

## 2008 AG Opinions

Date	Description
December 30, 2008	<b>No. I08-013 (R07-031)</b> Re: Application of One-Person, One-Vote Requirement of U.S. Constitution to Joint Technological Education District Elections
December 18, 2008	<b>No. I08-012 (R08-047)</b> Re: Average Daily Membership Calculation and Concurrent Enrollment
December 12, 2008	<b>No. I08-011 (R08-017)</b> Re: Statutes Requiring Paving or Stabilization of Parking Lots and Driveways as Air Pollution Control Measures
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**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 30, 2008</p>	<p>No. I08-013 (R07-031)</p> <p>Re: Application of One-Person, One-Vote Requirement of U.S. Constitution to Joint Technological Education District Elections</p>
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To: The Honorable Steve M. Gallardo  
Arizona House of Representatives

**Question Presented**

If a joint technological education district ("JTED") is divided into single-member districts from which its governing board members are elected, must it redistrict following each federal census or at any other time if necessary to comply with the one-person, one-vote requirement of the U.S. Constitution?

**Summary Answer**

Yes. Because JTEDs possess general governmental powers and perform important governmental functions, their elections must comply with the one-person, one-vote principle mandated by the U.S. Constitution. Therefore, the single-member districts from which a JTED elects its governing board members must be redistricted periodically to ensure that the districts' populations are as nearly equal as practicable.

## Background

Two or more school districts can form a JTED to provide vocational and technological training to students from those districts. To form a JTED, each school district must submit a plan to the voters of each district. A.R.S. § 15-392(B). Once approved by the electors, the JTED is managed and controlled by a JTED governing board. A.R.S. § 15-393(A).

The JTED's governing board is initially composed of persons that each member school district appoints. A.R.S. § 15-392(D). The appointed governing board members serve until January 1 following the next general election. *Id.* At the next general election, the voters within the JTED boundaries elect the JTED governing board. A.R.S. §§ 15-392(D), -393. The governing boards of the member districts must choose between the following two potential systems for electing a JTED governing board: the standard election system described in the statute, or an alternative election system submitted by the governing boards of the school districts that form the JTED and approved by the voters. A.R.S. § 15-393(A), (B). Under Section 5 of the federal Voting Rights Act of 1965, the U.S. Department of Justice must preclear whichever process is chosen. 42 U.S.C. § 1973c (2006).

Under the standard election system, the JTED governing board consists of five members elected from five single-member districts within the JTED. A.R.S. § 15-393(A). The boundaries of these single-member districts are required to be nearly equal in population and to generally follow election precinct lines where practicable. A.R.S. § 15-393(A)(1) (“The governing boards of the school districts participating in the formation of the joint district shall define the boundaries of the single member districts so that the single member districts are as nearly equal in population as is practicable. . . .”). The alternate election system has no express requirements regarding the formation of the districts from which the JTED governing board is elected.

The governing boards of the school districts participating in the formation of the joint district may vote to implement any other alternative election system for the election of joint district board members. If an alternative election system is selected, it shall be submitted as part of the plan for the joint district pursuant to § 15-392, and the implementation of the system shall be as approved by the United States justice department.

A.R.S. § 15-393(B).

### Analysis

In *Reynolds v. Sims*, the U.S. Supreme Court addressed the one-person, one-vote principle embodied in the Fourteenth Amendment's Equal Protection Clause. 377 U.S. 533, 554-58 (1964). The Court reviewed Alabama's method for electing state house and senate legislators and held that it was unconstitutional because the districts from which representatives and senators were elected were not being periodically reapportioned to account for population shifts. *Id.* at 577. "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579. The Court held in *Reynolds* that the U.S. Constitution required Alabama to periodically reapportion its legislative voting districts in accordance with population changes. *Id.* at 583-84.

The Court extended the one-person, one-vote principle to members of a local school board in *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 631-33 (1969) (holding that each vote in district should be counted as equally as practicable). And, in *Hadley v. Junior College District*, the Court applied the one-person, one-vote requirement to the election of community college district trustees because those trustees exercised general governmental powers and performed important governmental functions:

We hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment

requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

397 U.S. 50, 56 (1970). In so doing, the Court noted that “[e]ducation has traditionally been a vital governmental function.” *Id.* Further, “since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college[,]” the trustees perform “important governmental functions” with sufficient impact to require compliance with the one-person, one-vote standard. *Id.* at 53-54.

Courts have subsequently used these characteristics as a litmus test for determining whether to apply the one-person, one-vote requirement to an entity. *See Kelleher v. Se. Reg’l Vocational Tech. High Sch. Dist.*, 806 F.2d 9, 11 n.7 (1st Cir. 1986) (finding that apportionment violated the one-person, one-vote requirement); *Baker v. Reg’l High Sch. Dist. No. 5*, 520 F.2d 799, 801 (2d Cir. 1975) (finding that school boards performed a sufficiently extensive range of governmental functions to require the application of the one-person, one-vote requirement to their elections). “Relying on *Hadley*, federal courts have consistently held elected state boards of education and local school boards bound by the ‘one person, one vote’ standard.” *Panior v. Iberville Parish Sch. Bd.*, 498 F.2d 1232, 1235 (5th Cir. 1974) (reversing district court and finding one-person, one-vote requirement applicable to election for members of Louisiana parish school board).

The one-person, one-vote requirement, however, does not apply to certain entities “whose duties are so far removed from normal governmental activities and [whose functions] so

disproportionately affect different groups that a popular election . . . might not be required.” *Hadley*, 397 U.S. at 56; *see also Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 69 (1978) (stating people who did not live within geographical limits of governmental unit at issue did not have right to vote in that government unit’s elections). The Court also has held that when a board’s governing members are appointed rather than elected, the one-person, one-vote requirement does not apply. *Sailors v. Board of Educ.*, 387 U.S. 105, 111 (1967); *see also Burton v. Whittier Vocational Reg’l Sch. Dist.*, 449 F. Supp. 37, 38-39 (D. Mass. 1978) (holding that because board is appointed, one-person, one-vote principle inapplicable).

In sum, the Fourteenth Amendment’s Equal Protection Clause requires that whenever popular elections to state and local bodies possessing general governmental powers and performing important governmental functions involve multiple electoral districts, each district must elect a number of officials proportionate to its number of voters.

The governing board of a JTED consists of “five members elected from five single member districts formed within the joint district,” and “[t]he governing boards of the school districts participating in the formation of the joint district shall define the boundaries of the single member districts so that the single member districts are as nearly equal in population as is practicable.”<sup>1</sup> A.R.S. § 15-393(A) & (A)(1). Thus, the language of A.R.S. § 15-393 contemplates a popular election of board members proportionate to votes in each district in compliance with the one-person, one-vote requirement.

Moreover, the JTEDs’ statutory functions and powers indicate that they are governmental entities that are required to comply with the one-person, one-vote requirement. The statutory powers of a JTED include the power to:

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<sup>1</sup> The alternate election system permitted under A.R.S. § 15-393(B) does not contain any such description of the single-member districts to be formed therein. However, as described later, the functions of the JTED and its general application to all members of the district indicate that the one-person, one-vote requirement applies regardless.

- Issue bonds (A.R.S. § 15-393(D)(1));
- Levy taxes (A.R.S. § 15-393(F));
- Allocate and request funding from various sources, including federal monies (A.R.S. § 15-393(C)(2), (D)(7)-(10));
- Charge tuition for adult students and students from nonparticipating school districts (A.R.S. § 15-393(H));
- Enter into intergovernmental agreements (A.R.S. § 15-393(L));
- Appropriate monies for adult education under A.R.S. § 15-234 (A.R.S. § 15-393(C)(2));
- Employ and fix the salaries and benefits for employees (A.R.S. § 15-502,); and
- All the powers and duties of a regular school-district governing board under A.R.S. § 15-341 (A.R.S. § 15-393(C)(3)).

Thus, like the board of trustees in *Hadley*, the JTED can levy taxes, issue bonds, hire and fire teachers, make contracts, collect fees, supervise and discipline students, and generally manage the school district's operations. *See Hadley*, 397 U.S. at 54. Based on similar functions, the Court in *Hadley* held that the trustees performed "important governmental functions within the districts" and those powers were "general enough and have sufficient impact throughout the district to justify the conclusion that the principle" of one-person, one-vote be applied. *Id.* at 53-54.

At least one other court has come to the same conclusion. In *Kelleher*, the First Circuit held that the one-person, one-vote principle applied to a vocational school district. 806 F.2d at 13. In that case, the district court found inapplicable the one-person, one-vote requirement because the apportionment scheme had been voted on and approved by a majority of the voters. *Id.* The First Circuit reversed, holding that "[a] majority of citizens willing to have their rights diluted cannot deprive the minority of their right to cast an equally weighted vote." *Id.* at 12.

The court reasoned that the one-person, one-vote requirement was applicable because the committee “possesses many of the same powers held by the trustees in *Hadley v. Junior College District*.” *Id.* at 11 n.7. Specifically, the vocational school district could exercise the same powers as the school district and could “sue and be sued; acquire property; build, operate, and organize schools; incur debt; issue bonds and notes; and assess member municipalities for the [vocational d]istrict’s expenses.” *Id.*

In contrast, the Seventh Circuit found a joint technological board was not subject to the one-person, one-vote requirement, but the school council at issue in that case did not have the power to tax. *See Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1102-03 (7th Cir. 1995) (local school councils for public schools are not subject to the one-person, one-vote requirement because they did not have power to tax).

As set forth above, JTEDs have essentially the same powers as those described in *Hadley* and *Kelleher*. Therefore, JTED elections must comply with the one-person, one-vote requirement, and the JTED member districts must be periodically redistricted.

### **Conclusion**

Because JTEDs possess general governmental powers and perform important governmental functions, their elections must comply with the one-person, one-vote principle mandated by the U.S. Constitution. Consequently, the single-member districts from which a JTED elects its governing board members must be periodically redistricted to ensure that their populations are as nearly equal as practicable and that no vote is diluted.

Terry Goddard  
Attorney General



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

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 18, 2008</p>	<p>No. I08-012 (R08-047)</p> <p>Re: Average Daily Membership Calculation and Concurrent Enrollment</p>
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To: The Honorable Tom Horne  
Superintendent of Public Instruction

**Questions Presented**

You have asked whether Arizona law permits any one student to be counted more than once for the computation of average daily membership ("ADM") during one school year and, if so, under what circumstances this can occur. You specifically requested that this Office address the calculation of ADM for concurrent and consecutive enrollment as it applies to school districts, charter schools, joint technological education districts ("JTEDs"), both at satellite and main (or centralized) campuses and technology assisted project-based programs ("TAPBIs").<sup>1</sup>

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<sup>1</sup> This opinion addresses the most common scenarios related to concurrent enrollment. It does not address every conceivable scenario where a student may generate more than 1.0 ADM. In addition, due to the complexity of the concurrent enrollment scenarios, consecutive enrollment will not be addressed in this opinion, but will be addressed separately.

### Summary Answer<sup>2</sup>

Arizona statutes specifically address ADM in the following four scenarios: (1) a student enrolled in both a charter school and a JTED who resides within the boundaries of a school district participating in the JTED may generate up to 1.25 ADM; (2) a student enrolled in a traditional school district and a JTED satellite program where the career and technical education and vocational education courses or programs, including satellite courses, are provided in a facility owned or operated by the school district in which a student is enrolled may generate up to 1.25 ADM; (3) a student enrolled in a traditional school district or a charter school and a TAPBI cannot generate more than 1.0 ADM; and (4) a student enrolled in a traditional school district and a charter school cannot generate more than 1.0 ADM.

With regard to full-time high school students concurrently enrolled in two or more traditional school districts or two or more charter schools, the language of A.R.S. § 15-901(A)(2)(b)(ii) supports the current policy of the Department of Education (“Department”) limiting the ADM of such students to 1.0. However, statutory language and legislative history pertaining to JTEDs supports an exception from the 1.0 ADM limitation for full-time high school students concurrently enrolled in a traditional school district and a JTED main campus. Finally, elementary and fractional students are not limited to 1.0 ADM.

### Background

The Arizona Legislature enacted a comprehensive school financing scheme in 1974. 1974 Ariz. Sess. Laws, ch. 3, § 26 (codified at A.R.S. § 15-1212; re-codified in 1981 at A.R.S. § 15-901). Under the school financing system, each school district’s base-level funding is determined by multiplying the number of students enrolled by a legislatively determined dollar amount. A.R.S. § 15-943. The student count is determined by the ADM through the first 100

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<sup>2</sup> For convenience, a chart summarizing the conclusions drawn in the opinion has been appended.

days of instruction. A.R.S. § 15-902(A) and (B). ADM is “the total enrollment of fractional and full-time students, minus withdrawals, of each school day through the first one hundred days.”<sup>3</sup> A.R.S. § 15-901(A)(2). ADM is then used to determine the school district’s student count which is the basis for building a school district’s annual budget. A.R.S. §§ 15-901, -902, -943. State funding for a school district is based on the district’s ADM total. A.R.S. § 15-943. Thus, the correct calculation of ADM is of significant importance and concern to the Department and Arizona school districts and charter schools.

In calculating ADM, a part-time high school student is counted as a fractional student “if the student is enrolled in an instructional program that is at least one-fourth, one-half or three-fourths of a full-time instructional program.” A.R.S. § 15-901(A)(2)(a)(ii). A full-time high school student is defined as a student who has not graduated and is “enrolled in at least a full-time instructional program of subjects that count toward graduation as defined by the [Arizona] [S]tate [B]oard of [E]ducation. . . .” A.R.S. § 15-901(A)(b)(ii). A full-time instructional program meets at least for 720 hours during the minimum number of days required and includes: (1) at least four subjects each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of 123 hours a year; (2) or the equivalent; or (3) one or more subjects taught in amounts of time totaling at least 20 hours per week prorated for any week fewer than five school days. A.R.S. § 15-901(A)(2)(c)(vi). Section 15-901(A)(2)(b)(ii) states that “[a] full-time [high school] student shall not be counted more than once for computation of [ADM].”

The landscape of public education has changed dramatically in the past thirty years. In 1974, the only public schools were traditional school districts. Because there was only one

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<sup>3</sup> A withdrawal “include[s] students formally withdrawn from schools and students absent for ten consecutive school days, except for excused absences as identified by the [D]epartment.” A.R.S. § 15-901(A)(2).

public school option available to students, students were not concurrently enrolled in multiple schools. In 1990, the Arizona Legislature authorized the creation of JTEDs for the express purpose of allowing existing school districts to form a regional district for the provision of vocational and technical education programs in order to avoid duplication of expensive courses and programs. 1990 Ariz. Sess. Laws, ch. 248 § 1. With the creation of JTEDs came the concept of concurrent enrollment. In 1991, the Legislature specifically authorized funding up to 1.25 ADM for fractional students who were enrolled in JTED satellite courses provided in a facility owned or operated by the member school district in which the pupil was enrolled. 1991 Ariz. Sess. Laws, ch. 154, § 4 (S.B. 1264) (codified at A.R.S. § 15-393(D)(3)).<sup>4</sup>

In 1994, the Arizona Legislature authorized the creation of charter schools in order to provide a learning environment that would improve pupil achievement and provide additional academic choices for parents and pupils. 1994 Ariz. Sess. Laws, ch. 2, §2; A.R.S. §§ 15-181 to 15-189. The ADM for a student who is enrolled in both a charter school and a public school that is not a charter school (traditional school district) is not permitted to exceed 1.0 ADM. A.R.S. § 15-185(C). However, a charter school student who is also enrolled in a JTED and resides within the boundaries of a school district participating in the JTED may generate up to 1.25 ADM. A.R.S. § 15-185(C).

