required by A.R.S. § 38-431.09, are better served by allowing issues to be raised in an open meeting rather than requiring a concerned citizen to approach Board members in private to request that an item be placed on a future agenda. *Cf. White v. City of Norwalk*, 900 F.2d 1421, 1425 & n.4 (9th Cir. 1990) (recognizing two procedures for citizens to address the City Council, including an open call;

"City Council meetings . . ., where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests."); *Leventhal v. Vista Unified Sch. Dist.*, 973 F.Supp. 951, 960-61 (S.D. Cal. 1997) ("The public entrusts school boards with the education of its children, and the schools play a critical role in the social, ethical, and civic development of those students. To relegate discussion on the education of a community's children to closed, back-room sessions would deprive the public of the most appropriate forum to debate these issues."). The context, spirit, and purpose of the OML thus support an open call to the audience.

As you correctly note, the language of the OML limits public body discussion, consideration, or decisionmaking to matters listed on the agenda. A.R.S. § 38-431.02(H). However, to follow the construction urged in your opinion -- to essentially interpret the word "consider" in A.R.S. § 38-431.02(H) to mean listening to, hearing, or thinking about comments made during an open call to the public -- would not be harmonious with the statutory scheme and legislative purpose.[(6)] Examining the language of the OML within the legislative framework as a whole leads to the conclusion that "consider" means more than to individually and passively "listen" or "think about."

First, the language of the OML encompasses collective action by members of the public body, not passive individual thought. *See* A.R.S. § 38-431(3) ("'meeting' means a gathering of a quorum of members") and (2) ("'legal action' means a collective decision, commitment or promise"). Second, in the OML, the word "consider" is used in the context of a group taking action, not individuals simply listening. *See generally* MASONS MANUAL OF LEGISLATIVE PROCEDURE §§ 726 through 739 and 293 through 300 (1989); *Roberts Rules of Order* §§ 13, 51 (1981). Third, interpreting "consider" to mean "listen," "think about," or "hear" would result in an absurdity because it would mean that members of public bodies would violate the OML when they attend the same conferences or seminars, read the same correspondence from constituents, or watch the same television news programs. Such a result is obviously untenable. *See Robinson v. Lintz*, 101 Ariz. 448, 452, 420 P.2d 923, 927 (1966) (stating that a statute should be interpreted "to give it a fair and sensible meaning").

Finally, for more than 17 years, the Attorney General's Office has recognized that a "call to the public" may be used if the members of the public body properly limit their responses to any item raised. *See Romo v. Kirschner*, 181 Ariz. 239, 240, 889 P.2d 32, 33 (App. 1995) (an agency's interpretation of a statute that it implements is generally afforded great weight). For example, Section 7.7.2 of the *Arizona Agency Handbook* (revised 1993) provides as follows:

A public body may include in its agenda items such as "call to the public" to designate that part of the meeting at which members of the public may address the public body, since the public body will generally not know what "specific" matters will be raised. The more difficult question is whether the public body, in addition to "considering and discussing" the public comment, may take action on the matters raised. The public body may discuss, consider, or decide only "matters listed on the agenda and other matters related thereto." A.R.S. § 38-431.02(H). If a matter raised

during "call to the public" is not on the agenda, the public body should not discuss it during the meeting being conducted, but rather should request that it be added to the agenda of a future meeting for discussion.

S*ee also Local Government Handbook*, Section 4.7.2 and Form 4.10 (1988). This statement, which recognizes the benefits of giving the public a forum for presenting its concerns to its representatives, but requires advance notice of any actual discussion or consideration of an item, continues to be valid.

Accordingly, traditional principles of statutory construction require the conclusion that the mere act of using an open "call to the public" does not violate the OML. The more difficult issues, however, relate to what occurs during these calls to the public.

2. Members of Public Bodies Generally May Not Respond to Comments Made During an Open "Call to the Public" About Non-Agenda Matters.

Your opinion correctly advises (at 8) that members of a public body may not discuss an item raised by an audience member during an open call to the public that is not on the agenda. *See Arizona Agency Handbook* § 7.7.2 ("If a matter raised during 'call to the public' is not on the agenda, the public body should not discuss it during the meeting being conducted, but rather should request that it be added to the agenda of a future meeting for discussion."), and Form 7.10 ("Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date."). In fact, any responsive discussion by a member of the public body would violate the notice requirements of the OML. *See* A.R.S. § 38-431.02(H) ("public body may discuss, consider or make decisions *only* on [specific] matters listed on the agenda") (emphasis added). Accordingly, the best practice would be to insert something similar to the following language in the public agenda to explain in advance the reason for the silence from the public body during the open call to the public:

Call to the Public.

Consideration and discussion of comments and complaints from the public. Those wishing to address the [public body] need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.

Arizona Agency Handbook Form 7.10.

3. A Public Body May Impose Reasonable Time, Place, and Manner Restrictions on Speakers, and Any Content-Based Restrictions Must Be Narrowly Tailored to Effectuate a Compelling State Interest.

Your opinion correctly notes (at 12) that if a public body permits a call to the public, it creates a "limited public forum." *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Your related conclusions - that (i) the public body may place reasonable time, place, and

manner restrictions on speakers, and (ii) any content-based regulation must be narrowly drawn to effectuate a compelling state interest - also warrant concurrence.

> More specifically, your opinion properly concludes (at 21) that a public body

may place time limits on the speakers, may require that speakers speak only during an open call portion of the meeting and only when called upon . . ., can prohibit the speaker from engaging in disruptive activities during the meeting, and can require the speaker to provide information concerning himself/herself [e.g., name, so minutes may comply with A.R.S. § 38-431.01(B)(4)]. . . .

Indeed, courts have found the following types of restrictions to be constitutionally acceptable:

- Setting Time Limits - Serves a significant government interest in conserving time and ensuring that others are given a chance to speak. *Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984) (limiting speech time to five minutes per speaker); *Jones v. Heyman*, 888 F.2d 1328, 1333 n.9 (11th Cir. 1989) (two or three minutes); *Collinson v. Gott, 895 F.2d 994, 996 (4th Cir. 1990)* (two minutes).

- Banning Repetition - Serves a significant government interest in efficiently providing an opportunity for all viewpoints to be timely and productively heard. *See White v. City of Norwalk*, 900 F.2d at 1425.

- Prohibiting Disruptive Behavior (including words likely to provoke immediate combat or speech that exceeds pre-set time limits, is unduly repetitive, or extends discussion by irrelevancies) - Serves a significant government interest in preventing actions that block a public body from accomplishing its businesses in a reasonably efficient manner and interferes with the rights of other speakers. *White v. City of Norwalk*, 900 F.2d at 1425-26; *Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991) (speaker can be prevented from commenting during board's deliberative portion of hearing).

Of course, each public body must make its own policy decisions on which restrictions, if any, are necessary and permitted. Again, the best practice is to decide in advance so that speakers have prior notice about the restrictions that the public body has set. In this way, the public body may be able to prevent allegations that it either treated speakers differently or used content-based restrictions.

4. Public Bodies Must Be Cautious When Enforcing Restrictions on Speakers During an Open Call to the Public.

Your opinion correctly concludes (at 26) that "[a]ny reasonable time, place and manner restrictions which the District places on audience members participating in the call to the audience could be enforced by law

enforcement authorities in accordance with A.R.S. § 13-2911." That statute provides that a person interferes with the peaceful conduct of educational institutions (a class 1 misdemeanor) by "knowingly":

1. Going upon or remaining upon the property of any educational institution in violation of any rule of such institution or for the purpose of interfering with the lawful use of such property by others or in such manner as to deny or interfere with the lawful use of such property by others; or
2. Refusing to obey a lawful order given pursuant to subsection B of this section.

A.R.S. § 13-2911(A). Subsection B then provides that to maintain order, the chief administrative officer of the educational institution (or a designee), upon reasonable grounds to believe that a person is interfering with the peaceful conduct of any educational institution, may order such person to leave the educational institution's property.(7)

Although it is legally appropriate to stop a speaker who is reasonably perceived as threatening, disorderly, or impeding the fair progress of discussion, public bodies must be cautious not to halt a speaker because of the speaker's viewpoint. *See Collinson v. Gott*, 895 F.2d at 1000. The line is not always easily recognized, especially when a public body is confronted with divergent viewpoints and intense public concern. Hence, while a ruling of "we will not listen to your views on capital punishment at this public hearing on rezoning" should pass constitutional muster, a ruling of "we will not listen to yours or any views favoring rezoning at this rezoning hearing" would not. See City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 & n.8 (1976). Because these situations are fact-specific and may involve a variety of policy decisions, your analysis and conclusion regarding enforcing restrictions on speakers during an open call to the public are not reviewed.(8)

5. Decline to Review Your Opinion Regarding Alternatives.

Evaluation of your discussion of possible alternatives to a call to the audience is unnecessary because the OML does not bar public bodies from offering open calls to the audience, and resolution of a particular proposal would depend heavily upon specific facts not presented in your opinion.

* * *

To the extent that this Opinion does not specifically concur with or revise an issue in your letter, the proposition or conclusion is not reviewed, pursuant to A.R.S. § 15-253(B).

Conclusion

The Open Meeting Law permits public bodies to allow members of the public to comment at meetings during a properly conducted "open call to the public." At properly conducted open calls to the public, individual members

of the public body may request that staff follow up on an item or that the item be placed on a future agenda, but they may not dialogue with the presenter or collectively discuss, consider, or decide any item not listed on the agenda. Public bodies may impose reasonable time, place, and manner restrictions on speakers, but any content-based restrictions must be narrowly tailored to effectuate a compelling state interest. Pursuant to certain Arizona statutes, disruptive attendees of meetings may be removed to permit the public body to continue to conduct the public's business.

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[1] An "open call to the audience" or "open call to the public" is a time period for members of the public to address a public body on any item of concern relating to subject matter within the public body's jurisdiction, even if the item is not specifically listed on the agenda.

[2] Although your opinion focused on school governing boards, the analysis herein applies to all "public bodies," which the OML defines expansively to include entities such as state boards and commissions, county boards of supervisors, city and town councils, school governing boards, and boards of special improvement districts, and all standing, special, and advisory committees of such public bodies. *See generally* A.R.S. § 38-431(5).

[3] Technically, A.R.S. § 15-253(B) requires the Attorney General to review all opinions relating to school matters issued by "county attorneys," which has led to the suggestion that this Office should not review your opinion because you are a private attorney. That suggestion is rejected for three reasons. First, the Legislature has authorized school districts to retain private counsel, who in essence step into the shoes of county attorneys. *See* A.R.S. § 15-343(B). Second, the public policy purpose of Attorney General review of school law opinions - to ensure consistency in interpretation of education law in Arizona - would be defeated if the opinions of private attorneys (whether contract or in-house) could escape scrutiny. Third, based on the foregoing reasons, this Office has interpreted A.R.S. § 15-253 for more than two decades to allow review of private counsel's education law opinions, *see, e.g.*, Ariz. Att'y Gen. Op. Nos. I75-108, I81-038, and I96-012, which interpretation the Legislature has left undisturbed.

[4] The agenda requirement is one of many ways that the Open Meeting Law operates simultaneously as a sword to protect the public's rights and a shield to protect members of the public body. Other examples include the notice requirement (*sword*: the public must be given notice when a meeting will be held; *shield*: all members of the public body must be notified, thus preventing any attempts to exclude certain members by not inviting them to meetings) and the requirement to kepp minutes (*sword*: the public and future members of public body will have an accurate institutional memory of what occured; *shield*: members of the public body will have an accurate account to avoid being accused later of doing something different).

[5] Indeed, that would be antithetical to our system of government. *See* U.S. CONST. amend. I ("Congress shall make no law respecting . . . the right of the people . . . to petition the Government") and ARIZ.CONST. art. II, § 5 ("The right of petition, and of the people peaceably to assemble for the common good, shall never by abridged.").

[6] Page 5 of your opinion states as follows:

It would be difficult to argue that Governing Board members who are presented with comments concerning non-agenda items are not "considering" those comments, as that term is commonly understood. "Consider" has been defined as meaning "to fix the mind on in order to understand; to think on with care; to ponder." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, Unabridged, at 389 (2d ed. 1983). In fact, if the Board is not "considering" the comments with which it is presented, the open call is completely meaningless.

[7] *See also* A.R.S. § 13-2904(A) (a person commits disorderly conduct by, among other things, engaging in "seriously disruptive behavior," making "unreasonable noise," or making "any protracted commotion, utterance or display with the intent to prevent the transaction of the business of a lawful meeting, gathering, or procession").

[8] By declining to review a legal opinion relating to school matters pursuant to A.R.S. § 15-253(B), the Attorney General does not express an opinion on the accuracy of either the legal analysis or legal conclusion of the school attorney. Ariz. Att'y Gen. Op. I98-006 n.2. Factors that weigh toward deciding to decline to review include whether resolution of the question encompasses situations that turn on a narrow legal issue, is dependent on specific facts that are not provided or do not have broad statewide applicability, or would reflect on issues of educational policy that are best left with educators. *Id*

February 26, 1999
No. I99-005(R98-012)

Question Presented

You have asked whether the Arizona State Parks Board ("Parks Board") may award Heritage Fund monies to federal agencies and Indian tribes pursuant to Arizona Revised Statutes Annotated ("A.R.S.") §§ 41-501 through -503.

Summary Answer

The Parks Board may award Heritage Fund grants to any entity, including a federal agency or Indian tribe, for projects that are consistent with the purposes set forth in the Heritage Fund legislation.

Background

Arizona voters created the Heritage Fund in 1990 by passing an initiative measure, Proposition 200.(1) The initiative enacted statutes that provide the Parks Board and the Arizona Game and Fish Commission with annual funding from State Lottery revenues.(2) The declaration of policy in the informational pamphlet informed voters that the goals of the Heritage Fund would be to preserve, protect, and enhance certain natural and cultural values in Arizona:

> The people of Arizona believe it is in the best interest of the general economy and welfare of Arizona and its citizens to set aside adequate state funds on an annual basis to preserve, protect and enhance Arizona's natural and cultural heritage, wildlife, biological diversity, scenic wonder and environment and provide new opportunities for outdoor recreation in Arizona.

Proposition 200, § 1, SECRETARY OF STATE'S 1990 PUBLICITY PAMPHLET at 60.