In 1998, the Arizona Legislature authorized the creation of virtual schools or TAPBIs to meet the needs of pupils in the information age. 1998 Ariz. Sess. Laws, ch. 224, §2; A.R.S. § 15-808. TAPBI programs operate within a district or charter school. The ADM of a student who

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<sup>4</sup> At the time of enactment, the law applied to vocational and technological courses or programs provided in a facility owned “and” operated by a school district in which a pupil is enrolled. 1991 Ariz. Sess. Laws, ch. 154, § 4 (S.B. 1264). The Legislature amended the language in 2005 to provide for facilities owned “or” operated by school districts in which the pupil is enrolled. 2005 Ariz. Sess. Laws, ch. 294, §1 (H.B. 2418). The Legislature also amended the law to include satellite courses. *Id.*

is enrolled in either a school district or charter school and also participates in a TAPBI cannot exceed 1.0. A.R.S. § 15-808(F).

Prior to July 1, 2008, the Department generally allowed a student enrolled in Arizona public schools to be counted for more than 1.0 ADM. A student could generate more than 1.0 ADM in a single year by either being enrolled in two school districts simultaneously (“concurrent enrollment”) or enrolling in one district and then another district within the same year but prior to the second school district’s 100<sup>th</sup> day of instruction (“consecutive enrollment”).<sup>5</sup>

In October 2007, the Auditor General’s Office published a performance audit on TAPBI schools. Auditor General’s Performance Audit of TAPBIs (October 2007). The audit concluded that the Department over-funded public education by an estimated \$6.4 million for several reasons. First, the audit found that the Department failed to apportion the ADM to 1.0 for those students who were concurrently enrolled in a TAPBI and school district or charter school as required by A.R.S. § 15-808(F). *Id.* at 11-14. Second, the audit determined that the Department failed to apportion the ADM of students who were consecutively enrolled in a TAPBI and school district or charter school to 1.0 as required by A.R.S. § 15-808(F). *Id.*<sup>6</sup>

As a result of the audit, the Department reviewed its internal practices on concurrent and consecutive enrollment for students enrolled in all types of public schools. The Department’s internal review revealed that students who were concurrently and consecutively enrolled in more than one school had been funded for more than 1.0 ADM. For example, when a student was concurrently enrolled in both a JTED and a school district as a full time student, that student could generate 2.0 ADM. As a result of the Department’s internal review and pursuant to A.R.S.

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<sup>5</sup> Arizona funds its public schools based on the number of students enrolled through 100th day of instruction. A.R.S. § 15-902.

<sup>6</sup> The audit referred to the consecutive enrollment as funding “summer school.”

§ 15-901(A)(2)(b)(ii), it created a new policy that was issued on April 3, 2008, effective for the 2008-2009 school year, which states:

[A] student shall not be counted more than once for computation of average daily membership and ...dual enrollment between July 1st and the school district[']s and/or charter school[']s 100<sup>th</sup> day will now be apportioned between the schools....Consecutive enrollment after the 100<sup>th</sup> day will not be counted toward the student's ADM and will not generate funding.<sup>7</sup>

See the Department of Education Memo dated April 3, 2008, Regarding Reporting of Absences and Apportionment of ADM ("April 3, 2008, Memorandum"). The effect of the Department's new policy is that students who are concurrently enrolled as full-time students who would have previously generated more than 1.0 ADM will now only generate 1.0 ADM, unless otherwise provided by statute. The Department has created a process by which 1.0 ADM will be apportioned between the schools in which the student is concurrently enrolled.

Prior to July 1, 2008, a high school student could be concurrently enrolled in a full-time instructional program at both a traditional school district and at a JTED main campus, generating 1.0 ADM for each entity for a total of 2.0 ADM. However, under the Department's new interpretation, the ADM generated by that student cannot be more than 1.0, and the Department will apportion the ADM between the two entities accordingly. See April 3, 2008, Memorandum. The Department based its ADM calculation policy in part on the language of A.R.S. § 15-901(A)(2)(b)(ii), which, in defining a full-time high school student states that "[a] full-time student shall not be counted more than once for computation of average daily membership."

Some school districts disagree with the Department's interpretation of A.R.S. § 15-901(A)(2)(b)(ii). The school districts argue that A.R.S. § 15-901(A)(2)(b)(ii) applies to the

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<sup>7</sup> In addition, the Department's policy allowed for the generation of 1.25 ADM where a student was also enrolled in a JTED. See Department of Education Memo dated April 3, 2008, Regarding Reporting of Absences and Apportionment of ADM.

calculation of ADM in the context of one school district. Specifically, the school districts believe that the statute, which applies to full-time high school students, prohibits a single school district from counting a student more than once. The school districts maintain that the prohibition against counting a student more than once is a legislative attempt to address the provisions of A.R.S. § 15-901(A)(2)(c)(vi), which allows a school district to collect 1.0 ADM for a full-time student who enrolls in a full-time instructional program. Without the statutory cap, school districts argue that a single school district could collect up to 2.0 ADM for a full-time high school student enrolled in more than the minimum four subjects required by law. Under this analysis, the prohibition in A.R.S. § 15-901(A)(2)(b)(ii) applies only to a single school district's treatment of a student's enrollment and not to all school districts that may enroll that same student within a school year.

#### Analysis

**A. Arizona Statutes Support the Department's Policy With Regard to Students Concurrently Enrolled in Some Combination of School Districts, JTED Satellites, TAPBIs, and Charter Schools.**

Specific statutory limits regarding the calculation of ADM for students who are concurrently enrolled in a combination of traditional school districts, JTED satellites, TAPBIs, and charter schools support the Department's current policy. Arizona law identifies four scenarios in which ADM for a single student is apportioned between two public schools: 1) a student is enrolled in both a charter school and traditional school district; 2) a student is enrolled in both a charter school and JTED if the student lives within boundaries of a JTED participating district; 3) a student is enrolled in both a traditional school district and a JTED satellite program; and 4) a student is enrolled in a traditional school district or charter school and a TAPBI school. See A.R.S. §§ 15-185(C), -393(D)(3), -808(F).

Under A.R.S. § 15-185(C), a student is prohibited from generating more than 1.0 ADM if the student is concurrently enrolled in both a traditional school district and a charter school. If a student is enrolled in both a charter school and a traditional school district in a single school year and the ADM totals more than 1.0, the Department is required to reduce the ADM amount generated by the student to 1.0 and apportion the ADM between the traditional school district and charter school. A.R.S. § 15-185(C). Similarly, if a student is enrolled in both a charter school and a JTED and resides within the boundaries of a school district that participates in the JTED, the ADM generated by the student's enrollment is capped at 1.25 and must be apportioned between the two institutions. *Id.*

Under A.R.S. § 15-393(D)(3), a fractional student cannot generate more than 1.25 ADM if the student is enrolled in a traditional school district and a career and technical or vocational education course, including JTED satellite courses, in a facility owned or operated by the school district. Under the statute, the JTED and the traditional school district must apportion the 1.25 ADM generated by the student. A.R.S. § 15-393(D)(3).

Under A.R.S. § 15-808(F), a student enrolled in a TAPBI program and a traditional school district or charter school may not generate more than 1.0 ADM and the two entities are required by statute to apportion the ADM.

The Department's policy is consistent with each of these aforementioned statutory caps. Through each of these recently created education options, the Legislature demonstrates a history of limiting ADM at the inception or shortly after the new education option is created. In each instance where a new educational choice is created, the Legislature specifically capped the amount of ADM a student may generate. Thus, it appears from the history of these programs that the legislative intent was to have some sort of cap on the amount of ADM generated by a

student, which supports the Department's interpretation of A.R.S. § 15-901(A)(2)(b)(ii) as it applies to full-time high school students concurrently enrolled in two or more school districts or two or more charter schools.

**B. The Department's Current Policy with Regard to Full-Time High School Students Concurrently Enrolled in Two or More School Districts or Two or More Charter Schools and Is Reasonable Is Entitled to Deference.**

The statutes do not specifically address the issue of concurrent enrollment in two or more school districts or two or more charter schools. For high school students, the statutory language states that "[a] full-time student shall not be counted more than once for computation of [ADM]." A.R.S. § 15-901(A)(2)(b)(ii). This statutory language can be read to support the Department's policy. Although the statute can also be read, as some school districts advocate, to prohibit each district from counting the same student twice, we believe the Department's policy is entitled to some deference.

When a statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld when it is "based on a permissible construction of the statute." *Chevron U.S.A., Inc., v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984). When an agency interpretation of a relevant provision conflicts with the agency's earlier interpretation, it is entitled to considerably less deference than a consistently held agency view. *See Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 1681 (1981). However, the agency is still entitled to at least some deference. *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983). In this case, the Department revised its ADM policy in response to the Auditor General's 2007 TAPBI performance audit.

Under the Department's policy, a full-time high school student concurrently enrolled as a full-time high school student in two or more district schools or two or more charter schools

cannot be counted for more than 1.0 ADM. This is supported by the language in A.R.S. § 15-901(A)(2)(b)(ii) prohibiting counting full-time high school students more than once. While the Department's current policy may differ from prior practice and may result in lower funding for Arizona public schools, the Department—as the agency responsible for overseeing the school finance system—is entitled to some deference in its interpretation of A.R.S. § 15-901(A)(2)(b)(ii).

**C. A Full-Time High School Student Concurrently Enrolled in a Traditional School District and a JTED Main Campus May Be Counted Up to 2.0 ADM.**

The statutory language and legislative history pertaining to JTEDs supports an exception from the 1.0 ADM limitation for full-time high school students concurrently enrolled in a traditional school district and a JTED main campus. The statutes governing JTED main campuses specifically require JTEDs to calculate ADM in accordance with A.R.S. § 15-901. A.R.S. § 15-393(C). While the Legislature specifically capped at 1.25 ADM a student enrolled in a traditional school district and a JTED satellite program, A.R.S. § 15-303(D)(3), it did not do so with regard to full-time high school students enrolled at JTED main campuses and traditional school districts. The fact that it did not do so supports the conclusion that it did not intend to place a 1.0 ADM cap on full-time high school students concurrently enrolled in a school district and a JTED main campus. *See Padilla v. Industrial Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (stating that when construing a statute, one presumes that what the legislature means, it will say).

In addition, the fact sheet for the JTED omnibus reform bill, which overhauled the JTED educational system in 2006, states explicitly that under the current funding model for JTED main campuses, “both the member district and the JTED are allowed to include each student in their ADM calculation.” *Arizona State Senate, Final Amended Fact Sheet for H.B. 2700, 47<sup>th</sup> Leg.*,

2<sup>nd</sup> Reg. Sess. The fact sheet also cites a December 2004 Auditor General Report, which acknowledges that students attending a school district full time and also attending a JTED main campus full time can be counted up to 2.0 ADM. *Id.*; *see also* Auditor General Report to Legislature, Joint Technological Education Districts: Analysis of an Urban and a Rural JTED, December 2004, Summary at i (“For each student attending its Central courses, the JTED can receive up to a full 1.0 ADM, and the member district can also claim up to 1.0 ADM per student, depending on the amount of instruction minutes they provided the student. Thus, Central classes allow a potential 2.0 ADM to be claimed for each participating student.”).

Thus, high school students who are simultaneously attending a traditional school district and a JTED main campus, and who qualify as full-time students at both institutions, may be counted as 1.0 ADM by each entity for a total of 2.0 ADM.

**D. Elementary Students and Fractional High School Students Are Not Limited to 1.0 ADM.**

The general prohibition in A.R.S. § 15-901(A)(2)(b)(ii) only applies to full-time high school students and not elementary students or fractional high school students. Regarding elementary students, the statute does not expressly prohibit counting an elementary student more than once in the calculation of ADM when that student is attending two or more charter schools or two or more traditional school districts. The limitation on the calculation of ADM to 1.0 per student is only applicable to full-time high school students. Unlike the provision defining full-time high school students, the definition of a full-time elementary student does not explicitly prohibit counting an elementary student more than once for purposes of calculating ADM. *Compare* A.R.S. § 15-901(A)(2)(b)(i) *with* A.R.S. § 15-901(A)(2)(b)(ii). A negative inference may be drawn from exclusion of language from one statutory provision that is included in other provisions of same statute. *State v. Gonzales*, 206 Ariz. 469, 471, ¶11, 80 P.3d 276, 278 (App.

2003) (explaining that “the rule of *expressio unius est exclusio alterius* . . . is a rule of statutory construction meaning that the expression of one thing is the exclusion of another”). This canon of *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Here, the statutory provisions at issue are part of the statute detailing the parameters of a full-time student. See A.R.S. §§ 15-901(A)(2)(b)(i) and 15-901(A)(2)(b)(ii). The provision defining a full-time high school student for purposes of calculating ADM contains an explicit ban against counting a full-time student twice. The statutory provisions defining a full-time and fractional elementary student do not. See A.R.S. § 15-901(A)(2)(a)(i) and (b)(i). Thus, the prohibition against counting full-time high school students more than once for purposes of determining ADM does not generally apply to students attending elementary schools.<sup>8</sup> Because this aspect of the Department’s new policy is contrary to the statutory scheme, it is not entitled to deference.

Similarly, the prohibition against counting students more than once does not apply to the counting of fractional high school students in the calculation of ADM. A fractional high school student may generate more than 1.0 ADM when concurrently enrolled two or more charter schools, two or more traditional school districts or a traditional school district and JTED main campus. For high schools, a “fractional student” is defined as:

[A] part-time student who is enrolled in less than four subjects that count toward graduation as defined by the state board of education in a

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<sup>8</sup> While A.R.S. § 15-901(A)(2)(b)(ii) does not generally limit elementary students to 1.0 ADM, there are specific instances where statutes expressly limit the amount of ADM an elementary school student may generate. The statutes limit the calculation of ADM to 1.0 for elementary and high school students concurrently enrolled in a charter school and a traditional school district as well as students concurrently enrolled in a traditional school district or charter school and a TAPBI. A.R.S. §§ 15-185(C), and 15-808(F). The limitations do not apply to elementary students concurrently enrolled in two or more school districts or two or more charter schools.

recognized high school and who is taught in less than twenty instructional hours per week prorated for any week with fewer than five school days. A part-time high school student shall be counted as one-fourth, one-half or three-fourths of a full-time student if the student is enrolled in an instructional program that is at least one-fourth, one-half or three-fourths of a full-time instructional program.

A.R.S. § 15-901(A)(2)(a)(ii).

Like elementary school students, the Legislature placed no cap on the face of the statute dealing with fractional high school students. *See* A.R.S. § 15-901(A)(2)(a)(ii).<sup>9</sup> Moreover, there are no statutory limitations involving fractional students enrolled in two or more school districts, two or more charter schools, or a traditional school district and a JTED main campus. If the Legislature intended to place a cap on fractional high school students in these scenarios, it would have done so. *See Padilla*, 113 Ariz. at 106, 546 P.2d at 1137 (stating that when construing a statute, one presumes that what the legislature means, it will say).

The legislative history for JTEDs confirms that a fractional high school student can generate more than 1.0 ADM. A 1991 House Education Committee Summary for S.B. 1264,<sup>10</sup> indicates that a fractional student enrolled in both a JTED main campus and a school district could generate a fractional amount at each institution totaling more than 1.0 ADM. The summary states as follows:

In general a student is considered "full time" if enrolled in at least four courses. If a student is full-time, the student, for purposes of receiving state aid, is counted by the district as 1.0. If a pupil takes three courses, the pupil is counted as .75. Therefore, if a pupil were enrolled in three courses within the resident district and an additional three courses in the joint district, the pupil would be counted as .75 by each district, for a total sum count of 1.5.

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<sup>9</sup> While A.R.S. § 15-901(A)(2)(a)(ii) does not generally limit fractional students to 1.0 ADM, there are specific instances where statutes expressly limit the amount of ADM a fractional student can generate. Specifically, A.R.S. § 15-185(C) places a 1.0 ADM cap on full-time and fractional students enrolled in both a charter school and a school district; 15-808(F) places a 1.0 ADM cap on full-time and fractional students enrolled in a TAPBI and a school district or charter school; and 15-393(D)(3) places a 1.25 ADM cap on fractional students enrolled in a school district and JTED satellite program.

<sup>10</sup> Senate Bill 1264 created the 1.25 cap for students enrolled in school districts and JTED satellite programs.