After the passage of the initiative, the Parks Board implemented a grant program. The Parks Department (which staffs the Parks Board) accepts applications for different types of grants, including grants for trails, parks, and historic preservation. Parks Department staff members review the applications and make recommendations to various advisory boards, which in turn make recommendations to the Parks Board. The Parks Board then awards the grant monies and distributes funds to the successful applicants.

Throughout this decade, the Parks Board has granted Heritage Fund monies to federal entities for trails and to Indian tribes for historic preservation projects and parks. For example, in the first Heritage Fund grant cycle (fiscal year 1990-91), the Parks Board granted $159,000 to the Coronado National Forest for the development of Arizona Trail segments and $50,500 to the Coconino National Forest for Arizona Trail developments and other projects. ARIZONA STATE PARKS FY 1991-92 ANNUAL REPORT at 17. In fiscal year 1992-93, the Parks Board granted $199,825 to the Coronado and Kaibab National Forests for various trails projects and $17,760 to the

Hualapai Tribe for the development of the Hualapai Diamond Creek Road Recreational Area (a park). ARIZONA STATE PARKS FY 1992-93 ANNUAL REPORT at 28 and 32. In 1996, the Parks Board granted $95,000 to the Coconino National Forest for the development of the Red Rocks Pathways 4C-Bell Rock Trail that links the Village of Oak Creek and the Chapel of Sedona. ARIZONA STATE PARKS FY 1995-96 ANNUAL REPORT at 22. Also in 1996, the Parks Board granted $104,300 to the Yavapai-Apache Tribe to benefit Heritage Park. *Id.* at 20.

Analysis

The Heritage Fund provisions that govern the expenditure of monies for grant purposes are A.R.S. § 41-503(A)(1), (A)(2), and (F). Those provisions direct that five percent of Heritage Fund monies be spent on "local, regional and state trails," thirty-five percent be spent on "local, regional or state parks, for outdoor recreation and open space," and seventeen percent be spent on "local, regional and state historic preservation projects."(3) The question thus becomes whether the terms "local," "regional," and "state" refer to geographical location or instead to ownership.

1. The Plain Language of the Statutes Provides That Heritage Fund Grants Will Be Based on Location Rather Than Ownership.

In passing the initiative measure that created the Heritage Fund, the voters in the 1990 election did not provide specific definitions of the terms "local," "regional," or "state." When the Legislature (or in the case of an initiative, the public) has not offered its own definition of words, and it does not appear from the context that a special meaning was intended, words are to be given their ordinary meaning. *See Mid Kansas Fed. Sav. and Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).(4) The ordinary definition of the term "local" means "pertaining to or characterized by place or position in space." WEBSTER'S UNABRIDGEDDICTIONARY 840 (1989). "Regional" means "of or pertaining to a region of considerable extent; not merely local." *Id*. at 1208. One of the many definitions of the word "state" is "the territory, or . . . territories, of a government." *Id*. at 1388.

As the above definitions demonstrate, the terms "local," "regional," and "state" ordinarily refer to geographical location and not ownership. Thus, the mere fact that these words are contained within A.R.S. § 41-503 does not mean that Heritage Fund grant applicants or recipients must be municipal, county, or state entities. Under the plain language of the Heritage Fund provisions, the Parks Board may expend Fund monies on all projects that meet the statutory criteria and that serve local, regional, and state areas. The Board need not exclude otherwise eligible applicants simply because they are federal or tribal entities.

2. The Intent of the Initiative, as Reflected by the Voter's Declaration of Policy and the Resulting Statutory Framework, Is That Grants Should Be Based on Location

Rather Than Ownership.

The intent of the initiative in this case reinforces the conclusion that Heritage Fund grants should be based on a project's location, and not on who may own, possess, or control the land. A determination of legislative intent necessarily requires an examination of several factors, including the statute's context, its language, subject matter and historical background, its effects and consequences, and its spirit and purpose. *Hayes v. Continental Ins. Co*., 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994). Here, both the policy behind the initiative and the overall statutory scheme governing trails, parks, and historic preservation reveal that the intent of Proposition 200 is consistent with the plain language interpretation as set forth above.

First, the declaration of policy in the 1990 Publicity Pamphlet supports an interpretation that does not preclude awards to federal and tribal entities.(5) The purpose of the Heritage Fund is to provide grant monies to "preserve, protect, and enhance Arizona's . . . cultural heritage, wildlife, . . . scenic wonder and environment and provide new opportunities for outdoor recreation." Neither the statutory language nor the Publicity Pamphlet restricts the grants to land owned by certain types of governmental entities. The policy statement instead supports the conclusion that the Parks Board is charged solely with identifying those projects and resources that meet the stated criteria for eligibility, regardless of which individuals or entities own the resources.

Second, the statutory scheme governing trails, parks, and historic preservation programs sheds additional light on the objectives of the Heritage Fund. Because the statutes governing these programs relate to the same subject matter and have the same general purpose, they should be construed together so that they constitute one body of law. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970); *U.S. Xpress, Inc. v. Arizona Tax Court*, 179 Ariz. 363, 366, 879 P.2d 371, 374 (App. 1994).

For example, A.R.S. § 41-503(A)(1) directs that the Parks Board expend five percent of Heritage Fund monies on "local, regional and state trails." "Trails" are broadly defined as "those trails for non-motorized use nominated for inclusion in the state trails system, including urban, cross-state, recreation, interpretive or historic trails." A.R.S. § 41-501(2). The statewide trail systems plan, as explained in A.R.S. § 41-511.22, does not contemplate that all of the trails in this system be under the ownership of the Parks Board, or even another governmental entity. To the contrary, the legislative direction in establishing state trails is for the trails system to be comprised of trails located throughout the State, which will necessarily be owned by many different entities or individuals. *See* A.R.S.§§ 41-511.22(A)(1) (the plan must "identif[y] on a **statewide** basis the general location and extent of significant trail routes, areas and complementary facilities")(emphasis added); 41-511(A)(4) (referring to "adopting" trails in the system, and not to acquiring or purchasing such trails); 41-511.22(A)(5) (requiring that the Parks Board "recommen[d] to federal, state, regional, local and tribal agencies and the private sector actions that will enhance the trail systems").

Thus, the Heritage Fund statutes authorize the Parks Board to expend

Heritage Fund monies on trails that are of the types set forth in A.R.S. § 41-503(A)(1) and that are nominated for inclusion in the state trails system. The statutes do not in any way designate or circumscribe the types of entities that can apply for and receive these grants.

Moreover, due to the interspersed and sometimes checkerboard land ownership patterns in Arizona, a comprehensive trail system must necessarily cross lands belonging to different owners. This would include not only state land, but also federal and tribal land, private land, and land owned by municipal governments and other entities as well. Indeed, a comprehensive statewide trail system would not be possible without the inclusion of lands owned by these various entities. So long as the trails that they are developing or improving are for non-motorized use and are nominated for inclusion in the state trails system, a statutory interpretation which allows Heritage Fund grants to be made to various entities therefore advances the possibility of a statewide trails system and is consistent with the purpose of the Heritage Fund initiative, which is, among other things, "to provide new opportunities for outdoor recreation in Arizona."