Ariz. House of Representatives, Educ. Comm. Summary for S.B. 1264, 40<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess., at 47 (1991). Arizona Attorney General Opinion I04-002 supports this analysis.<sup>11</sup> That opinion stated that “[t]he definition of ‘fractional student’ under A.R.S. § 15-901(A)(2)(a)(ii) allows a student who attends a high school facility part-time and a JTED part-time to be counted for attendance purposes in an amount greater than a whole.” Ariz. Op. Att’y Gen. No. I04-002. The opinion also stated that “[a] student who took three classes at a JTED and three classes in the high school facility would be counted as 1.5.” *Id.*

Although this legislative history and Attorney General Opinion addressed the fractional student issue in the context of JTEDs, the analysis applies equally to concurrent enrollment in charter schools or traditional school districts. Traditional school districts, charter schools and JTEDs are all subject to the fractional high school student definition under A.R.S. § 15-901(A)(2)(a)(ii). *See* A.R.S. §§ 15-901(A)(2)(a)(ii); 15-185(A)(1) and (B)(2); 15-393(D)(3) respectively. As the Attorney General Opinion analyzed the definition of “fractional student” generally and indicated that a fractional high school student could count for an amount greater than the whole, this analysis applies to any school that is subject to A.R.S. § 15-901(A)(2)(a)(ii), unless some other limiting language applies. As previously discussed, no other limiting language applies to fractional high school students concurrently enrolled in two or more traditional school districts, two or more charter schools, or in a traditional school district and a JTED main campus. Therefore, these fractional students may generate more than 1.0 ADM.

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<sup>11</sup> The opinion analyzed A.R.S. § 15-393(D)(3) in 2004, when the statute applied the 1.25 cap to a facilities “owned and operated by a school district in which [a] pupil is enrolled.” Ariz. Op. Att’y Gen. No. I04-002, at 2. The Legislature subsequently amended the statute to apply to facilities “owned or operated by a school district in which a pupil is enrolled.” 2005 Ariz. Sess. Laws, ch. 294, §3.

### Conclusion

Arizona statutes specifically address ADM in the four following scenarios: (1) a student enrolled in both a charter school and a JTED who resides within the boundaries of a school district participating in the JTED may generate up to 1.25 ADM; (2) a student enrolled in a traditional school district and a JTED satellite program where the career and technical education and vocational education courses or programs, including satellite courses, are provided in a facility owned or operated by the school district in which a student is enrolled may generate up to 1.25 ADM; (3) a student enrolled in a traditional school district or a charter school and a TAPBI cannot generate more than 1.0 ADM; and (4) a student enrolled in a traditional school district and a charter school cannot generate more than 1.0 ADM.

The language of A.R.S. § 15-901(A)(2)(b)(ii) supports the current policy of the Department limiting full-time high school students concurrently enrolled in two or more traditional school districts or two or more charter schools to 1.0 ADM. However, statutory language and legislative history pertaining to JTEDs supports an exception from the 1.0 ADM limitation for full-time high school students concurrently enrolled in a traditional school district and a JTED main campus. In addition, elementary and fractional students are not limited to 1.0 ADM.

Terry Goddard  
Attorney General

<b>Type of Concurrent Enrollment</b>	<b>Maximum ADM permitted under law</b>	<b>Authority</b>
For any student who is concurrently enrolled in a <b>District and Charter</b>	ADM must be apportioned between the district and charter not to exceed 1.0 ADM. Apportionment is based on the percentage of total time that the pupil is enrolled or in attendance at the public school and the charter school.	A.R.S. § 15-185(C)
For any student who is concurrently enrolled in a <b>Charter and JTED</b> (if student lives within boundaries of a member district participating in the JTED)	ADM must be apportioned between the JTED and the charter not to exceed 1.25.	A.R.S. § 15-185(C)
For any student who is concurrently enrolled in a <b>School District and TAPBI</b> Or <b>Charter School and TAPBI</b>	ADM must be apportioned between the two entities not to exceed 1.0 ADM. Apportionment is based on the percentage of total time that the pupil is enrolled or in attendance at the district or charter and the TAPBI.	A.R.S. § 15-808(F)
For any student who is concurrently enrolled in a <b>District and JTED Satellite</b> (in a facility owned or operated by the district in which the pupil is enrolled)	Sum of <i>fractional</i> ADM shall not exceed 1.25 ADM.	A.R.S. § 15-393(D)(3)
For a full-time high school student who is concurrently enrolled in: <b>2 Districts</b> Or <b>2 Charters schools</b>	A full-time student cannot exceed 1.0 ADM.	A.R.S. §§ 15-901(A)(2)(b)(ii)
For a full-time high school student who is concurrently enrolled in a <b>member School District and a JTED Main Campus</b>	A full-time high school student concurrently enrolled in a member school district and a JTED main campus may be counted up to 2.0 ADM.	Ariz. State Senate, Final Amended Fact Sheet for H.B. 2700, 47 <sup>th</sup> Leg. 2 <sup>nd</sup> Reg. Sess.
For a fractional student concurrently enrolled in: <b>2 Districts;</b> <b>2 Charter Schools;</b> or <b>a District and a JTED Main Campus</b>	A fractional student may generate multiple enrollments that exceed 1.0 ADM.	A.R.S. § 15-901(A)(2)(a)(ii)

<p>For a <b>full-time elementary student</b> who is concurrently enrolled in two school districts or two charter schools and none of the caps on ADM apply (see above)</p>	<p>There is no limitation on ADM.</p>	<p>A.R.S. §§ 15-901(A)(2)(a)(i) and -901(A)(2)(b)(i)</p>
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**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 12, 2008</p>	<p>No. I08-011 (R08-017)</p> <p>Re: Statutes Requiring Paving or Stabilization of Parking Lots and Driveways as Air Pollution Control Measures</p>
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TO: The Honorable Carolyn S. Allen  
Arizona State Senate

**Questions Presented**

You have asked for an Attorney General opinion addressing whether the implementation of Arizona Revised Statutes ("A.R.S.") §§ 9-500.04(A)(7) and 49-474.01(A)(6) would constitute a taking requiring compensation to the affected property owners under the Arizona or United States Constitutions. These statutes require the adoption and enforcement of laws mandating the paving or stabilization of parking lots and driveways in certain areas of the State. You have also asked whether A.R.S. § 12-1134, adopted as part of Proposition 207 in the 2006 general election, would affect the implementation of these statutes.

### Summary Answer

The enforcement of ordinances or other laws that A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6) requires would not result in a taking of property under either the Arizona or United States constitutions or under A.R.S. § 12-1134, as long as such ordinances or other laws did not deprive a landowner of virtually all beneficial or economic use of the land.

### Background

In 2007, the Legislature passed Senate Bill 1552, an air pollution control measure, codified in part at A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6). 2007 Ariz. Sess. Laws, ch. 292, § 1. Section 9-500.04(A)(7) applies to cities and/or towns in area A, which is defined in A.R.S. § 49-541(1), as the Phoenix metropolitan area. It requires any city or town in area A to adopt or amend its codes or ordinances to ensure that “parking, maneuvering, ingress and egress areas that are three thousand square feet or more in size at residential buildings with four or fewer units are maintained with a paving or stabilization method authorized by the city or town by code, ordinance or permit.” A.R.S. § 39-500.04(A)(7). Section 49-474.01(A)(6) requires a county with a population of over two million people or in an area designated by the United States Environmental Protection Agency as a serious PM<sub>10</sub><sup>1</sup> nonattainment area to adopt or amend its codes or ordinances to contain the same requirements. The Phoenix metropolitan area is one such designated nonattainment area. See <http://www.azdeq.gov/environ/air/plan/notmeet.html> (listing designated nonattainment areas in Arizona). The purpose of these new laws is to reduce airborne particulate (dust) pollution. *Arizona State House of Representatives, Fact Sheet for S.B. 1552, 48<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess.*

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<sup>1</sup> “PM<sub>10</sub>” is an airborne pollutant of 10 micrometers or less in size. A.A.C. § R18-2-101(86). Health impacts related to PM<sub>10</sub> pollution may be found in the U.S. Environmental Protection Agency Fact Sheet issued in connection with its adoption of national standards, at [http://www.epa.gov/particles/pdfs/20060921\\_factsheet.pdf](http://www.epa.gov/particles/pdfs/20060921_factsheet.pdf).

## Analysis

We analyze questions of government takings under both the United States and Arizona constitutions, as well as under A.R.S. § 12-1134.

### **A. United States Constitution**

The “takings clause” of the Fifth Amendment to the United States Constitution prohibits the taking of “private property . . . for public use, without just compensation.” The takings clause applies to a direct appropriation of property or to the “functional equivalent of a practical ouster of [the owner’s] possession.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citations and quotation marks omitted). In addition, since the decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the United States Supreme Court has recognized that “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.” *Lingle*, 544 U.S. at 537.

In *Lingle*, the Court described two categories of regulatory action that it would generally deem *per se* takings for Fifth Amendment purposes. “First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.” *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking)). The Court has similarly found a taking where a regulatory authority has required landowners to grant public access easements as a condition of obtaining permits from the authority. *Id.* at 539, 546-48 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825 (1987)). Second, a taking occurs when regulations completely deprive an owner of “‘all economically beneficial us[e]’ of her

property.” *Id.* at 538 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that South Carolina law prohibiting construction within certain distance of shoreline constituted taking and required compensation because it deprived landowner of any reasonable economic use of the land)).

Aside from the above two relatively narrow categories of regulatory takings, the Supreme Court has stated that regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). The *Penn Central* decision did not develop any set formula for determining when a regulatory taking has occurred, but did identify several factors the Court would consider in that analysis, including the economic impact of the regulation on the property owner and the extent to which the regulation “interfered with distinct investment-backed expectations.” *Penn Central*, 438 U.S. at 124. The *Penn Central* Court also looked to the “character of the governmental action,” and whether it amounts to a physical invasion or merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good.” *Id.*

The Court in *Penn Central* also stated that the land “parcel as a whole” is what should be measured in determining the degree to which a property’s value has been affected by regulatory action. *Id.* at 130-31. In so doing, the *Penn Central* Court ultimately upheld a landmark preservation law that prevented the construction of a multi-story office tower over the Grand Central Terminal, arguably costing the landowner millions of dollars. *Id.* at 138. *Penn Central* cited previous Supreme Court decisions where regulations were upheld even though they drastically reduced the value of the affected landowner’s property, as much as 75 to 87 percent. *Id.* at 131. As the *Lingle* Court commented, the Supreme Court’s takings cases “share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the

classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle*, 544 U.S. at 539.

Short of a law requiring a property owner to suffer a physical invasion of his property rights or a virtual elimination of the economic benefit of such property, the U.S. Supreme Court has upheld regulatory action as not being a taking. The U.S. Supreme Court has not addressed compensation in any circumstance close to the situation at hand, where a law would merely require the paving or stabilization of driveways and parking areas. The requirement to pave or stabilize the driveways and parking areas of a parcel of land to improve the public’s air quality presumably would not substantially preclude a property’s intended use. Likewise, the requirement will not result in a physical invasion of, or ouster from, any affected landowner’s property. Accordingly, the requirement is not a taking under the U.S. Constitution.

**B. Arizona Constitution**

The Arizona Constitution’s “takings clause” is found at Ariz. Const. art. II, § 17. Arizona courts have, in interpreting this provision, followed the U.S. Supreme Court in holding that diminution in the value of land alone is not sufficient to constitute a taking of private property and that deprivation of the most beneficial use of the land is also not sufficient to constitute a taking. *Ranch 57 v. Yuma*, 152 Ariz. 218, 226, 731 P.2d 113, 121 (App. 1986). A taking would occur if an aggrieved property owner could show that an ordinance, if enforced, would put such a restriction on the owner’s property as to “preclude its use for any purpose to which it is reasonably adapted,” and thus destroy its economic value. *Id.* (internal citations omitted).

Therefore, because the legal standard is the same, the analysis of the statute under the Arizona Constitution is necessarily similar to the analysis under the U.S. Constitution. The imposition of a requirement to pave or stabilize the driveways and parking areas of a parcel of

land presumably would not preclude its intended use, or result in a physical invasion of, or ouster from, any affected landowner's property, and thus would not qualify as a taking under the Arizona constitution.

**C. Proposition 207**

Finally, we examine the effect of A.R.S. § 12-1134, which passed with Proposition 207 in November 2006. This statute provides, in subsection A:

If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

The statute contains in subsection (B)(1) an exception declaring that it does not apply to laws that “[l]imit or prohibit a use . . . of real property for the protection of the public’s health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control.”

Both A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6) are pollution control measures designed to reduce airborne contaminants, including dust, from unpaved and unstabilized parking areas and roadways. As such, these statutes fall within the exception stated in A.R.S. § 12-1134(B)(1), and thus the takings provisions of this statute do not apply to them.

**Conclusion**

For the foregoing reasons, an ordinance or code provision adopted or enforced pursuant to the requirements of A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6) that did not deprive a landowner of virtually all beneficial or economic use of his or her property would not effect a

taking of property requiring that compensation be paid to any landowner under either the United States or Arizona constitutions, or under A.R.S. § 12-1134.

Terry Goddard  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 12, 2008</p>	<p>No. I08-010 (R08-026)</p> <p>Re: Cancellation of Contracts Pursuant to A.R.S. § 38-511</p>
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To: The Honorable Robert Meza  
House of Representatives

**Questions Presented**

1. Is a contract to which the State, a political subdivision, or a department or agency of either is a party subject to cancellation pursuant to Arizona Revised Statutes ("A.R.S.") § 38-511 if within three years after the contract's execution, a person significantly involved in negotiating or drafting the contract is employed by or serves as a consultant to another party to the contract in a matter unrelated to the contract's subject matter?

2. If an outside attorney (not a government employee) represents the State or a political subdivision in connection with drafting a contract, may that attorney within three years after the contract's execution provide legal services to the other party to the contract in connection with matters unrelated to the contract without implicating A.R.S. 38-511?

### Summary Answer

1. Pursuant to A.R.S. § 38-511, if a person who was significantly involved in negotiating or drafting a contract on the behalf of the State or a political subdivision of the State becomes an employee or an agent of another party to the contract within three years of the execution of the contract, the State or its political subdivision may cancel the contract. However, if that person becomes a consultant to another party to the contract in a matter unrelated to the contract's subject matter, the contract is not subject to cancellation.

2. If outside counsel played a significant role in the drafting or negotiation of a contract for the State or political subdivision of the State, he or she may not become an agent for, or an employee of, another party to the contract without subjecting the contract to cancellation pursuant to A.R.S. § 38-511.

### Analysis

Arizona Revised Statutes § 38-511(A) permits the State or a political subdivision to cancel a contract within three years of its execution

if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the state, its political subdivisions or any of the departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract.

When interpreting statutes, courts endeavor to give effect to legislative intent. *Mejak v. Granville*, 212 Ariz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006). Legislative intent is established by clear statutory language. *Id.* If the language is clear, the court need not look further. *Ariz. Dep't of Revenue v. Salt River Project Agric. Improvement & Power Dist.*, 212 Ariz. 35, 39, ¶ 15, 126 P.3d 1063, 1067 (App. 2006). On the other hand, if the statute is not clear, the court reads the

statute as a whole and interprets it in such a manner that “no provision is rendered meaningless, insignificant or void.” *Mejak*, 212 Ariz. at 557, ¶ 9, 136 P.3d at 876.

The statute states that the State or its political subdivision may cancel the contract if a person who was significantly involved in the formulation of the contract on behalf of the State becomes “an employee or agent of any other party to the contract *in any capacity*.” A.R.S. § 38-511(A) (emphasis added). Thus, under the statute’s plain language, even if the person is employed by or is an agent to another party in an area completely unrelated to the subject matter of the contract at issue, the State or its political subdivision may at its option cancel the contract. However, the same is not true with respect to consultants; the statute authorizes cancellation when a person becomes “a consultant to any other party of the contract *with respect to the subject matter of the contract*.”<sup>1</sup> A.R.S. § 38-511(A) (emphasis added). Therefore, a person who had a significant role in the contract’s negotiating or drafting on the behalf of the State or its political subdivision may serve another party to the contract as a consultant in unrelated matters without subjecting the contract to cancellation.

These same principles apply to an outside attorney who is significantly involved in a contract’s formation on behalf of the State or its political subdivision. Outside counsel who was significantly involved in the formation of the contract on behalf of the State or its political subdivision may not act as an agent for, or become an employee of, another party to the contract without making the contract subject to cancellation under A.R.S. § 38-511(A).

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<sup>1</sup> A consultant differs from an agent in certain key respects. A consultant gives expert or professional advice and does not act on behalf of, or under the control of, a principal. *II New Riverside Univ. Dictionary* 303 (1994). Because a consultant does not represent or advocate a position on the client’s behalf, he or she is closer to an independent contractor than to an agent or an employee. *See Simpson v. Home Petroleum Corp.*, 770 F.2d 499, 500 (5<sup>th</sup> Cir. 1985). An agent acts on behalf of the principal, has little if any actual binding authority without the principal’s consent, and is controlled by the capacity in which he or she represents the principal’s interest. *Black’s Law Dictionary* 32 (5<sup>th</sup> ed. 1983); Restatement (3d) of Agency, § 1.01 (definition of agency).

Generally, a lawyer acts as an agent of his or her client, the principal. In *Dawson v. Withycombe*, 216 Ariz. 84, 100, ¶ 43, 163 P.3d 1034, 1050 (App. 2007), the court noted that

to create an agency relationship, there must be a manifestation of consent by the alleged principal to the alleged agent that the agent shall act on his behalf and subject to his control and consent by the agent to act on behalf of the principal and subject to his control.

And, an attorney is defined as “[a]n agent, or one acting on behalf of another.” *Black’s Law Dictionary* 66 (5th ed. 1983). An attorney is an agent because he or she works on the principal’s behalf, has little if any actual binding authority without the principal’s consent, and is controlled by the capacity in which he or she represents the principal’s interest.

There may be limited instances in which a lawyer acts as a consultant rather than as an agent. As noted above, the cancellation provision in A.R.S. § 38-511 is not implicated when a person significantly involved in a contract’s formation on behalf of the State or political subdivision later becomes a consultant to another party to the contract in a matter unrelated to the contract’s subject matter. Therefore, if an outside attorney who previously was involved on behalf of the State or a political subdivision of the State in the formulation of a contract and then within three years of its execution becomes a consultant to, rather than an agent of, another party to the contract on an unrelated subject matter, the contract would not be subject to cancellation pursuant to A.R.S. § 38-511. If the outside attorney provides legal services to another party to the contract limited to rendering advice on subject matter unrelated to the contract, and the attorney is not authorized to act on that party’s behalf as an employee or agent and is not rendering the advice from the position of an advocate on behalf of that party, the contract is not subject to cancellation. However, as a practical matter it should be noted that a lawyer acts as a consultant to a client rather than an agent in only very limited circumstances.

### **Conclusion**

A party, including an outside attorney, playing a significant role in the development or negotiation of a contract to which the State or a political subdivision of the State was a party may not become an employee or agent for another party to the contract within three years of the contract's execution without subjecting the contract to cancellation at the State or political subdivision's discretion, regardless of whether that person's work relates to the contract. However, he or she may become a consultant to that same party without subjecting the contract to cancellation so long as he or she does not work on the contract's subject matter.

Terry Goddard  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p><b>ATTORNEY GENERAL OPINION</b></p> <p>By</p> <p><b>TERRY GODDARD</b> <b>ATTORNEY GENERAL</b></p> <p>September 30, 2008</p>	<p>No. I08-009 (R08-037)</p> <p>Re: Excluding Passing Time in Calculating Instructional Time for Determining Average Daily Membership</p>
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To: David Schwartz, Esq.  
Udall, Shumway & Lyons

This Office revises portions of the opinion you provided to the Glendale Union High School District and submitted under Arizona Revised Statutes (“A.R.S.”) § 15-253(B) concerning the calculation of instructional time for purposes of determining average daily membership (“ADM”). Specifically, this Office reached a different conclusion to the first scenario you presented regarding passing time—the time a student spends traveling to or from a course of study—and issues this Opinion because the matter presented is of statewide importance and applies to all public schools. This Office declines to review the remainder of the opinion you submitted.

**Question Presented**

May the Arizona Department of Education (“ADE”) define and exclude portions of passing time in a school’s calculation of time spent in an instructional program as that term is used to calculate ADM?

### Summary Answer

Yes. ADE may reasonably exclude passing time between an instructional period and a non-instructional period, such as lunch, home room, study hall, or recess or excessive passing time when calculating instructional time.<sup>1</sup>

### Background

Arizona law has a complex statutory scheme to calculate student count for purposes of receiving state funding. *See* A.R.S. §§ 15-901 to -916. Student count is determined by detailed requirements for calculating average daily membership.<sup>2</sup> A.R.S. §§ 15-901(A)(2) and 15-902. Each student's ADM is determined by the amount of instructional time provided during the school year.<sup>3</sup> *Id.*

ADE issued Guidelines and Procedures GE-19 ("GE-19" or "policy") to provide guidance regarding when and how passing time may be counted toward instructional time for purposes of calculating ADM. In the policy, ADE defines passing time as "the time it takes for a student to physically travel from one Board approved course of study to another Board approved course of study." *See* GE-19.<sup>4</sup> It appears that ADE had no

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<sup>1</sup> This Opinion uses the terms "instructional time," "instructional period," and "instructional hours" interchangeably because those terms are used throughout A.R.S. §§ 15-901 to 15-916, and the Arizona Department of Education uses these terms in its related guidelines. This Opinion does not address a "full-time instructional program," which is defined in Arizona law at 15-901(A)(2)(c).

<sup>2</sup> A.R.S. § 15-902 calculates the weighted student count through a formula, which results in the adjusted average daily membership.

<sup>3</sup> ADM is calculated separately for common school students and high school students, as either fractional or full-time students. A.R.S. § 15-901(A)(2).

<sup>4</sup> GE-19 also states, in part:

- b. A total of seven (7) minutes or less of passing time can be included in calculating the annual instructional hours. Annual instructional hours are specified in A.R.S. § 15-901(A) (2) (a) (b) or (c).
- c. Passing time not allowed:
  - (i) Passing time in excess of seven (7) minutes shall not be included in calculating the annual instructional hours required in A.R.S. § 15-901(A) (2) (a) (b) or (c).

formal policy or guideline on passing time prior to GE-19. We analyze whether this new guidance is within the parameters of Arizona's school financing statutes, which govern the calculation of ADM.

### Analysis

#### **I. ADE's Authority to Interpret the Statutory Scheme**

Section 15-239(A)(1) and (B) authorize ADE to monitor school districts to ascertain the proper implementation of applicable laws and to adopt guidelines relative to this purpose. ADE is thus responsible for providing guidance to public schools regarding how to count instructional time in determining ADM. The terms "instructional program," "instructional hours" and "instructional time" are used in Arizona statutes, but they are not specifically defined. *See* A.R.S. §§ 15-901 to -916. For example, under A.R.S. § 15-901(A)(2)(c)(vi), the term "instructional program" is used to define what constitutes a full-time instructional program.<sup>5</sup> Similarly, the term "instructional hours" is used in defining a part-time student, A.R.S. § 15-901(A)(2)(a)(ii),<sup>6</sup> and the term "instructional

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- (ii) Passing time to or from one instructional program to a non-instructional program such as lunch, home room, study hall and recess shall not be included in the calculation of annual instructional hours.

<sup>5</sup> The statute states that a "full-time instructional program" is one that meets at least a total of seven hundred twenty hours during the minimum number of days required and includes at least four subjects each of which, if taught each school day for the minimum number of days required in a school year, would meet a minimum of one hundred twenty-three hours a year, or the equivalent or one or more subjects taught in amounts of time totaling at least twenty hours per week prorated for any week with fewer than five school days.

A.R.S. § 15-901(A)(2)(c)(vi).

<sup>6</sup> A.R.S. § 15-901(A)(2)(a)(ii) states

For high schools, a part-time student who is enrolled in less than four subjects that count toward graduation as defined by the state board of education in a recognized high school and who is taught in less than twenty *instructional hours* per week prorated for any week with fewer than five school days. A part-time high school student shall be counted as one-fourth, one-half or three-fourths of a full-time student if the student is enrolled in an instructional program that is at least one-fourth, one-half or three fourths of a full-time instructional program as defined in subdivision (c) of this paragraph.

(Emphasis added.)

time” is employed in defining daily attendance, A.R.S. § 15-901(A)(6)(a) & (b) (using the term “instructional time” to define daily attendance for various grades).

Although the Arizona Legislature has not defined the term “passing time,” the Legislature has addressed concepts related to passing time. For example, state law defines ADM for both fractional and full-time students in common schools to prohibit the inclusion of lunch periods and recess periods as instructional time unless the child’s individualized education program requires instruction during those periods. A.R.S. §§ 15-901(A)(2)(a)(i) & (b)(i).

When a statute is “silent or ambiguous with respect to the specific issue,” the agency’s interpretation must be upheld when it is “based on a permissible construction of the statute.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002). In circumstances “in which the legislature has not spoken definitively to the issue at hand, ‘considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.’” *Arizona Water Co. v. Arizona Dep’t of Water Res.*, 208 Ariz. 147, 154, ¶ 30, 91 P.3d 990, 997 (2004) (quoting *Chevron*, 467 U.S. at 844); *Stearns v. Arizona Dep’t of Revenue*, 212 Ariz. 333, 336, ¶ 17, 131 P.3d 1063, 1066 (App. 2006).<sup>7</sup>

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<sup>7</sup> You state in your opinion that ADE’s interpretation is not entitled to deference given “ADE’s inconsistency regarding its interpretation of this law.” 7/31/2008 Letter from D. Schwartz, Udall Shumway & Lyons PLLC, to Superintendent Jennifer Johnson, PhD., Glendale Union High School District, at 3. You cite in support *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In that case, the U.S. Supreme Court held that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). However, in this case, it does not appear that ADE has previously issued a formal policy with respect to the inclusion or exclusion of passing time in calculating instructional time for purposes of determining ADM. Moreover, even if ADE’s policy is new or inconsistent, it is still entitled to some, albeit less, deference as long as it is a reasonable construction of the governing statutes.

An agency's construction of a statute need not be "the only one it permissibly could have adopted . . . , or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Moreover, when a legislative body has remained silent on an issue, there is an assumption that the legislative body left a void for an agency to fill. *Chevron*, 467 U.S. at 843-44; see *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1276 (9<sup>th</sup> Cir. 1993). In the present situation, the Legislature's silence on the definition of instructional time and the appropriate amount of passing time that could be counted toward instructional time leaves ADE with the responsibility of providing guidance to school districts on how to include or exclude passing time in the calculation of instructional time for the purposes of determining ADM.

## **II. The Definition of Instructional Time**

ADE interprets instructional time to mean a period of the day in which an instructional program or course of study is offered that is included in the State Board of Education's approved minimum course of study based on the definitions contained in Arizona law and the State Board of Education's rules. See GE-19. ADE provided guidance that instructional time should not include lunch, recess, homeroom, study hall, early release, and late start hours because no instruction is offered during these periods. See GE-18 at 2; see also *Ariz. Op. Att'y Gen. I97-002* (stating that late start time is not instructional time because actual physical attendance is required).

ADE's guidance interprets "instructional time," "instructional program" and "instructional hours" in a manner that is consistent with the statutory definitions for "course," "subject" and "course of study." Section 15-101(8) defines a "course" as an

“organized subject matter in which instruction is offered within a given period of time and for which credit toward promotion, graduation or certification is usually given.” “Subject” is defined as “a division or field of organized knowledge, such as English or mathematics, or a selection from an organized body of knowledge for a course or teaching unit, such as the English novel or elementary algebra.” A.R.S. § 15-101(23). “Course of study” is defined as “a list of required and optional subjects to be taught in the schools.” A.R.S. § 15-101(9).

ADE also incorporates the State Board of Education’s rules regarding the minimum course of study in its interpretation of instructional time. *See* Ariz. Admin. Code §§ R7-2-302 through R7-2-302.02. The State Board of Education’s course of study rules require that students complete a specific number of courses and subjects in order to graduate from high school. *Id.*

In addition, ADE’s guidance on this issue complies with Attorney General Opinion I97-002, which discusses the framework by which a school could determine whether off-campus activities, field trips and vocational programs could be counted as instructional time. Ariz. Op. Att’y Gen. I97-002. In that Opinion, the Attorney General advised that periods could count as instructional time if: (1) the time was part of the school’s approved course of study; (2) the time included instruction; (3) the time was distinguishable from lunch and recess, which are statutorily excluded from instructional time for at least common school students; and (4) the school maintained a record of attendance. *Id.* at 4; *see also* A.R.S. § 15-901(A)(2)(a)(i) & (b)(i) (noting that lunch and recess periods may not be counted as instructional time unless instruction is being provided to the child during that time and is specifically documented).

ADE's definition of instructional time conforms to the framework outlined in Arizona statutory law and Attorney General Opinion 197-002. Therefore, the interpretation of instructional time by ADE is reasonable and a permissible construction of the statutory scheme determining the amount of time in the school day that may be counted in the calculation of ADM. The issue then becomes whether ADE's guidance regarding passing time, which further defines the parameters of instructional time, is a reasonable interpretation of Arizona's school funding and instruction statutes.

### **III. Exclusion of Passing Time When It Is Excessive or Occurs Between an Instructional Period and a Non-Instructional Period**

Unlike instructional time, passing time is not mentioned anywhere in Arizona's education statutes. However, as a practical matter, passing time is integral to the educational process as time when students move from one course of study to another. Recognizing that passing time is an essential part of a student's day, GE-19 permits passing time of seven minutes or less to be included in the calculation of annual instructional hours. Under ADE's policy, passing time does not count toward instructional time when it exceeds seven minutes or occurs between an instructional period and a non-instructional period such as lunch, home room, study hall and recess.<sup>8</sup> In creating this guidance, ADE's definition of passing time relies on the statutory definitions for calculating ADM. Specifically, ADE's policy states, "A total of seven (7) minutes or less of passing time can be included in calculating the annual instructional

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<sup>8</sup> ADE's policy also provides schools with a procedure that outlines how to count passing time toward instructional time. See GE-19.

hours. Annual instructional hours are specified in A.R.S. § 15-901(A)(2)(a), (b), and (c).” GE-19(II)(b).<sup>9</sup>

ADE is not alone in its use of the concept of passing time to regulate funding tied to the instructional day. For example, federal law defines non-instructional time, which is “time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.” 20 U.S.C. § 4072. This definition is consistent with ADE guidance that passing time to or from one instructional program to a non-instructional program such as lunch, home room, study hall and recess is not to be included in the calculation of ADM. *See* GE-19.

In addition, California courts have also contemplated passing time in a manner that conforms to ADE’s definition of passing time. The California Supreme Court in *In re Randy G.*, 28 P.3d 239, 241 n.1 (Cal. 2001), noted that passing time is a term used to describe time between classes when high school students move from one classroom to another. *See also Dawson v. East Side Union High Sch. Dist.*, 34 Cal. Rptr. 2d 108, 129 (Cal. Ct. App.1994); *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 856 (11<sup>th</sup> Cir. 1998).

Although statutes and case law from other jurisdictions are not controlling precedent within Arizona, they support the conclusion that ADE’s definition of passing time is a reasonable construction within the framework of the Arizona school finance statutes.

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<sup>9</sup> Section 15-901(A)(2)(a), (b) and (c) refer to fractional students, full-time students and full-time instructional programs respectively, and these concepts are used to calculate ADM.

### **Conclusion**

For the foregoing reasons, ADE's guideline GE-19 excluding portions of passing time in calculating time spent in an instructional program is a permissible exercise of ADE's statutory authority.