The statutes governing the parks grant program also support this result. In addition to the initiative's requirement that thirty-five percent of Heritage Fund monies be spent on local, regional, or state parks for outdoor recreation and open space, A.R.S. § 41-503(A)(2), the statutes direct that seventeen percent of the monies be spent on "acquisition of natural areas" and four percent on the "maintenance, operation and management of natural areas administered by the state parks board." A.R.S. § 41-503(D)(1) and (2). Similarly, seventeen percent of Heritage Fund monies are to be spent on state park acquisition or development. A.R.S. § 41-503(D)(4).

All of these statutes refer to properties maintained, operated, managed, acquired, and developed by the Parks Board. If the voters had intended in A.R.S. § 41-503(A)(2) to restrict Heritage Fund expenditures to properties owned and operated by municipal governments, county governments, or the Parks Board, they would have done so.[(6)]

Likewise, the historic preservation statutes in Title 41 do not limit their coverage to state-owned sites.[(7)] The term "historic preservation" is defined in A.R.S. § 41-501(4) as all "archeological or historic properties listed on or eligible for listing on the Arizona register of historic places that require funding for easements, stabilization, rehabilitation, education and preservation program development, reconstruction, restoration, interpretive development, acquisition and maintenance." Under A.R.S. § 41-511.04(A)(9), the Parks Board is charged with the responsibility of keeping the Arizona register of historic places (the "Register"), which is to be comprised of "districts, sites, buildings, structures and objects significant in this state's history, architecture, archaeology, engineering and culture which meet criteria which the [Parks] board establishes or which are listed on the national register of historic places."

Even a cursory review of these statutes makes clear that Heritage Fund grants are available to any historic preservation project that qualifies for a Register listing. A.R.S. §§ 41-501(4) and -503(F). Eligibility for the Register is *not* contingent upon the ownership or location of the site, but rather is based upon the site's historical, architectural, archaeological,

engineering, or cultural significance. *See* A.R.S. § 41-511.04(A)(9). The Legislature thus intended that sites owned by private, federal, state, tribal, municipal, or other entities may be eligible for listing on the Register.[8] Considering that a multitude of types of entities own Register-eligible properties as defined by statute, the Parks Board is authorized to grant Heritage Fund monies pursuant to A.R.S. § 41-503(F) for eligible historic preservation projects and is not required to disqualify grant applications filed by tribal or federal entities.

3. Long-standing Administrative Interpretation and Legislative Acquiescence Thereto Reflect That Grants Should Be Disbursed Based on a Project's Location Rather Than Its Ownership.

Finally, during the past eight years, the Parks Board has itself interpreted the Heritage Fund grant program as allowing for grants to federal agencies and Indian tribes. The Parks Board's annual reports, filed with the Legislature pursuant to A.R.S. § 41-503(F), have consistently and repeatedly reflected these grants. Thus, the Legislature has known of the Parks Board's administrative interpretation and application for several years, and has not made any material change to the Heritage Fund statutes.

Although courts are not bound by administrative interpretations of statutes, they do give considerable weight to such interpretations. *See Long v. Dick*, 87 Ariz. 25, 29, 347 P.2d 581, 584 (1959) (citing *Chee Lee v. Superior Court*, 81 Ariz. 142, 147, 302 P.2d 529, 533 (1956)) (adopting the administrative interpretation and application of a statute made by the Superintendent of Public Instruction over a twelve-year period). Accordingly, courts will not adopt a different construction than that accepted by the Legislature over long periods of time, if not manifestly erroneous. *See id*. (citing *Bohannon v. Corp. Comm'n*, 82 Ariz. 299, 313 P.2d 379 (1957)). The acquiescence of the Legislature to the Parks Board's administrative interpretation and application of the Heritage Fund provisions may therefore be viewed as its endorsement. *See id.*

Conclusion

The Parks Board may award Heritage Fund grants to federal agencies and Indian tribes for projects and resources that are consistent with the purposes set forth in the Heritage Fund statutes.

APPENDIX

Attorney General Opinion No. I99-005

A.R.S. § 41-501. Definitions

In this article:

1. "Natural areas" means parcels of land or water that contain examples of unique natural terrestrial or aquatic ecosystems, rare species of plants and animals or unusual or outstanding geologic or hydrologic

features.
2. "Trails" are those trails for non-motorized use nominated for inclusion in the state trails system, including urban, cross-state, recreation, interpretive or historic trails.
3. "Environmental education" means educational programs dealing with basic ecological principles and the effects of natural and man related processes on natural and urban systems and programs to enhance public awareness of the importance of safeguarding natural resources.
4. "Historic preservation" means archeological or historic properties listed on or eligible for listing on the Arizona register of historic places that require funding for easements, stabilization, rehabilitation, education and preservation program development, reconstruction, restoration, interpretive development, acquisition and maintenance.

A.R.S. § 41-502. Establishment of fund

A. The Arizona State Parks Board Heritage Fund is established in the office of the state treasurer consisting of monies deposited from the state lottery fund pursuant to § 5-522 and interest earned on those monies.

B. The fund shall be administered by the Arizona State Parks Board and is not subject to appropriation. Expenditures from the fund are not subject to additional approval notwithstanding any provision of § 41-511.05, § 41-511.11 or any other statutory provision to the contrary. Monies received pursuant to § 5-522 shall be deposited directly with the Arizona State Parks Board Heritage Fund. On notice from the Arizona State Parks Board, the state treasurer shall invest monies in the fund as provided in § 35-311. The state treasurer shall credit monies earned from those investments to the fund.

C. The board shall not use its rights of eminent domain under § 41-511.06 to acquire property to be paid for with monies from the Arizona State Parks Board Heritage Fund.

D. All monies in the Arizona State Parks Board Heritage Fund shall be spent by the Arizona State Parks Board only for the purposes and in the percentages set forth in this article. In no event shall any monies in the fund revert to the state general fund and monies in the fund are exempt from the provisions of § 35-190, relating to lapsing of appropriations.

A.R.S. § 41-503. Expenditures from fund; purpose and amounts

A. Monies in the fund for local, regional and state trails, parks, outdoor recreation and open space shall consist of:

1. Five per cent of monies received pursuant to § 5-522 shall be spent on local, regional and state trails.
2. Thirty-five per cent of monies received pursuant to § 5-522 shall be spent on local, regional or state parks, for outdoor recreation and open space.

B. Arizona state parks board heritage fund monies allocated pursuant to subsection A, paragraphs 1 and 2 of this section shall be spent in accordance with § 41-511.25 and shall be available as matching funds.

C. No entity receiving funds under subsections A and B of this section shall receive more than twenty per cent of the monies available in any fiscal year.

D. Monies received pursuant to § 5-522 shall be spent as follows:

1. Seventeen per cent on acquisition of natural areas.
2. Four per cent on maintenance, operation and management of natural areas administered by the Arizona state parks board.
3. Seventeen per cent on local, regional and state historic preservation projects. Monies provided under this paragraph shall be administered by the Arizona state parks board through the state historic preservation officer.
4. Seventeen per cent on state park acquisition or development.
5. Five per cent on environmental education.

E. All monies earned as interest on monies received pursuant to § 5-522 shall be spent only in the percentages and for the purposes described in subsections A through D of this section or for costs of administering the Arizona state parks board heritage fund in such amounts as determined by the Arizona state parks board.