Terry Goddard  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 29, 2008</p>	<p>No. I08-008 (R08-036)</p> <p>Re: Application of Open Meeting Law to Meetings of Public Bodies Conducted Online</p>
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To: A. Dean Pickett, Esq.  
Mangum, Wall, Stoops & Warden, P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review your opinion to the Superintendent of the Camp Verde Unified School District Governing Board (the "Board") regarding the Board's ability to conduct a meeting through the Internet during which the Board would engage in deliberations and discussion. This Office concurs with your conclusion that, after providing proper notice and an agenda in accordance with the Open Meeting Law and implementing procedures designed to safeguard the public's access to the meeting, a public body can conduct an online meeting to allow deliberation and discussion about matters within the public body's jurisdiction. We issue this Opinion to provide guidance concerning this matter to all public bodies subject to the Open Meeting Law. *See* Ariz. Att'y Gen. Op. I06-003.

### **Question Presented**

Does the Open Meeting Law, A.R.S. §§ 38-431 to 38-431.09, allow the governing board of a school district to conduct deliberations and discussion in an online meeting when the Board provides proper notice under the law and facilitates public access to the online meeting through the Internet?

### **Summary Answer**

Yes. The definition of "meeting" under A.R.S. § 38-431 includes the gathering of a quorum of a public body through technological devices and would encompass serial communications of a quorum of the public body through the Internet or other online medium. Measures must be taken, however, to provide clear notice to the public about when the Board will be deliberating in its online meeting and to facilitate the public's access to the meeting.

### **Analysis**

You have asked this Office to evaluate your opinion regarding a proposal by the Board to conduct online meetings to discuss and edit documents. The Board does not propose to take any legal action during the online meeting. The Board meeting would be conducted online for a defined time period with members accessing the document over the Internet to comment and propose changes. Board members would not necessarily be editing or commenting on the document simultaneously. The public could also access the document over the Internet, but could only review changes and comments made by the Board members.<sup>1</sup> The public would be able to see which Board member proposed each change or submitted a comment. The Board proposes to offer free computer access at or near its offices during the online meeting. After

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<sup>1</sup> Under the Open Meeting Law, the Board is not required to offer editing or commenting rights to the public. The public has the right to attend and observe the Board's proceedings, but no right to participate in the proceedings unless the Board allows it. A.R.S. § 38-431.01.

the online meeting for comment and revision ends, the Board would conduct a traditional meeting at its office to take legal action to adopt the final version of the document. At this meeting, the Board would include a call to the public so that members of the public could address comments about the document to the Board. Under these circumstances, is a “virtual meeting” in which Board members participate through serial communications over the Internet in compliance with the requirements of the Open Meeting Law?

Construed in a fashion most favorable to open and public meetings, as directed by the Legislature in A.R.S. § 38-431.09, the Open Meeting Law allows the Board to hold a virtual meeting through technological devices if it otherwise complies with the requirements of the statute. Under the Open Meeting Law, “all 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 “meeting” consists of “the gathering, in person *or through technological devices*, of a quorum of members of a public body at which they discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action.” A.R.S. § 38-431(4) (emphasis added). The Open Meeting Law clearly contemplates the ability of the Board to hold meetings through the use of technological devices, such as telephones, video-cameras, or even web-cameras, in which all members of the body are present simultaneously to discuss the Board’s business.

Additionally, the statute allows the Board to meet through serial communications to discuss and deliberate about Board business if accomplished in compliance with the terms of the Open Meeting Law. This Office previously opined that serial e-mail communications without notice or public access between a quorum of a public body’s members about public business constituted a meeting through technological devices that violated the Open Meeting

Law. Ariz. Att'y Gen. Op. I05-004. In that opinion, the Attorney General noted that "even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a 'meeting.'" *Id.* at 4. Thus, the Board can conduct a virtual meeting in which a quorum of Board members contribute comments and edits to a document posted on the Internet through serial communications if the Board complies with the notice requirements, minute-keeping requirements, and other provisions of the Open Meeting Law.<sup>2</sup> To comply with the statute, the public must be able to access the entire course of discussion or deliberation between the Board members and be able to identify which Board members contributed which edits or comments. In addition, the Board must ensure that it creates a document retention policy under the public records statute to govern the maintenance and preservation of electronic documents created in this process.

Although using technology may provide broader access to the public than would otherwise be possible, virtual meetings such as those proposed by the Board also provide potential obstacles for public access based on uncertainty about the timing of the meeting, lack of equipment necessary to access the meeting, or unfamiliarity with operating such equipment. To offset these risks, this Office encourages the Board to strictly comply with the notice and minute-keeping requirements of the Open Meeting Law and to facilitate the public's access to

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<sup>2</sup> We note that under A.R.S. § 38-431.01(A), any member of the public who so desires must be permitted to "attend *and listen* to the deliberations and proceedings" in an open meeting. (Emphasis added.) It is unlikely that this provision restricts the requirements of the Open Meeting Law to only allow meetings in which every person can hear the proceedings. In the case of an agency like the Arizona Commission for the Deaf and Hard of Hearing, some members of the public "listen" to proceeding by observing sign language interpreters. It would be inconsistent with the purpose of the Open Meeting Law to find a violation of the statute because not every member of the public can listen to an audible meeting. See A.R.S. § 38-431.09. We conclude that the mandate to interpret the Open Meeting Law in favor of open and public meetings requires an interpretation of "listen" that includes other methods of observing deliberations and proceedings of a board, including non-audible methods.

the virtual meeting. Because not all citizens own a computer or have Internet access, the Board should take measures at its facility to allow public access to the on-line meeting. Your suggestions that the Board provide free Internet access at or near the Board office and maintain regular print-outs of the results of the on-line meeting for public review provide valid solutions to address these concerns. Regarding the notice for the on-line meeting, the Board should provide clear notice of when the meeting will begin and end, as well as clear instructions on how to access the meeting or to operate any software used by the Board to host the on-line meeting. The notice should also indicate to the public how the Board intends to facilitate public access, including the location of any free Internet access offered by the Board or printouts of the results of the on-line meeting. In addition, the notice should also include the proposed date and time of the meeting at which the Board intends to take final action adopting the proposed document. The Board must also offer reasonable accommodations to any member of the public with a disability that requests accommodation, as required by federal law.<sup>3</sup>

### Conclusion

The Board can lawfully hold a virtual meeting, including one comprised of serial communications through the Internet, under the Open Meeting Law. Continuing developments in telecommunications technology offer the promise of widening the public's access to meetings held by public bodies, whether by web-casting meetings or allowing other forms of virtual meetings. This promise, however, is counterbalanced by the potential for abuse or technological obstacles for some citizens to access the meeting. Thus, any public body

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<sup>3</sup> The Civil Rights Division of the Department of Justice offers a helpful guide to state and local government entities seeking to create a website that complies with the Americans with Disabilities Act. The document can be found at [www.ada.gov/websites2.htm](http://www.ada.gov/websites2.htm).

choosing to use technological means to conduct its meetings must scrupulously comply with the notice and minute-keeping requirements imposed by the Open Meeting Law and must further make all reasonable efforts to facilitate public access to the meeting, whether through explicit instructions on using the technology or by providing access to the meeting at the public body's own facilities.

Terry Goddard  
Attorney General



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

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 2, 2008</p>	<p>No. I08-007 (R08-027)</p> <p>Re: Calculation of Average Daily Membership by School Districts</p>
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To: David Swartz, Esq.  
Udall, Shumway & Lyons

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review an opinion you prepared for Dr. David Allison of the Gilbert Unified School District regarding how a school district calculates attendance of high school students for purposes of determining average daily membership ("ADM"). This Office concurs with your conclusion and writes this Opinion because the issue presented is of statewide importance.

**Questions Presented**

In calculating attendance of high school students for purposes of determining ADM, is a school district required to report only absences and, if so, must it consider as

absent those students who do not meet a daily minimum of at least four hours of attendance?

### Summary Answer

When reporting attendance of high school students for determining ADM, a school district is not limited to reporting only absences based on a requirement that a student be present a certain number of hours a day. Rather, a school district may determine full-time student status by considering annual hourly totals comprising an instructional program, as described in A.R.S. § 15-901(A)(2).

### Analysis

Arizona school districts are required to record and report electronically to the Arizona Department of Education (“ADE”) “membership and attendance on a school by school basis for each day school is in session.” A.R.S. § 15-902(I).<sup>1</sup> This data is then used to calculate the school district’s base support level. A.R.S. § 15-943. “Absences shall be made a part of the attendance record” being forwarded electronically to the ADE. A.R.S. § 15-902(J).

There are several statutory methods for counting student attendance for school funding purposes, all of which meet the requirements of Arizona law. Generally, public schools are required to operate on either a four- or five-day-per-week calendar.<sup>2</sup> A.R.S. §§ 15-801(A), -861(A). However, this provision cannot be read in a vacuum. *Hoy v. State*, 150 Ariz. 416, 418, 724 P.2d 35, 37 (App. 1984) (“Statutes are not to be interpreted

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<sup>1</sup> Charter schools are required to comply with ADM reporting requirements, pursuant to A.R.S. § 15-185.

<sup>2</sup> Alternative education programs are an exception to the general rule and may report a pupil as having attended full-time in any week during which the pupil was enrolled in and physically attending at least 20 hours of instruction during that week. A.R.S. §§ 15-796, -797.

in a vacuum, and the legal relationships mandated by one statute cannot be ignored in interpreting another.”).

In considering what qualifies as average daily attendance of high school students under A.R.S. § 15-901(A), the following definitions also guide the analysis:

- **Average daily membership** means the total enrollment of fractional students and full-time students, minus withdrawals, of each school day through the first 100 days in session. A.R.S. § 15-901(A)(2).
- **Fractional student** or part-time student means, for high schools, a student who is enrolled in less than four subjects that count toward graduation as defined by the state board of education in a recognized high school and who is taught in less than twenty instructional hours per week prorated for any week with fewer than five school days. A.R.S. § 15-901(A)(2)(a)(ii).
- For high schools, a **full-time student** means, except as provided in section 15-105,<sup>3</sup> a student not graduated from the highest grade taught in the school district, or an ungraded student at least fourteen years of age by September 1, and enrolled in at least a full-time instructional program of subjects that count toward graduation as defined by the state board of education in a recognized high school. A.R.S. § 15-901(A)(2)(b).
- A **full-time instructional program** means an instructional program that meets at least a total of 720 hours during the minimum number of days required and includes at least four subjects each of which, if taught each

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<sup>3</sup> A.R.S. § 15-105 deals with the issue of early graduation and the allowance of school districts to include early graduates in the student count. A.R.S. § 15-105(E).

school day for the minimum number of days required in a school year, would meet a minimum of 123 hours a year, or the equivalent, or one or more subjects taught in amounts of time totaling at least 20 hours per week prorated for any week with fewer than five school days. A.R.S. § 15-901(A)(2)(c)(vi).

In addition, A.R.S. § 15-901(A)(6)(d) provides that, in the case of high schools and certain ungraded high schools,

the attendance of a pupil shall not be counted as a full day unless the pupil is actually in attendance and enrolled in and carrying four subjects, each of which, **if taught each school day for the minimum number of days required in a school year**, would meet a minimum of one hundred twenty hours a year; or the equivalent; that count toward graduation in a recognized high school.

(Emphasis added.)

Limiting calculation of student attendance to a requirement that a student be present a certain number of hours a day would ignore these other statutory provisions, which provide lawful alternate ways of calculating attendance. *See Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, 295, 183 P.3d 544, 546 (App. 2008) (when construing a statute, the court gives effect to each word, phrase, clause, and sentence so that no part of the statute will be void, inert, redundant, or trivial). Moreover, the phrase, “if taught each school day for the minimum number of days required in a school year” in A.R.S. § 15-901(A)(2)(c)(vi) and (A)(6), indicates a per-day hourly minimum is not the sole method of establishing whether a student is a full-time student for purposes of determining ADM. This statute’s subsections focus on a student’s attendance based upon yearly totals and recognize that not all classes at the high school level will necessarily be taught every day. The Legislature, thus,

contemplated satisfaction of the instructional hourly requirements on a cumulative basis, rather than on a daily minimum number of hours basis.<sup>4</sup>

Using all of the statutory definitions that the Legislature has provided, a full-time student is one in a full-time instructional program that satisfies the criteria in A.R.S. § 15-901(A)(2)(c)(vi). That statute defines a full-time instructional program as one that meets at least 720 hours over the minimum required days of school and includes (1) at least four subjects which, if taught each school day for the minimum number of days, would meet a minimum of 123 hours a year, or the equivalent, or (2) one or more subjects taught in amounts of time totaling at least 20 hours per week. *Id.*

The Legislature has in other instances clearly required attendance of four hours a day each day of school. *See, e.g.*, A.R.S. § 15-901(A)(6)(f) (“For homebound or hospitalized, a full day of attendance may be counted for each day during a week in which the student receives at least four hours of instruction.”). Thus, the Legislature presumably knows how to require that attendance be calculated solely upon the number of daily hours attended. Had the Legislature intended that attendance be calculated solely in that manner in the case of high school students in general, it would have omitted the criteria that use a cumulative hourly attendance count. *See Dowling v. Stapley*, 218 Ariz. 80, 84, 179 P.3d 960, 964 (2008) (noting that Legislature has shown that it knows how to

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<sup>4</sup> This conclusion is consistent with the conclusion reached in a 1986 opinion, with which this Office concurred. *See* Ariz. Att’y Gen. Op. I86-064 (“The use of the word ‘if’ implies that each subject may not be taught each day for the minimum number of days required in the school year, but must meet a minimum of 120 hours a year. This supports our interpretation that allows a certain daily flexibility as long as the 120 hours per year requirement is met.”).

specify who may offer educational services for homeless children when that is what it means).

**Conclusion**

In determining ADM, a school district is not limited to reporting only absences based on a requirement that a student be present a certain number of hours a day. Rather, a school district may determine full-time high school student status by considering annual hourly totals comprising an instructional program.

Terry Goddard  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>August 18, 2008</p>	<p>No. I08-006 (R08-023)</p> <p>Re: Election Procedures for School District Unification Elections</p>
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To: Representative David Lujan  
Arizona House of Representatives

**Questions Presented**

You have asked about procedures to be followed in connection with upcoming school district unification elections ("Unification Elections"), which are to be held pursuant to 2005 Ariz. Sess. Laws, ch. 191 ("Chapter 191"). Your questions are summarized as follows:

1. Section 4(C) of Chapter 191 requires that the ballot question provide the "name of proposed unified school district." Should County School Superintendents insert names that conform with A.R.S. § 15-441(B)? If not, how should names of the proposed new unified school district be chosen for purposes of the ballot question?

2. If the proposed unification plan submitted to the voters for approval (“Plan”) involves the subdivision of an existing high school district, how should the subdivided portion of the existing high school district be described in the ballot question?
3. When a Plan calls for the subdivision of an existing school district and unification of the subdivided portion with other districts if the Plan is approved, should there be two separate questions on the ballot?
4. When a Plan calls for the subdivision of an existing school district if the Plan is approved, are qualified electors who reside in the portions of the existing high school district that would not be included in the proposed new district permitted to vote on the proposed unification?

**Summary Answer**

In designating proposed new districts on ballot questions in Unification Elections, County School Superintendents should insert names that conform with Arizona Revised Statutes (“A.R.S.”) § 15-441(B). If the Plan involves the subdivision of an existing high school district, the ballot question should make clear which portion of the existing school district will be subdivided and included in the proposed new district.

If the Plan calls for the subdivision of an existing school district and unification of the subdivided portion with other existing school districts, the ballot may contain a single question asking the voters to approve or not to approve the Plan. In this situation, qualified electors who reside in the portions of the existing high school district that would not be included in the proposed new district are permitted to vote on the proposed unification.

## Analysis

Chapter 191 prescribes procedures for allowing Arizona electors to determine whether certain Arizona school districts should be unified into a newly created school district (“Proposed District”) by including specific language of ballot questions to be used in the Unification Election. 2005 Ariz. Sess. Laws, ch. 191, § 4, subsection C.<sup>1</sup> While Chapter 191 provides some guidance about how ballot questions should be worded, it also leaves questions about (1) the particular language that should be used in describing the Proposed District on the ballot, (2) whether more than one ballot question is required in the case of the proposed subdivision of an existing school district, and (3) who may vote on the Plan.