F. On or before December 31 each year the board shall submit its annual report to the president of the senate, the speaker of the house of representatives and the chairmen of the senate and house of representatives committees on natural resources and agriculture, or their successor committees.
The annual report shall include information on:

1. The amount of monies spent or encumbered in the fund during the preceding fiscal year and a summary of the projects, activities and expenditures relating to:

(a) Local, regional and state trails.

(b) Local, regional or state parks for outdoor recreation and open space.

(c) Natural areas, including acquisition and maintenance, operation and management of natural areas.

(d) Local, regional and state historic preservation projects.

(e) State park acquisition and development.

(f) Environmental education.

2. The number and location of parcels of property acquired during the preceding fiscal year.
3. For personal and real properties acquired with fund monies during the preceding fiscal year, the amount of property tax revenue paid to each taxing jurisdiction during the last full tax year prior to acquisition.
4. The amount of money spent from the fund during the preceding fiscal year for employee personal services.
5. The number of full-time employees employed in the preceding fiscal year in connection with property acquisition, including survey, appraisal and other related activities.

[1] The Arizona Constitution reserves power to the people to propose and enact laws at the polls. Ariz. Const. art. IV, pt. 1, § 1(1).

[2] The Heritage Fund statutes, A.R.S. §§ 41-501 through -503, are attached hereto as Appendix A.

[3] The remaining forty-three percent of the Heritage Fund monies are to be distributed for acquisition of natural areas (17%), operation and maintenance of natural areas administered by the Parks Board (4%), state park acquisition or development (17%), and environmental education (5%). See A.R.S. § 41-503(D), (E), (G), and (H).

[4] The same rules of construction that apply to legislative enactments apply to initiatives. 2A, Norman J. Singer, *Sutherland Statutory Construction* § 48.19 (5th ed. 1992).

[5] Explanatory or informative materials, such as voting pamphlets on propositions, are considered relevant legislative history for purposes of construction of a measure after its enactment. 2A Norman J. Singer, *Sutherland Statutory Construction*, § 48.19 (5th ed. 1992); *see also Legislature of California v. Eu*, 816 P.2d 1309 (Cal. 1991).

[6] For example, the statutory language governing Law Enforcement and Boating Safety Fund grants by the Parks Board specifically restricts the pool of eligible applicants to counties. *See* A.R.S. § 5-383(B) ("[t]he board of supervisors of a**ny county** may apply for law enforcement and boating safety fund grants") and § 5-383 (the Arizona Outdoor Recreation Coordinating Commission -- an advisory body to the Parks Board -- may "distribute grant monies . . . **to counties**") (emphasis added). Significantly, no such restriction was set forth in the Heritage Fund statutes.

[7] Again, seventeen per cent of Heritage Fund monies received must be spent on local, regional, and state historic preservation projects. A.R.S. § 41-503(D)(3).

[8] In fact, the Register lists the Tumacacori National Monument, the Casa Grande Ruins National Monument, and the Pipe Springs National Monument, all of which are located on federal land; Mission San Xavier del Bac, Fort Apache, and the Awatovi Ruins National Historic Landmark, all of which are located on tribal lands; and the Beet Sugar Factory, approximately 67 historic districts, the Alpine Elementary School and the Arizona Inn, all of which are located on private land.

[1] Also, the State and the county each pay one-half the salary of a regularly-elected judge of the superior court. A.R.S. § 12-128.

The Honorable Carol Springer **February 25, 1999**
Arizona State Treasurer **No. I99-004(R99-008)**

Question Presented

Which entity is responsible for paying the salaries of justices of the peace pro tempore: the State or the county in which they are assigned?

Summary Answer

Arizona Revised Statutes Annotated ("A.R.S.") § 22-123 provides that salaries of justices of the peace pro tempore are to be paid entirely by the county in which they are assigned.

Background

Generally, justices of the peace appointed on a temporary basis may be designated as pro tempore. *See* BLACK'S LAW DICTIONARY 1223 (6th ed. 1990) (the term "pro tempore" means "for the time being; temporarily; provisionally"). The appointment of a justice of the peace pro tempore is made by the presiding judge of the superior court of a county "for any precinct of that county where needed in the manner provided by this article subject to the approval of the board of supervisors." A.R.S. § 22-121(A). Justices of the peace pro tempore are ordinarily appointed on a temporary basis when the workloads of regular justices of the peace become too great.

For regularly-elected justices of the peace and those appointed to fill an unexpired term of an elected justice of the peace, the county pays sixty per cent of the compensation and the State pays forty per cent. A.R.S. § 22-117(B). Some county officials apparently are under the impression that the State is likewise obligated to pay forty per cent of the compensation of justices of the peace pro tempore, and have requested such payments from the State Treasurer.

Analysis

Arizona law provides that "[t]he salary of the justice of the peace pro tempore shall be paid by the county wherein the justice of the peace pro tempore is assigned . . . ." A.R.S. § 22-123. In designating "the county" as the entity that shall pay the salary of a justice of the peace pro tempore, A.R.S. § 22-123 is unambiguous and no interpretation is needed. *Accord Herberman v. Bergstrom*, 168 Ariz. 587, 589, 816 P.2d 244, 246 (App. 1991) (when a statute's language is clear and leaves no opportunity for interpretation, it must be followed).

When the Legislature desires the salaries of judicial entities be divided between the State and counties it says so expressly. For example, A.R.S. § 22-117 provides that the salary of a justice of the peace (as opposed to a justice of the peace pro tempore) shall be divided 60-40 between the county and the State. Likewise, the Legislature has provided that the salary of a judge pro tempore of the superior court shall be paid "one-half by the state and one-half by the county to which such judge is assigned." A.R.S. § 12-143(A).[(1)] Here, A.R.S. § 22-123 is clear and unambiguous; counties must

pay the total salary and costs associated with a justice of the peace pro tempore. When statutory language is not ambiguous, the Attorney General must apply the text as written. *See Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). The State has neither the statutory responsibility nor the statutory authority to contribute to this county expense.

Conclusion

The express and unambiguous language of A.R.S. § 22-123 leaves no question that the State is not authorized to pay any portion of the salary of a justice of the peace pro tempore.

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[1] Also, the State and the county each pay one-half the salary of a regularly-elected judge of the superior court. A.R.S. § 12-128.

The Honorable David L. Eberhart **January 7, 1999**
Arizona House of Representatives **Re: I99-003(R98-025)**

Question Presented

You have asked for an opinion on whether counties may expend highway user revenue funds for traffic safety and law enforcement purposes.

Summary Answer

The explicit restrictions in Article IX, § 14 of the Arizona Constitution preclude counties, incorporated cities, and towns from expending highway user revenue funds for traffic safety and law enforcement purposes.

Background

All revenues that the State receives from licenses, taxes, penalties, and fees for vehicle registration, drivers licenses, and fuel taxes are deposited into a highway user revenue fund. Arizona Revised Statutes Annotated ("A.R.S.") § 28-6501. Revenues in the fund may be spent only for the purposes prescribed in Article IX, § 14 of the Arizona Constitution. A.R.S. § 28-6533. The pertinent portion of Article IX, § 14 provides as follows:

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, *shall be expended for other than highway and street purposes including* the cost of administering the State highway system and the laws creating such fees, excises, or license taxes, statutory refunds and adjustments provided by law, payment of principal and interest on highway and street bonds and obligations, *expenses of* ***State*** *enforcement of traffic laws and* ***State*** *administration of traffic safety programs*, payment of costs of publication and distribution of Arizona Highways magazine, State costs of construction, reconstruction, maintenance or repair of public highways, streets or bridges, costs of rights of way acquisitions and expenses related thereto, roadside development, *and for distribution to counties, incorporated cities and towns to be used by them solely for highway and street purposes* including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county, city and town roads, streets, and bridges and payment of principal and interest on highway and street bonds.[(1)]

(Emphasis added.)

Analysis

Your question requires an interpretation of Article IX, § 14 of the Arizona Constitution. When interpreting a constitutional provision, the focus is the intent of the framers who adopted the provision or, in the case of an amendment, the intent of the electorate that adopted it. *See Soto v. Superior Court*, 190 Ariz. 450, 454-55, 949 P.2d 539, 543-44 (App. 1997) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994)). When the language is clear and unambiguous, the text as written is followed. Id.

The plain language controls if the provision is clear. *See State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996).

Article IX, § 14 is divided into two parts. The first part establishes the purposes for which the State can spend highway user revenue funds. It specifically includes "expenses of State enforcement of traffic laws and State administration of traffic safety programs . . . ." The second part identifies the purposes for which counties, incorporated cities, and towns may expend these funds. Unlike the State, counties, incorporated cities, and towns may not expend highway user revenue funds for traffic safety and law enforcement purposes. The language of Article IX, § 14 clearly limits a county's expenditure of highway user revenue funds "solely for **highway and street purposes** including costs of rights of way acquisition and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development of county, city and town roads, streets and bridges and payment of principal and interest on highway and street bonds."

It is true that the Legislature's examples of permissible highway and street purposes are not exclusive.[(2)] There is no legal basis, however, to augment the purposes for which counties, incorporated cities, and towns may spend highway user revenue funds. The electorate has opted to provide only the State with discretion to spend these funds for traffic safety and law enforcement purposes. *See Pima County Industrial Development Authority v. Maricopa County*, 189 Ariz. 558, 560, 944 P.2d 73, 75 (App. 1997) ("[e]very word of a statute or constitutional provision is to be given meaning"); *see also Bohannan v. Corporation Comm'n*, 82 Ariz. 299, 302, 313 P.2d 379, 381 (1957) (it is self evident that courts do not have the right to add something to the Constitution which is not expressed or cannot be fairly implied). Indeed, given that the same sentence of the constitutional provision defines "highway and street purposes" differently for the State (specifically allowing "enforcement of traffic laws and administration of traffic safety programs") than for counties or cities (limiting use to actual road work projects) shows that the electorate intended the entities to have different limits. *Cf. Fields v. Capitol Indemnity Corp.*, 180 Ariz. 312, 313, 884 P.2d 198, 199 (1994) ("[w]hen the legislature expressly includes an item for coverage in one section of a statute but not in another, the legislature intends to exclude from coverage those items not mentioned").

When the language in a constitutional provision is clear and unambiguous it must be followed. *See Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). Nevertheless, a constitutional analysis that looks beyond the plain language leads to the same conclusion. Principles of constitutional construction require consideration of the history behind the provision, the purpose sought to be accomplished, and the evil sought to be remedied. *See McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982). Both the 1952 and 1970 Publicity Pamphlets evaluating Article IX, § 14 explain that the highway user revenue funds are to be used by counties for street and highway acquisition, construction, and maintenance. The 1952 Publicity Pamphlet described the proposal as "The Better Roads Amendment" and noted as follows:

THE VERY SORT OF PEOPLE who, years, ago, did not want to pay for needed highways out of general funds of the state, and so devised the gas tax, now look longingly at the highway fund and all too often bring

pressure in the legislature to appropriate these revenues to other than highways.

INITIATIVE AND REFERENDUM PUBLICITY PAMPHLETS, 1951-1970, Arizona Secretary of State (1973) (1952 Publicity Pamphlet).

Attorney General Opinion I89-85 pointed out that the League of Arizona Cities and Towns, in the 1970 Publicity Pamphlet, stressed that the 1970 proposal would not alter the protections of the 1952 amendment because "gasoline and diesel tax moneys must continue to be used solely for street and highway purposes." *Id*., 1970 Publicity Pamphlet at 20. In that same pamphlet, the Phoenix Chamber of Commerce stated that there was no desire to deprive the counties in Arizona of revenues necessary to properly maintain their roads. Thus, the purposes articulated in the pamphlets, along with an absence of discussion of contemplated county traffic safety or law enforcement, reflects the public's intent to retain the constitutional highway user revenue fund protections adopted in 1952.

The language, history, and purpose of Article IX, § 14 authorize only the State to spend highway user revenue funds for traffic safety and law enforcement purposes. There is no legal basis to expand that specific and limited authorization to counties, cities, and towns.

Conclusion

The express language in Article IX, §14 of the Arizona Constitution, as well as the history and purpose of the enactment and its amendment, compels the conclusion that highway user revenue funds may not be used for traffic safety or law enforcement expenses of counties, incorporated cities, and towns. While that type of use may be laudable, it is not lawful.

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[1] The voters approved Article IX, § 14 in 1952, and later amended it in 1970 to provide for distribution of highway funds pursuant to statute. *See* Historical Note, ARIZ. CONST. art IX, §14, Vol. 1A Arizona Revised Statutes Annotated (West 1984).

[2] Attorney General Opinions I84-087 and I92-004 stated that the controlling limitation on counties in Article IX, § 14 is that they spend highway user revenue funds on *highway or street purposes*, and that if an activity in question is for such a purpose, the funds may be used even if the activity does not fall within one of the enumerated categories. This reasoning, however, does not create new authorized expenditure purposes for counties when the framers have specifically limited their expenditures to highway and street purposes.

The Honorable Lisa Graham Keegan **January 7, 1999**
Superintendent of Public Instruction **Re: I99-002(R98-026)**

Question Presented

You have asked for an opinion on whether a joint technological education district ("JTED") may include excess utility costs in its budget and whether it is authorized to utilize a budget balance carry forward.

Summary Answer

The Legislature has not provided statutory authority for a JTED to include excess utility costs in its budget or to implement a budget balance carry forward.

Background

In 1990, the Legislature authorized school districts to join together to form a JTED. 1990 Ariz. Sess. Laws ch. 248, amended by ch. 399, § 23 (now codified as Arizona Revised Statutes Annotated ("A.R.S.") §§ 15-391 through -396). Formation of a JTED requires significant study and planning, approval by the school district governing boards and the qualified electors of each participating district, and endorsement from the State Board for Vocational and Technological Education. A.R.S. § 15-392(A)-(B). Once approved and established, a JTED is managed and controlled by a special governing board, A.R.S. §§ 15-392(D) and 15-393, and is subject to fourteen different sets of education-related statutes, including General Provisions for School District Budgets. A.R.S. § 15-393(C). In 1990, the Legislature also specifically established the components for the general budget limit of a JTED. A.R.S. § 15-947.01. Unlike a standard school district, which has general authority to include excess utility costs[(1)] in its budget, A.R.S. § 15-910, a JTED has statutory budget limit components that exclude excess utility costs. A.R.S. § 15-947.01.