The analysis of the language of Chapter 191 is guided by the principle that the primary goal of statutory construction is to ascertain and give effect to the Legislature's intent in enacting the statute or law. *Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006). When a statute's plain language is clear and unambiguous, courts give effect to that language without resorting to any other rules of statutory construction. *Ariz. Dep't of Revenue v. Salt River Project Agric. Improvement & Power Dist.*, 212 Ariz. 35, 38, 126 P.3d 1063, 1066 (App. 2006). However, when language of a law is “susceptible to more than one construction,” any ambiguity is resolved by examining the statute “in the context of related statutes.” *State v. Wolter*, 197 Ariz. 190, 192, 3 P.3d 1110, 1112 (App. 2000); see also *Robson Ranch Quail Creek, LLC. v. Pima County*, 215 Ariz. 545,

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<sup>1</sup> The first time that voters will vote on any Plan will be in the November 2008 General Election. Moreover, this will be the only time voters will vote on any Plan because sections 3 and 4 of Chapter 191, pertaining to the School District Redistricting Commission and school unification elections, have a delayed repeal date of December 31, 2008. 2005 Ariz. Sess. Laws, ch. 191, § 5. For more background on Chapter 191, see Ariz. Att’y Gen. Op. I08-005.

549-50, 161 P.3d 588, 592-93 (2007) (using a related statute found in a separate title of the Arizona Revised Statutes to determine the meaning of A.R.S. § 11-821).

1. Designation of the Proposed District on the ballot.

With respect to designating the Proposed District on the ballot, Chapter 191, § 4, subsection C states:

If the election pursuant to subsection A of this section is to create a unified district that does not follow current boundaries of a common or high school district or if the unification is for more than one district affected, the election ballot shall contain the following language:

Do you support the unification of the (insert names of school districts affected), as political subdivisions of the state of Arizona, to become a unified school district to provide instruction in preschool programs for pupils with disabilities and in kindergarten and grades one through twelve? Yes ( ) No ( )

A yes vote shall have the effect of approving the unification of the (insert names of school districts affected) into the (name of proposed unified school district).

A no vote shall have the effect of denying the unification of the (insert names of school districts affected) into the (name of proposed unified school district).

While Chapter 191 does not specify how the Proposed District is to be designated on the ballot, A.R.S. § 15-441 provides:

A. The bases of the educational organization of the county and state are the school districts as defined in § 15-101. Existing districts shall be continued, and new districts may be formed as provided in this title.

B. Each school district shall be designated as school district no. \_\_\_\_\_ (insert the number of the district), of \_\_\_\_\_ county (insert the name of the county).

In the ballot questions used in the Unification Elections, county school superintendents should designate the Proposed Districts in the manner that A.R.S. § 15-441(B) requires.

2. Description of the Proposed District when only portion(s) of an existing school district will be included in the Proposed District.

Chapter 191, § 4, subsection C requires that the ballot question describe the school districts that will be affected if unification is approved. If only a portion of an existing school district is to be included in the Proposed District, the ballot question should make it clear to voters which portion of the existing school district will be subdivided and included in the Proposed District.

3. The language of the ballot question when the Plan calls for the creation of a new school district by subdividing an existing high school district.

Chapter 191 does not specifically address whether there should be separate ballot questions addressing subdivision and unification, nor does it address what the ballot question should say. Rather, Chapter 191 only specifies one ballot question to use when the election is “to create a unified district that does not follow the boundaries of a common or high school district or if the unification is for more than one district affected,” which is the following:

Do you support the unification of the (insert names of school districts affected), as political subdivisions of the state of Arizona, to become a unified school district to provide instruction in preschool programs for pupils with disabilities and in kindergarten and grades one through twelve? Yes ( ) No ( )

A yes vote shall have the effect of approving the unification of the (insert names of school districts affected) into the (name of proposed unified school district).

A no vote shall have the effect of denying the unification of the (insert names of school districts affected) into the (name of proposed unified school district).

*Id.* § 4, subsection C.

Although this ballot language provided by Chapter 191 does not refer to the subdivision of an existing school district, a separate question on subdivision is not

required. Related statutes in Title 15, which also address formation a new school district or districts by subdivision of existing districts, provide guidance about what language should be used on the ballot in the case of a Plan that calls for subdivision of an existing district. For example, A.R.S. § 15-458, enacted in 1981, sets forth the procedures for elections involving subdivision and unification of school districts, which are initiated by petition or by action of school district governing boards.<sup>2</sup> A.R.S. § 15-458(G)(3) provides as follows:

The election shall be held as provided in section 15-459, except that the ballot shall contain the words “subdivision and unification, yes” and “subdivision and unification, no”, and there shall be one of the following two ballot questions, whichever is applicable, stated as follows:

- (a) Should (insert the name of the district) union high school district be subdivided with boundaries identical to the boundaries of (insert the name of the districts) common school districts and simultaneously creating (insert the number of the districts) unified school districts with the respective common school districts as specified in the subdivision and unification plan?
- (b) Should (insert the name of the district) union high school district be subdivided simultaneously with the subdivision of (insert the name of the districts) common school districts and simultaneously creating (insert the number of the districts) unified school districts with the subdivided common school districts as specified in the subdivision and unification plan?

Using A.R.S. § 15-458 (G)(3) as a guide, it follows that in the case of a Plan that calls for the subdivision of an existing high school district and unification of the subdivided portion with other school districts, one ballot question may be used.

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<sup>2</sup> A.R.S. § 15-459 addresses election procedures to be used in the case of the proposed consolidation of existing school districts.

4. The electors who may vote in the Unification Election in the case of a Plan that calls for an existing school district to be subdivided.

Chapter 191 contains conflicting language with respect to which electors are allowed to vote in a Unification Election when only portions of an existing school district will be included in the Proposed District if the measure passes. Chapter 191, § 4 subsection A states, “Each county school superintendent in a county with a school district that is affected by the proposed school district unification plan submitted . . . shall call an election of **all qualified voters within the boundaries of the proposed unified school district** to be held at the next general election to adopt the boundaries as proposed by the commission.” (Emphasis added.) On the other hand, Chapter 191, § 4(D) says:

**A majority of the qualified electors in each affected school district is required** to approve the proposed unification plan. If the unification plan is approved, the unified school district will become operational at the beginning of the next fiscal year. If any of the affected districts fail to approve the proposed unification plan, the plan is void.

(Emphasis added.)

The logical conclusion is that the Legislature intended for all qualified electors in all affected school districts to vote on the question of subdivision and unification for several reasons. First, there is only one ballot question specified in Chapter 191 in the case of subdivision and unification. In addition, allowing all electors to vote on subdivision and unification is consistent with the related statutory scheme that applies to elections involving subdivision and unification of school districts, initiated by petition or by action of school district governing boards. A.R.S. § 15-458(C) requires that “a majority of the votes cast by the qualified electors in each of the areas proposed as a school district must approve the division of the existing school district and the formation of the new school district.” This language indicates that the Legislature intended all voters in the affected school districts would have a say regarding how the school district

will be subdivided and what the boundaries of the new school district will be, as does the language of § 4(D). It therefore follows that qualified electors who reside in the portions of the existing high school district that would not be included in the Proposed District are permitted to vote on the proposed unification, as well as the subdivision.

### Conclusion

In designating Proposed Districts on ballot questions, County School Superintendents should insert names in the manner that A.R.S. § 15-441(B) requires. If the Plan involves the subdivision of an existing high school district, the ballot question should make clear which portion of the existing school district will be subdivided and included in the proposed new district.

If the Plan calls for the subdivision of an existing school district and unification of the subdivided portion with other existing school districts, two separate questions regarding subdivision and unification are not required; the ballot may contain just one question asking the voters to approve or not to approve the Plan. In this situation, qualified electors who reside in the portions of the existing high school district that would not be included in the Proposed District are permitted to vote on the proposed unification.

Terry Goddard  
Attorney General



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>July 10, 2008</p>	<p>No. I08-005 (R08-022)</p> <p>Re: Publicity Pamphlet Argument For or Against a School District Unification Plan</p>
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To: The Honorable David Lujan  
Arizona House of Representatives

**Questions Presented**

You have asked the following questions about the content of publicity pamphlets for the upcoming school redistricting elections, which are to be held pursuant to 2005 Ariz. Sess. Laws, ch. 191 ("Chapter 191"):

1. May a governing board discuss its position on the redistricting plan in a public meeting in order to formulate and vote on argument for the publicity pamphlet, as is done in connection with override elections?
2. If not, can a majority of board members discuss and/or circulate such arguments outside of a public meeting, given that, if the answer to the first question is "no," the issue is not a matter that may foreseeably come before the board for action?

### Summary Answer

In connection with the publicity pamphlet for school redistricting elections, the governing boards of affected districts may submit an argument in favor of or in opposition to the unification plan that is on the ballot. Any discussion of the proposed argument by a quorum of the Board must take place in a properly noticed open meeting.

### Analysis

In 2005, the Arizona Legislature enacted Chapter 191, which established a procedure for allowing Arizona electors to determine whether certain Arizona school districts should be unified into a newly created school district. 2005 Ariz. Sess. Laws, ch. 191. Under Chapter 191, the Legislature created the School District Redistricting Commission (“Commission”) and, among other things, charged the Commission with the task of formulating a proposal to unify school districts in Arizona (the “Plan”) and preparing a final report on the Plan to be submitted to the Governor. *Id.* § 3. Chapter 191 also states that, once the Governor signs the final report, county school superintendents of counties where affected school districts are located must call an election (the “Unification Election”) for electors residing in the boundaries of affected school districts to vote on the question of whether to approve or disapprove the Plan. *Id.* § 4, subsection A. In connection with the Unification Election, Chapter 191 requires the county superintendents to prepare publicity pamphlets that “shall include any arguments in favor of the plan and any arguments in opposition to the plan submitted by members of the governing boards of the affected school districts or from any elector who wishes to submit such an argument.” *Id.*

The term “members of the governing board” as used in Chapter 191 raises an issue because it could be interpreted as allowing only arguments in favor of or in opposition to the plan by individual members of the governing board, rather than allowing the governing board as a body to consider, formulate, and submit arguments. For example, in connection with school district budget override elections, the Legislature has directed that the informational report sent to qualified electors must include the following:

Arguments for the proposed increase in the budget shall be provided in writing and signed by the governing board . . . . The names of those persons other than the governing board or superintendent submitting written arguments shall not be included in the report without their specific permission.

A.R.S. § 15-481(B)(9).

The primary goal of statutory construction is to ascertain and give effect to the Legislature’s intent in enacting the statute. *Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006). The statute’s language is the best indicator of that intent. *Id.* When a statute’s plain language is clear and unambiguous, courts give effect to that language without resorting to any other rules of statutory construction. *Ariz. Dep’t of Revenue v. Salt River Project Agric. Improvement & Power Dist.*, 212 Ariz. 35, 39, 126 P.3d 1063, 1067 (App. 2006). “A cardinal rule of statutory interpretation is to avoid, if possible, an interpretation which renders superfluous any portion of a statute.” *In re Maricopa County Superior Court No. MN 2001-001139*, 203 Ariz. 351, 354, ¶ 17, 54 P.3d 380 (App. 2002).

Given the foregoing principles of statutory construction, the logical conclusion is that, in connection with school redistricting elections, the Legislature intended to allow

the governing boards of affected districts as a whole to submit an argument in favor of or in opposition to the Plan that is on the ballot. A contrary conclusion would render the reference to “members of the governing board” superfluous. The statute already allows “any elector” to submit arguments. Individual governing board members are, by definition, “electors.” A.R.S. § 15-421(C). Individual governing board members have no powers or rights beyond those enjoyed by other citizens. Ariz. Att’y Gen. Op. I81-054. Therefore, the term “members of the governing board” would add nothing to the statute if it did not permit action by the board members in their official capacities.

Governing board members in their individual capacities have the same rights and powers as all other citizens. Thus, Chapter 191 should be read as referring to board members in their official capacities. Board members can act “in an official capacity only when lawfully convened as a body.” Ariz. Att’y Gen. Op. I81-054 (quoting *School District of Philadelphia v. Framlau Corp.*, 15 Pa.Com. 621, 328 A.2d 866, 870 (1974)). Of course, nothing in Chapter 191 prohibits individual board members from also submitting their arguments in their capacities as “electors.”

Moreover, the fact that A.R.S. § 15-481(B) (9) uses different terminology in the context of an override election does not compel a different conclusion. That statute inherently recognizes that the governing board acts through its members when it provides that the “names of [p]ersons other than the governing board . . . submitting written arguments shall not be included in the report without their specific permission.” A.R.S. § 15-481(B)(9).

Any statement by a school district governing board would have to be agreed upon in public pursuant to the Arizona Open Meeting Law, A.R.S. § 38-431 *et seq.* (“OML”).

*See Del Papa v. Board of Regents*, 114 Nev. 388, 401, 956 P. 2d 770, 779 (1998) (decision by board members on whether to issue media advisory constitutes action under the Nevada open meeting law). This office has defined “taking legal action” in the context of the OML as a “collective decision, commitment or promise” made by a majority of the members of a governing body. A.R.S. § 38-431(3); Ariz. Att’y Gen. Op. 192-007. The decision by a majority of a quorum of the members of the governing board to issue a statement in support of or in opposition to a Plan constitutes legal action under the OML. Likewise, discussion and approval of the content of the governing board’s statement must take place in accordance with the OML.<sup>1</sup>

### **Conclusion**

The governing boards of school districts affected by school district unification elections may submit an argument in favor of or in opposition to the unification plan that is on the ballot to be included in the publicity pamphlet for such elections. However, any discussion by a quorum of the board of the proposed argument for or against a unification plan must take place in a properly noticed open meeting.

Terry Goddard  
Attorney General

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<sup>1</sup> Because Chapter 191 specifically authorizes a school district governing board to adopt a statement in support of or in opposition to a unification plan, the governing board’s action does not violate A.R.S. § 15-511, which prohibits the use of school resources to influence the outcome of elections. Chapter 191’s specific language allowing governing boards to submit arguments for publicity pamphlets controls over the more general prohibition in A.R.S. § 15-511. *See Lemons v. Superior Court of Gila County*, 141 Ariz. 502, 505, 687 P.2d 1257, 1260 (1984) (generally, more recent and specific statute governs over older and more general statutes).



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>June 4, 2008</p>	<p>No. I08-004 (R08-005)</p> <p>Re: Authority of the Arizona Commission for the Deaf and Hard of Hearing to Establish Advisory Committee</p>
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To: Sherri Collins, Executive Director  
Arizona Commission for the Deaf and Hard of Hearing

**Question Presented**

You have asked whether the Arizona Commission for the Deaf and the Hard of Hearing (“the Commission”) has the authority to create an advisory committee made up of Commission members and nonmembers for the purpose of reviewing complaints against interpreters, making recommendations to the Commission, and taking action as deemed appropriate.<sup>1</sup>

**Summary Answer**

The Commission may create the advisory committee, but the committee may not perform the official statutory duties or exercise the official statutory powers that the Legislature has

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<sup>1</sup> You have attached to your request a draft of proposed rules as a detailed explanation of the advisory committee’s contemplated role. However, this Opinion will focus on the question directly presented and will leave the analysis of whether the proposed rules comply with this Opinion to the Commission’s attorney and to the Governor’s Regulatory Review Council’s review of the rules.

assigned to the Commission. The committee may act only in an advisory manner, and the Commission must be free to accept, reject, or simply ignore its advice.

### **Background**

Arizona Revised Statutes (“A.R.S.”) section 36-1946 required the Commission to begin licensing interpreters for the deaf and hard of hearing on September 1, 2007. The Commission’s duties and responsibilities relating to interpreter licensing include adopting rules (1) that provide qualified interpreters for civil, criminal, and administrative hearings; (2) that classify interpreters based on their skill levels; (3) that establish standards for the qualifications and procedures for the licensure of each class of interpreter; and (4) that establish standards and procedures by which to certify sign language teachers in American sign language. A.R.S. § 36-1946. The statutes establish the following: (1) who must have a license; (2) what acts are prohibited; (3) the qualifications for licensure; (4) the manner and conditions for issuing and renewing licenses; (5) the bases for denying, revoking, or suspending a license or otherwise disciplining licensees; and (6) the Commission’s authority to investigate complaints, hold hearings, and seek injunctive relief. A.R.S. §§ 36-1971 to -1978. None of the statutes relating to the Commission’s licensing authority give the Commission express authority to establish an advisory committee that reviews complaints, makes recommendations, and takes appropriate action on a complaint. Nevertheless, based on discussion with and other input from stakeholders in the community, the Commission seeks to appoint such an advisory committee to assist it in making decisions related to the complaint and discipline process concerning licensed interpreters.

## Analysis

### **I. The Commission May Appoint an Advisory Committee if It Determines that Doing So Is Reasonably Necessary to Carry Out Its Express Authority.**

“[A]gencies are creatures of statute, [and] the degree to which they can exercise any power depends upon the legislature’s grant of authority to the agency.” *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767 (2003). An agency that assumes power beyond that which the statutes have given it usurps the constitutional power vested only in the Legislature. *Id.*; see also *Corella v. Superior Court*, 144 Ariz. 418, 420, 698 P.2d 213, 215 (App. 1985). An agency’s powers also include the power to use discretion in carrying out the express authority that Arizona’s Constitution or statutes have given it. *3613 Ltd. v. Dep’t of Liquor Licenses & Control*, 194 Ariz. 178, 183, 978 P.2d 1282, 1287 (App. 1999); see also *Facilitec*, 206 Ariz. at 487, 80 P.3d at 766 (“Because the legislature is often unable to specify detailed rules of conduct . . . it frequently entrusts agencies with the responsibility for developing and implementing regulatory policy for a limited subject matter.”).

In *Arizona Corporation Commission v. State*, 171 Ariz. 286, 830 P.2d 807 (1992), the Arizona Supreme Court considered whether the Arizona Corporation Commission’s constitutional power to regulate ratemaking included the authority to establish rules addressing the reorganization and diversification of public service utilities and their holding companies. The court noted that earlier cases had recognized that the Commission’s express power to set rates extended to the “enactment of the rules and regulations that are reasonably necessary steps in ratemaking.” *Id.* at 294, 830 P.2d at 815. The court concluded that “even assuming we restrict the Commission’s regulatory power to its ratemaking function, we must give deference to the Commission’s determination of what regulation is reasonably necessary for effective ratemaking.” *Id.* In analyzing the extent of deference to give the Commission, the court

considered the range of the Commission's legislative discretion in light of the intent of the Constitution's framers in establishing the Commission "to protect consumers from abuse and overreaching by public service corporations." *Id.* at 295, 830 P.2d at 816. The court held that the Commission had the power to enact the proposed rules because they were reasonably necessary "to fulfill the framers' intent with respect to ratemaking in light of modern corporate practices and regulatory realism." *Id.* at 297, 830 P.2d at 818; *see also City of Bisbee v. Ariz. Water Co.*, 214 Ariz. 368, 372, 153 P.3d 389, 393 (App. 2007) (summarizing the Commission's powers as including reasonably necessary steps in ratemaking). Thus, an agency's implied powers "include those reasonably necessary to carry out [its] express authority." Ariz. Att'y Gen. Op. I87-132.

The Legislature has created or authorized the creation of advisory committees to assist many state agencies by express statutory provisions.<sup>2</sup> And, in practice, state agencies have created subcommittees by resolution to help carry out their express statutory authority. There are no Arizona cases that directly address whether a state agency has the implied power to appoint an advisory committee by resolution, but some cases from Arizona and other states suggest such authority. The facts in *Washington School District v. Superior Court*, 112 Ariz. 335, 541 P.2d 1137 (1975), suggest that the school board had the authority to appoint a textbook advisory committee without any official statutory mandate because the Arizona Supreme Court upheld the actions that the school board took after considering the committee's recommendations. Another

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<sup>2</sup> *See, e.g.*, A.R.S. §§ 15-203(B)(4) (permitting the State Board of Education to provide for an advisory committee to conduct hearings and screenings to determine whether grounds exist to discipline a certificated person); -918.01 (mandating that the State Board of Education form a state career ladder advisory committee); -1872 (establishing the Family College Savings Program Oversight Committee to assist the Commission for Postsecondary Education); 32-703(B)(10) (permitting the Arizona State Board of Accountancy to appoint committees to advise or assist as necessary); -1307(B)(2) (permitting the State Board of Funeral Directors and Embalmers to appoint citizen advisory committees to make recommendations concerning the Board's enforcement and administration of the governing statutes); -1503(E) (permitting the chairperson of the Naturopathic Physicians Board of Medical Examiners to establish committees from the board membership and to define the committees' duties); -1704(G)(1) (permitting the State Board of Optometry to appoint advisory committees).

state's appellate court has directly addressed the issue of whether a board may appoint an advisor without express authority to make the appointment and has found that such authority may be implied if reasonably necessary. In *Smith v. Department of Professional Regulation*, 202 Ill. App. 3d 279, 289, 559 N.E.2d 884, 891 (Ill. App. 1990), the Illinois Court of Appeals stated that "administrative agencies are to be given wide latitude in determining what actions are 'reasonably necessary' and a court may not overturn an agency policy or action simply because the court considers the policy unwise or inappropriate."

Thus, the Commission may appoint the advisory committee by resolution if it determines that the committee is reasonably necessary to carry out its express authority and if it does not exceed its statutory authority in granting the committee power to act.<sup>3</sup>

**II. Although the Commission May Create an Advisory Committee by Resolution, It May Not Delegate Its Official Statutory Duties or Powers to the Advisory Committee.**

State agencies may not delegate their official powers or duties to private citizens because "a delegation of any sovereign power of government to private citizens cannot be sustained nor their assumption of it justified."<sup>4</sup> *Emmett McLoughlin Realty, Inc. v. Pima County*, 203 Ariz. 557, 559, 58 P.3d 39, 41 (2002) (quoting *People ex rel. Chicago Dryer Co. v. City of Chicago*, 109 N.E.2d 201, 206 (1952)); see also Ariz. Att'y Gen. Op. I95-17 ("Courts have repeatedly held that neither the Legislature nor public agencies may delegate their official powers or duties to private parties."). In *Arizona Department of Economic Security v. Superior Court*, 178 Ariz. 236, 241, 871 P.2d 1172, 1177 (App. 1994), the Arizona Court of Appeals held that the Arizona Department of Economic Security ("DES") could not, in effect, force the juvenile courts to pay

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<sup>3</sup> Any such advisory committee would be subject to Arizona's Open Meeting Law, which would require that its meetings be open to the public. See A.R.S. §§ 38-431 to -431.09.

<sup>4</sup> In *Emmett*, the Arizona Supreme Court directly addressed the issue of legislative delegation of authority to private citizens, and Arizona Attorney General Opinion I95-17 noted that courts in several other jurisdictions had also held that public agencies cannot delegate their statutory authority to private citizens.

private attorneys for legal services for children when, by statute, DES was responsible for providing those services with its own attorneys. The court found that DES could not “so delegate its responsibilities regarding dependent children” to private attorneys. *Id.* State agencies may not delegate their official powers or duties within the agency without express statutory authority either. In *Godbey v. Roosevelt School District*, 131 Ariz. 13, 638 P.2d 235 (1981), the Arizona Supreme Court held that without express legislative authorization, the school board could not delegate rule-making power to the superintendent. *Id.* at 19, 638 P.2d at 241; *see also Peck v. Bd. of Educ. of Yuma Union High Sch. Dist.*, 126 Ariz. 113, 115, 612 P.2d 1076, 1078 (App. 1980) (holding that school board could not delegate certain statutory powers to the superintendent). Thus, if the Commission intends to appoint the advisory committee solely through its own resolution and adoption of rules, it may not delegate its official powers and duties to the committee regardless of whether the committee is composed of members, nonmembers, or both.

The principle that the Commission cannot delegate its official powers and duties to the advisory committee means that the Commission cannot be bound by the committee’s actions or recommendations. For example, in *Peters v. Hobby*, 349 U.S. 331, 335 (1955), the Supreme Court held that the Loyalty Review Board exceeded the executive order that had created it as an advisory board to assist an agency by assuming jurisdiction through its own motions to review cases, hold hearings, and reach decisions that bound the agency. As Arizona Attorney General Opinion I90-013 cautioned, a state agency or board simply cannot “be bound by actions of [an] advisory committee” without statutory authority. *Id.*

Applying these principles to the Commission, only the Commission has the power to make decisions and take actions regarding licensees. Arizona Revised Statutes sections 36-1976

and 36-1978 give the Commission broad powers to regulate or discipline a licensee by revoking or suspending a license, placing a licensee on probation, issuing a reprimand, imposing a civil penalty, or asking the Attorney General or the County Attorney to seek an injunction restraining a licensee from engaging in a violation of A.R.S. Title 36, Chapter 17.1. Under the Arizona Administrative Procedures Act, the Commission also has the authority to negotiate with the licensee and to accept an informal settlement of the matter through "stipulation, agreed settlement, consent order or default." A.R.S. § 41-1092.07(F)(5). Thus, the Commission's official duties and powers include making the final decision whether to use a formal hearing proceeding to resolve a complaint or to settle the complaint by an informal settlement agreement that the Commission creates and adopts.<sup>5</sup> The advisory committee may assist the Commission by recommending how it should proceed in a licensing matter, but the Commission must have the discretion to accept, reject, or simply ignore the committee's advice. *See Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894, 903 (Mo. App. 1997) (stating that even if board adopted licensure committee's findings and recommendation, committee's role was merely advisory where determining what weight to give recommendation and evidence before the board was entirely within board's discretion); *Harrington v. Tate*, 254 A.2d 622, 624-25 (1969) (stating that police review board that mayor had appointed to hold hearings and make recommendations concerning discipline was advisory in nature and did not interfere with or

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<sup>5</sup> For example, the Commission cannot be limited to either accepting the Advisory Committee's recommendation or proceeding with a hearing. It also cannot delegate the power to make settlement agreements or final resolutions of a licensing matter to the Advisory Committee. In addition, the Commission cannot delegate the power to hold a hearing on a licensing matter because the Arizona Administrative Procedures Act provides that all state agencies supported by the general fund must use the Office of Administrative Hearings' services to conduct administrative hearings, unless exempted by statute or unless the agency head, the board, or the commission directly conducts the hearing. A.R.S. § 41-1092.01(E), (F). Moreover, under the "Regulatory Bill of Rights" in the Administrative Procedures Act, a person is entitled to have an administrative hearing heard by an independent administrative law judge. A.R.S. § 41-1001.01(A)(11). The Act defines an administrative law judge as "an individual or an agency head, board or commission that sits as an administrative law judge, that conducts administrative hearings in a contested case or an appealable agency action and that makes decisions regarding the contested case or appealable agency action." A.R.S. § 41-1092(1).

impinge on police department's function where commissioner was free to accept or ignore review board's advice).

### **Conclusion**

The Commission has the authority to appoint an advisory committee made up of members and nonmembers for the purposes of reviewing complaints and making recommendations to the Commission. However, the Commission may permit the committee to act only in an advisory capacity and must retain the authority to make the final decisions with respect to regulating and disciplining licensees.

Terry Goddard  
Attorney General

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

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ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  March 20, 2008	No. I08-003 (R08-011)  Re: Development Plans Regarding Ancillary Military Facilities
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TO: The Honorable John B. Nelson  
Arizona House of Representatives

**Question Presented**

Is residentially zoned land within the boundaries of an ancillary military facility's high-noise or accident-potential zone exempt from Arizona Revised Statutes ("A.R.S.") § 28-8481's requirements where no "development plan" other than zoning was approved with respect to the land by December 31, 2004?

**Summary Answer**

Arizona Revised Statutes § 28-8481(F) exempts from A.R.S. § 28-8481's requirements land with respect to which a "development plan" (as A.R.S. § 28-8481(P)(1) defines that term) was approved by December 31, 2004. Preexisting zoning does not constitute a "development plan" within A.R.S. § 28-8481(P)(1)'s meaning. Land that was zoned before December 31,

2004, but with respect to which no development plan was approved before that date therefore is not exempt from A.R.S. § 28-8481's requirements.

### **Analysis**

Arizona Revised Statutes § 28-8481(A) requires political subdivisions whose territory includes land within the boundaries of an ancillary military facility's high-noise or accident-potential zone to adopt comprehensive and general plans and to adopt and enforce zoning regulations "to assure development compatible with the high noise and accident potential generated by . . . ancillary military facility operations that have or may have an adverse effect on public health and safety." Subsection B of the statute requires political subdivisions to incorporate sound attenuation standards into building codes that apply to land in the vicinity of ancillary military facilities. Subsection C of the statute requires political subdivisions whose territory includes land within the boundaries of an ancillary military facility's high-noise or accident-potential zone to adopt, administer, and enforce the zoning regulations that subsection A of the statute authorizes in the same manner as the law requires them to enforce their comprehensive zoning ordinances, with the exception that they may not grant a variance without a specific finding that the variance preserves the purpose of ancillary military facility compatibility.

Subsection 28-8481(F) provides an exemption for land with respect to which a "development plan" was approved prior to December 31, 2004. *See* A.R.S. § 28-8481(F) ("This section does not . . . authorize . . . any political subdivision to restrict . . . the right of a landowner to [develop] . . . any property located in a high noise or accident potential zone that is appurtenant to an ancillary military facility under the terms and conditions of a development plan

. . . approved on or before December 31, 2004 . . . .)”<sup>1</sup> Subsection 28-8481(P) defines “development plan” as the following:

1. “Development plan”:

(a) Means a plan that is submitted to and approved by the governing body of the political subdivision pursuant to a zoning ordinance or regulation adopted pursuant to title 9, chapter 4, article 6.1 or title 11, chapter 6 and that describes with reasonable certainty the density and intensity of use for a specific parcel or parcels of property.

(b) Includes a planned community development plan, a planned area development plan, a planned unit development plan, a development plan that is the subject of a development agreement adopted pursuant to § 9-500.05 or 11-1101, a site plan, a subdivision plat or any other land use approval designation that is the subject of a zoning ordinance adopted pursuant to title 9, chapter 4, article 6.1 or title 11, chapter 6.

(c) Means a conceptual plan for development that generally depicts densities on a particular property that a military airport, as described in paragraph 9, subdivision (a), deems is compatible with the operation of the ancillary military facility.

(Footnotes omitted.) You have asked whether residential zoning, without more, constitutes a “development plan” for the purposes of this exemption from A.R.S. § 28-8481’s requirements.

The primary goal of statutory construction is to ascertain and give effect to the Legislature’s intent in enacting the statute. *Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006). The statute’s language is the best indicator of that intent. *Id.* When a statute’s plain language is clear and unambiguous, courts give effect to that language without resorting to any other rules of statutory construction. *Ariz. Dep’t of Revenue v. Salt River Project Agric. Improvement & Power Dist.*, 212 Ariz. 35, 39, 126 P.3d 1063, 1067 (App. 2006). Courts must

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<sup>1</sup> See also A.R.S. § 28-8481(E) (“This section does not . . . authorize . . . any political subdivision to restrict . . . the right of a landowner to [develop] . . . any property under the terms and conditions of a development plan . . . approved on or before December 31, 2000, or on or before December 31 of the year in which the development’s property becomes territory in the vicinity of a[n] . . . ancillary military facility . . .”).

read and apply statutes in accordance with any special statutory definitions of the terms that the statute uses. *State v. Hazlett*, 205 Ariz. 523, 531, 73 P.3d 1258, 1266 (App. 2003).

Subsection 28-8481(P)(1)(a) defines a “development plan” as a plan (1) that is submitted to and approved by a political subdivision’s governing body pursuant to a zoning ordinance or regulation and (2) that “describes with reasonable certainty the density and intensity of use for a specific parcel or parcels of property.” The statute does not define a development plan as a zoning ordinance or regulation. It instead defines it as a plan that must be submitted to and approved by a political subdivision *pursuant to* a zoning ordinance or regulation. Under this definition, a development plan is not identical to a zoning ordinance or regulation but is instead a plan that is submitted and approved *after* zoning ordinances or regulations are already in place.