Analysis

The fundamental rule of statutory construction is to determine the Legislature's intent. *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984). Review of the statutes applicable to a JTED leads us for several reasons to conclude that the Legislature has not authorized a JTED to budget for excess utility costs. First, if a general and specific statuteon the same subject are inconsistent, then the specific statute will control. *See Arden-Mayfair, Inc. v. State Dep't of Liquor Licenses & Control*, 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979). Here, the Legislature established specific budget limit components for a JTED that, unlike the budget components for a school district, exclude excess utility costs. Second, a JTED is created for a special purpose, has only limited powers, and cannot exercise other powers unless they are expressly or impliedly granted. *See Olmsted & Gillelen v. Hesla*, 24 Ariz. 546, 551, 211 P. 589, 590 (1922). Section 15-947.01, A.R.S., expressly limits the JTED's budget components. An Attorney General may not augment that authority by overlooking the direct legislative restriction. *Cf. In re Adoption of Wilcox*, 68 Ariz. 209, 213, 204 P.2d 168, 170 (1949) (where a statute expresses the legislative intent in no uncertain language, courts will not presume that words in an earlier statute should be extended beyond their obvious

meaning). Finally, if the specific budget limit components for a JTED established by the Legislature in A.R.S. § 15-947.01 were disregarded, that provision would be rendered purposeless. Such an interpretation would contravene the presumption that the Legislature did not intend a futile act by including a provision that is trivial or not operative. *See Patterson v. Maricopa County Sheriff's Office*, 177 Ariz. 153, 156, 865 P.2d 814, 817 (App. 1993). Consequently, a JTED is not statutorily authorized to include excess utility costs in its budget.[(2)]

Likewise, the budget balance carry forward provisions of A.R.S. § 15-943.01, by their language, apply solely to "the governing board of a school district." The Legislature did not include these provisions in the JTED enabling legislation, either directly or by reference. *See Collins v. Stockwell* 137 Ariz. 416, 420, 671 P.2d 394, 398 (1983) (courts will not read into a statute something that is not within the manifest intent of the Legislature as gleaned from the statute itself). Consequently, there is no legal basis for suggesting that a JTED may make use of a budget balance carry forward.

Applying traditional rules of statutory construction leads to the inescapable conclusion that a JTED does not have statutory authority to either include excess utility costs or to implement a balance carry forward in its budget. The Legislature controls these statutes and can amend them to allow a JTED to alter its budget.

Conclusion

The Legislature has not provided statutory authority for a joint technological education district to include excess utility costs as part of its budget or to implement a budget balance carry forward.

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[1] Excess utility costs generally include direct operational costs of heating, cooling, water and electricity, telephone communications, and sanitation fees. A.R.S. § 15-910(A).

[2] The amendments to A.R.S. § 15-910.02 do not affect a JTED's inability to include excess utility costs in its budget. By its plain language, this provision deals with a situation where a *school district governing board* undertakes measures to reduce excess utility costs and to conserve energy. The meaning of this statute is clear from the plain language of the provisions, so we do not need to look beyond that language. *See Board of Educ. v. Leslie*, 112 Ariz. 463, 465, 543 P.2d 775, 777 (1975) (if the language of a statute is plain and unambiguous, one need not look further to determine the Legislature's intent).

Janet Napolitano

January 7, 1999

Office of the Arizona Attorney General **Re: I99-001(R99-001)**

Question Presented

At the November 3, 1998, general election, Arizona's electorate passed Proposition 302, which contained the following language proposed by the Commission on Salaries for Elected State Officers:

> Each state legislator shall be paid $24,000 per annum, and as further compensation, per diem reimbursement commensurate with and as provided by law for non-elective Arizona state employees.

On January 6, 1999, you requested a formal legal opinion on the effect of the payment provisions in Proposition 302. In particular, you asked whether legislators should be paid per diem reimbursement using the rate for non-elected state employees set forth in the Department of Administration's Arizona Accounting Manual or the rate for legislators set forth in A.R.S. § 41-1104.

Summary Answer

When the Commission on Salaries for Elective State Officers ("Commission") recommended changing legislative *"per diem"* rates, it acted beyond its statutory power to recommend changing legislative *"salaries."* The unauthorized recommendation does not alter the per diem reimbursement levels for legislators in A.R.S. § 41-1104. Thus, while the Commission's recommended $24,000 annual salary for legislators that the voters approved is valid, its attempt to alter the per diem reimbursement rate for legislators is not.

Background

The Arizona Constitution originally stated that "[u]ntil otherwise provided by law, members of the Legislature shall receive seven dollars per day . . . . They shall also receive mileage one way, by the shortest practicable route, at the rate of twenty cents per mile." Former ARIZ. CONST. art. 4, pt. 2, § 22. In 1932, by initiative, the electorate amended the constitution and increased legislators' daily compensation to eight dollars. *See* Historical Note, ARIZ. CONST. art. 4, pt. 2, § 1. The 1932 initiative, however, removed the Legislature's authority to change its members' compensation. Former ARIZ. CONST. art. 4, pt. 2, § 1.

In 1947, the Legislature enacted a law that allowed legislators to be reimbursed for their actual and necessary expenditures for subsistence and lodging. *See Earhart v. Frohmiller*, 65 Ariz. 221, 178 P.2d 436 (1947). This reimbursement law was challenged as being an increase in compensation in violation of the Constitution. *Id*. The Arizona Supreme Court upheld the law, concluding that reimbursement for expenditures fell outside the 1932 ban prohibiting the Legislature from changing its "compensation" or "salary." *Id*. at 226, 178 P.2d at 438.

In 1958, the Legislature placed on the ballot, and the people approved, an amendment to the Arizona Constitution that provided for an annual legislative "salary of one thousand eight hundred dollars as compensation for services . . . ." Former ARIZ. CONST. art. 4, pt.2, § 1, ¶(2)(a). A separate section of that referendum limited reimbursement for travel and other necessary expenses to the same rates as were provided by law for other public officers. *Id*. at ¶ 2(b).

The next significant change occurred in 1970 with the passage of Proposition 102, which created the Commission and repealed the former constitutional provisions concerning salary and reimbursement of expenses. ARIZ. CONST. art. 5, § 12. That section and A.R.S. § 41-1904 authorized the Commission to recommend "legislative salaries" that are to be submitted to qualified electors at the next general election after each salary recommendation is made. Legislative reimbursement continued to be governed by then A.R.S. § 41-1103(1968)(later renumbered as A.R.S. § 41-1104).

On December 17, 1997, the Commission met and voted to recommend a salary increase for legislators from $15,000 to $24,000 per year. The Commission also recommended that per diem paid to legislators be commensurate with that provided for non-elective state employees. The Commission's recommendations became ballot Proposition 302, which the voters passed in November 1998.

Analysis

1. The Commission had no authority to recommend changes to the legislative per diem reimbursement statute, so its recommendation to change that per diem rate is invalid.

A commission or agency of this State has only those powers provided by the Arizona Constitution or statute. *Kendall v. Malcolm*, 98 Ariz. 329, 334, 404 P.2d 414, 417 (1965). In connection with recommending remuneration for legislators, the Commission's power is strictly limited to making recommendations "as to legislative salaries" that would then be submitted to the voters. A.R.S. § 41-1904(D).

By the time the Commission was created in 1970, Arizona courts had distinguished between "salary" or "compensation" and "reimbursement." *See Earhart v. Frohmiller*, 65 Ariz. at 226, 178 P.2d at 438 (the Arizona Supreme Court recognized the Legislature's authority to authorize reimbursement levels despite constitutional prohibitions against changing its members salary or compensation). Additionally, the 1958 constitutional amendments treated salary and reimbursement separately. Former ARIZ. CONST. art. 4, pt. 2, §1, ¶¶(2)(a) and (2)(b). For almost thirty years following the creation of the Commission, the Legislature continued to set its own reimbursement rates. *See* 1968 Ariz. Sess. Laws ch. 180, § 2 (currently codified at A.R.S. § 41-1104). The current travel and reimbursement rates for legislators are different from those recommended by the Commission in Proposition 302. *See* A.R.S. § 41-1104.

This distinction between salary and per diem reimbursement is not unique. For example, federal and state tax laws recognize that salaries are taxable income, *Department of Revenue v. Arthur*, 153 Ariz. 1, 734 P.2d 98 (App. 1986); 26 U.S.C. § 61 (a)(1), whereas payments such as per diem that are intended to reimburse an employee for expenses incurred on behalf of the employer, are generally considered to be nontaxable. 26 U.S.C. § 62 (a)(2) and (c)(2); 1.62-2(c)(4). Similarly, large portions of A.R.S. Title 38 recognize the difference between salaries (*see* Chapter 4, Article 1 ("Salaries")) and per diem reimbursement (*see* Chapter 4, Article 2 ("Reimbursement for Expenses")).

The lengthy history distinguishing salary from reimbursement (including per diem) in Arizona leads to the conclusion that the Commission has constitutional authority to recommend *only* salary changes. The Commission has no authority to venture into other areas, such as recommending that Arizona voters approve entering treaties with foreign countries, imposing new taxes, or altering legislative per diem rates. This Office reached a similar conclusion in 1980. In Ariz. Att'y Gen. Op. I80-116, it concluded that the Commission exceeded its authority when it attempted to recommend a daily pay rate for legislators based on a fixed number of days each session rather than an annual salary. Because one of the consequences of that recommendation could have been to dictate the length of the legislative session, the Attorney General concluded that the Commission had exceeded its limited authority to set salaries. *Id*.

If an agency takes an action that is beyond its authority, the action is void. *Magma Copper Co. v. Arizona State Tax Comm'n*, 67 Ariz. 77, 86-87, 191 P.2d 169, 175 (1948). Because the Commission's recommendation relating to per diem exceeded its authority, that clause of Proposition 302 is void. Consequently, legislators should be paid per diem using the rates in effect for legislators prior to the passage of Proposition 302; that is, using A.R.S. § 41-1104.[(1)]

2. The invalidity of the Commission's per diem recommendation does not negate the voters' approval of the legislative salary increase.

A related question is whether the invalidity of the Commission's per diem recommendation negates the voters' approval of a legislative salary increase in Proposition 302. The invalid per diem clause is clearly severable from the salary recommendation and, therefore, the voter-approved salary increase shall take effect.

Under Arizona law, two provisions are severable if severance is consistent with the intent of those who created the law. *See Ruiz v. Hull*, 191 Ariz. 441, 459, 957 P.2d 984, 1002 (1998)("the valid portion of the statute will be severed only if it can be determined from the language that the voters would have enacted the valid portion absent the invalid portion")(citing *State Compensation Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993)). The unique manner in which Proposition 302 was developed requires review of the Commission's intent as well as the intent of the electorate to determine whether severance applies.

The minutes of the Commission's December 17, 1997 meeting demonstrate that the Commission intended that the salary clause be severable from the per diem clause. All four members present voted in favor of the salary and per diem recommendations. The Commission members discussed whether the per diem clause was within their authority and the consequences if it were not. Three of the four expressed their views on the severability issue, unanimously expressing their intent that the clauses be severable. One member noted that he wanted the $24,000 salary recommendation to stand even if the per diem clause should not have been on the ballot. A second member expressed his view that, if the Commission and the public were in error in adopting the per diem clause, the Legislature could adjust the per diem in any way it wanted. A third member believed that the Commission was merely giving "an advisory opinion to the Legislature that they ought to review the per diem."

The only evidence of the electorate's intent is the language of the 1998 Publicity Pamphlet prepared by the Secretary of State. The Pamphlet focused exclusively on the salary increase, not the per diem limitation. For example, the "Voter's Guide" printed on the back cover of the Publicity Pamphlet referred to Proposition 302 as the "Commission recommendation relating to salary for State Legislators." It did not mention the per diem clause. Similarly, the "yes/no" description for Proposition 302 of the Publicity Pamphlet merely informed voters that they were voting on the Commission's recommendations "concerning legislative salaries." Publicity Pamphlet at 159. Again, it made no reference to the per diem limitation.

Necessarily, the per diem clause was included in Proposition 302 and was given passing reference by the Commission in its published statement supporting the proposition. Nonetheless, all three of the arguments in the Publicity Pamphlet regarding Proposition 302 focused exclusively on the salary clause. The arguments did not mention the per diem clause.

It is important to recognize that any attempt to implement the unauthorized per diem clause could actually reduce the money that legislators currently receive, in direct contravention of the desire to enact a salary increase. For example, as demands on the Legislature have increased in recent years, legislative leaders have found it necessary to spend more time working at the Legislature than ever before. Several times in this decade legislative leaders received annual per diem amounts in excess of $9,000, the amount of the voter-approved salary increase, because of the heavy demands on their time. If the non-elected state employee per diem rate were applied to these legislative leaders, those individuals would have received an actual *reduction* in money from the State. The voters did not intend this result when they passed Proposition 302.

Proposition 302 had its origins with the Commission. The commissioners were the architects of the language and intended that the salary increase be allowed to stand even if the per diem clause were invalid. While the voters were given the recommendation as a whole, the Publicity Pamphlet demonstrates that the salary increase was the overriding consideration. Under these circumstances, the invalid per diem restriction must be severed from Proposition 302, allowing the salary increase, alone, to take effect.

Conclusion

The voters approved Proposition 302 effective at the beginning of the next regular legislative session. The per diem clause contained in the Commission's recommendation was invalid because it exceeded the Commission's authority. Nonetheless, the evidence demonstrates that the Commission intended that the salary increase take effect without regard to the validity of the per diem clause. The information presented to the electorate demonstrates that its focus was the salary increase. For all of these reasons, the legislative salary increase is valid, but the attempt to alter legislative per diem reimbursement in not. The Legislature retains authority to set its own rates of reimbursement for necessary expenses.

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[1] The recent enactment of Proposition 105 does not alter this conclusion. Proposition 105 bars the Legislature from repealing an *initiative or referendum* measure passed by a majority of the voters and from most modifications of such measures. Proposition 105, however, does not apply to Commission recommendations under art. 5, § 12 of the

constitution. By its terms, Proposition 105 only affects initiative and referendum matters enacted pursuant to art. 4, pt. 1, § 1 of the constitution.