While a zoning ordinance or regulation might satisfy the second half of A.R.S. § 28-8481(P)(1)(a)’s definition of a “development plan” by “describ[ing] with reasonable certainty the density and intensity of use for a specific parcel or parcels of property,” this would not establish that such a regulation or ordinance was a development plan within the statute’s meaning. Because the statute includes the conjunctive word “and,” a plan would have to satisfy both parts of the definition to be considered a development plan within its meaning. *See Phoenix Newspapers, Inc. v. Ariz. Dep’t of Corr.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997) (stating that when a statute is written in the conjunctive, all of its elements must be satisfied); *Guarrascio v. Fisher*, 154 Ariz. 186, 188, 741 P.2d 319, 321 (App. 1987) (stating the same with respect to a court rule). Because a regulation or ordinance could not satisfy the first part of the definition, it could not be a development plan within the meaning of A.R.S. § 28-8481(P)(1)(a) even if it satisfied the second part.

Arizona Revised Statutes § 28-8481(P)(1)(b) lists examples of the types of plans that the term “development plan” may include.<sup>2</sup> It identifies a series of plans by specific names and concludes with the phrase “any *other* land use approval designation that is the subject of a zoning ordinance.” (Emphasis added.) That concluding phrase must refer to plans of the same kind or type as the preceding ones listed. *See State v. Barnett*, 142 Ariz. 592, 596, 691 P.2d 683, 687 (1984) (stating that when a statute lists specific classes of items and then refers to them in more general terms, the general terms are limited to the same class as the items specifically listed); *see also Wilderness World, Inc. v. Ariz. Dep’t of Revenue*, 182 Ariz. 196, 199, 895 P.2d 108, 111 (1995) (same). Thus, like subsection (P)(1)(a), this subsection contemplates that a “development plan” is a plan that is submitted for approval *pursuant to* a zoning ordinance. It does not provide that a zoning ordinance itself may be a development plan.<sup>3</sup>

### **Conclusion**

Because preexisting zoning does not constitute a “development plan” within the meaning of A.R.S. § 28-8481(F) and (P), land that was zoned before December 31, 2004, but with respect to which no development plan was approved before that date is not exempt from A.R.S. § 28-8481’s requirements.

Terry Goddard  
Attorney General

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<sup>2</sup> Arizona Revised Statutes § 28-8481(P)(1)(c) does not apply to the issue raised because it applies to conceptual plans that a military airport deems compatible and does not make any reference to zoning ordinances.

<sup>3</sup> Any issues regarding whether implementing A.R.S. § 28-8481 constitutes a taking under the United States Constitution’s Fifth Amendment and Arizona Constitution article 2, section 17, or requires compensation under A.R.S. §§ 12-1131 to -1138, are beyond the scope of this Opinion because they do not affect the statutory interpretation question at issue here and the analysis depends entirely upon the facts that relate to the specific parcel at issue.

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

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<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>March 18, 2008</p>	<p>No. I08-002 (R07-032)</p> <p>Re: Availability of Funding for Water Lines Adjacent to District Property</p>
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TO: Kellie Peterson, Esquire  
Mangum, Wall, Stoops & Warden, P.L.L.C.

You have submitted to the Attorney General’s Office for review an opinion that you prepared for the Camp Verde Unified School District (“District”) regarding the availability of funding under the Adjacent Ways statute, Arizona Revised Statutes (“A.R.S.”) § 15-995 (“Adjacent Ways”), to construct a two-mile water line from the school district property to the municipal water supply in order to comply with the orders of the State Fire Marshall and the Arizona Department of Environmental Quality.<sup>1</sup> You concluded in your opinion that the District cannot use Adjacent Ways funds because the water line was not a project designed to provide physical access to the school. Additionally, you concluded that Adjacent Ways monies cannot be used to fund improvements that are more than one-quarter mile from the school property.

Finally, you concluded that the SFB’s Emergency Deficiencies Correction Fund, A.R.S. § 15-

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<sup>1</sup> The Arizona School Facilities Board (“SFB”) has agreed that an “emergency” as defined in A.R.S. § 15-2022(E) exists and has agreed to fund improvements needed on the school site.

2022 (“Emergency Fund”), can fund the water line’s construction. We have revised your opinion to clarify that the use of Adjacent Ways funds to improve public ways off school property is not restricted to projects that provide physical access to school property.

Additionally, we have revised your opinion to clarify that Adjacent Ways funds are not restricted to being used within one-quarter mile of school property.

### **Questions Presented**

1. May the District use Adjacent Ways funding to construct a water line that is not being built to assure safe ingress to and egress from public school property?

2. May the District use Adjacent Ways funding to extend a water line from the school site for more than one-quarter mile to the closest municipal water line?

### **Summary Answer**

1. The Adjacent Ways statute does not restrict the use of the funds that it makes available for projects off the school site to projects that assure safe ingress to and egress from school property.

2. The Adjacent Ways statute does not restrict the use of the funds that it makes available for projects off the school site to projects that are within one-quarter mile of school property.

### **Background**

The District has been informed that its current on-site well does not comply with applicable fire codes and that it will not meet the water quality standard for arsenic that became effective in January 2008. The District determined that the most financially effective long-term solution was to construct a two-mile water line from the school property to the municipal water supply. The District applied to the SFB for funding from the Emergency Fund. In a letter dated

October 22, 2007, the SFB's Executive Director recommended that the District pursue Adjacent Ways funding for the off-site costs because the SFB had a longstanding policy of not funding costs related to off-site developments.

The District contends that Adjacent Ways funding is inappropriate for the water line extension for two reasons. First, the District contends that Adjacent Ways funding is limited to projects that provide physical access to schools and that a water line does not provide such access. The District further contends that even if a water line could be deemed to provide such access, the two-mile distance does not fit within the established meaning of "adjacent," which the District has defined as being no more than one-quarter mile from school property. Based on its conclusion that Adjacent Ways funds cannot be used to construct the water line, the District states that the SFB must pay for the off-site improvement.

### **Analysis**

The Adjacent Ways statute provides a funding mechanism (1) that enables school districts to construct certain improvements, including utility lines, along any public way that is adjacent to school district property and (2) that permits school districts to pay for the improvements by levying a special assessment upon the taxable property in the school district.

The relevant portion of the Adjacent Ways statute, A.R.S. § 15-995(A), states as follows:

The governing board of a school district may contract for constructing, maintaining or otherwise improving any public way adjacent to any parcel of land owned by the school district or leased for school purposes by the school district, or an intersection of any public way adjoining a quarter block in which the parcel of land is situated, and for the construction of sidewalks, sewers, utility lines, roadways and other related improvements in or along such streets and intersections, and to pay for such improvements by the levy of a special assessment upon the taxable property in the school district. A school district shall not use any portion of the monies generated from the special assessment for any construction, maintenance or other improvements to the school district's

property except improvements necessary to assure the safe ingress to and egress from public school property directly adjacent to the public way for buses and fire equipment.

The primary goal of statutory construction is to find and give effect to the Legislature's intent. *See Mail Boxes, Etc., U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best and most reliable indicator of that intent is the statute's own language. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). "When the statute's language is not clear, [courts] determine legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Id.* A statute's individual provisions must be considered in the context of the statute as a whole to achieve a consistent interpretation. *State v. Gaynor-Fonte*, 211 Ariz. 516, 518, 123 P.3d 1153, 1155 (App. 2005).

The Adjacent Ways statute authorizes a school district's governing board to levy a special assessment on the taxable property in the school district to pay for certain improvements that the school site or its occupants will use. A.R.S. § 15-995(A). Subsection A of the statute addresses the use of adjacent ways monies under two specific circumstances. In the first circumstance, the funds are used to improve public ways that are adjacent to school property—that is, they are used off-site. In the second circumstance, the funds are used on the school property to provide safe ingress and egress for buses and fire equipment—that is, they are used on-site. The District's proposed use of the funds to construct a water line off-site along the public way is subject to subsection A's first sentence, which concerns off-site use. It is not restricted by the language in subsection A's second sentence, which concerns only on-site use.

Accordingly, the District's construction of the water line off the school property is not subject to any public ingress or egress restrictions.

The next issue is whether the District is precluded from using the Adjacent Ways funds more than the one-quarter mile from the school site. The statute does not define the word "adjacent." *See* A.R.S. § 15-995. When statutory terms are undefined, courts look to the plain meaning of the terms. *See, e.g., Mail Boxes*, 181 Ariz. at 121, 888 P.2d at 779. Arizona Attorney General Opinion I90-098 concluded that a school district could use Adjacent Ways funds for improvements that did not abut the school property for their entire length but were adjacent to it. In doing so, the Opinion relied on previous Arizona Attorney General Opinions and case law from other jurisdictions that stated that "adjacent" did not require "contiguousness" or "abutting or touching" but meant "in the neighborhood of," "in the vicinity of," or "within a reasonable distance of" the property in question. (Internal quotation marks and citations omitted.) The public way at issue in the Opinion happened to be one-quarter mile from the school site. The Opinion did not discuss the improvement's distance from the school site, and none of its language would support the conclusion that one-quarter mile from a school site was the furthest distance at which one could use Adjacent Ways funds. In fact, none of the prior Opinions that it cited addressed the issue of how far an improvement could be from school property and still be considered "adjacent" to it. The prior Opinions were fact-specific and recognized that the term "adjacent" was a relative one that depended on the particular facts and circumstances of the funds' anticipated use. *See id.* (stating that the proposed improvements at issue would upgrade the existing connecting road and construct a second connecting road to provide safe access to the school). Accordingly, it can only be concluded from the Opinion that under the specific facts and circumstances at issue in the Opinion, the public way one-quarter

mile from the school site was “adjacent” to the site. However, there is no language in the Opinion from which to conclude that a location more than one-quarter mile away from school property was too far to be considered adjacent to it.

It is also instructive that the Legislature used the word “adjacent” differently depending upon whether the funds at issue were to be used on-site or off-site. Specifically, with respect to the on-site use of funds, the Legislature used the phrase “directly adjacent” to describe the physical relationship between the on-site ingress and egress and the public way. The use of the word “directly” clearly implies that a close physical proximity is required between the on-site use of the funds and the public way, although the statute does not require that the public way be contiguous to or abutting the school site. Therefore, by comparison, use of the word “adjacent” alone with respect to off-site improvements necessarily contemplates a further permissible distance from the school site for them than for on-site use improvements. Accordingly, the determination of whether Adjacent Ways funds can be used for a specific off-site improvement is fact-specific.

Your Opinion correctly noted that the applicable statute and the rules promulgated pursuant to it neither prohibit nor require the SFB to fund an off-site project. The statutory language and legislative history of A.R.S. §§ 15-2001 to -2041 provide no guidance to the SFB regarding the funding of off-site improvements. We understand, however, that the SFB has a longstanding general policy of not funding off-site improvements that Adjacent Ways monies have traditionally funded. The interpretation of a statute by an administrative agency such as the SFB that administers it is entitled to deference. *See, e.g., Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 299, 53 P.3d 1139, 1143 (App. 2002) (stating that the court accords great weight to an agency's interpretation of a statute); *Berry v. State Dep’t of Corr.*, 145 Ariz.

12, 13, 699 P.2d 387, 388 (App. 1985) (stating that the “historical statutory construction placed upon a statute by an executive body administering the law will not be disturbed unless clearly erroneous”). As long as the SFB ensures that it provides the funding necessary to comply with its statutory obligations, the statutes do not require it to fund off-site improvements for which Adjacent Ways funding is available. The application of the SFB statutes to this particular fact-specific situation, however, is beyond this Opinion’s scope.

### **Conclusion**

We revise your opinion to clarify that Adjacent Ways funds used to construct projects off school property are not restricted to projects that provide safe ingress to and egress from school property. They may therefore be used to construct a water line off school property. Furthermore, such funds may be used more than one-quarter mile from school property. Additionally, the SFB is not statutorily prohibited from funding off-site improvements, but it may have a general policy of not funding such improvements.

Terry Goddard  
Attorney General

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

ATTORNEY GENERAL OPINION  by  TERRY GODDARD ATTORNEY GENERAL  March 11, 2008	No. I08-001 (R08-001)  Re: Effect of an Open Meeting Law Violation Concerning an Improperly Noticed Agenda Item on the Validity of Properly Noticed Agenda Items
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TO: Candyce B. Pardee  
Deputy County Attorney  
Cochise County Attorney's Office

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253, you submitted for review an opinion that you prepared for the Superintendent of the Valley Union High School District. This Office concurs with your conclusion that when a meeting subject to the Open Meeting Law ("OML") is properly noticed, a violation of the OML during the meeting with respect to a single agenda item does not render all legal action taken with respect to other agenda items null and void. We issue this Opinion to provide guidance concerning this matter to all public bodies subject to the OML. See Ariz. Att'y Gen. Op. I06-003 (stating that review may be granted when facts have broad statewide applicability).

## **Questions Presented**

Does the OML render null and void all legal action taken at a meeting when a public body violates the OML at that meeting by discussing, proposing, or taking legal action on a single improperly noticed agenda item?

## **Summary Answer**

The OML does not render null and void all legal action taken at a meeting at which an OML violation occurs with respect to a single improperly noticed agenda item.

## **Analysis**

“The OML is intended to open the conduct of government business to public scrutiny and prevent public bodies from making decisions in secret.” Ariz. Att’y Gen. Op. I05-004 (citing *Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979)); *see also* A.R.S. § 38-431.09.<sup>1</sup> “A meeting held in the spirit of this enunciated policy is a valid meeting.” *Karol*, 122 Ariz. at 97, 593 P.2d at 651.

The OML protects the public’s right to attend and to listen to the deliberations and proceedings of public bodies. A.R.S. § 38-431.01(A). Public bodies obstruct this right when they hold discussions, make propositions, or take legal actions outside of a properly noticed open meeting or concerning matters not properly noticed on an open meeting agenda. *See* A.R.S. §§ 38-431.01(A) (stating that all legal action must occur during a public meeting); 38-431.02(H) (stating that a public body may only hold discussions or take legal action concerning items on an agenda). When these types of OML violations occur, the OML’s ratification procedures restore the public’s right to attend and to listen to a public body’s proceedings and deliberations by requiring that the public have at least seventy-two hours’ advance notice of the meeting at which

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<sup>1</sup> Section 38-431.09 provides in pertinent part as follows: “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 discussed or decided.”

ratification will occur and advance access to a “detailed written description of the action to be ratified and all deliberations, consultations and decisions . . . related to such action.” A.R.S. § 38-431.05(B)(2)-(4). This allows the public to learn what discussions it missed when the improper act took place and to be present when the public body considers the matter in accordance with the OML. The question posed here involves how to treat legal action *properly* taken at a meeting at which an OML violation occurred.

In *Karol*, the Arizona Supreme Court considered whether a Board’s refusal, in violation of the OML, to allow members of the public to record a meeting made all business conducted at the meeting null and void. The plaintiffs argued that A.R.S. § 38-431.05, which has since been amended, invalidated all action taken at the meeting. At the time, the statute provided as follows: “All business transacted in any body during a meeting or public proceedings held in violation of the provisions of this article shall be null and void.” *See Karol*, 122 Ariz. at 97, 593 P.2d at 651. The court rejected the plaintiffs’ broad interpretation of the statute in light of a reading of the OML as a whole. Instead, the court held that

a technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature . . . .

*Id.* at 98, 593 P.2d at 652. Consequently, this Office has explained that *Karol* “imposes a substantial compliance test and requires a weighing of the equities before a court will declare an action void.” *Arizona Agency Handbook* § 7.12.1 (Ariz. Att’y Gen. 2001).

*Karol* preceded amendments to A.R.S. § 38-431.05 that specifically authorize public bodies to ratify legal action taken in violation of the OML in accordance with certain procedures. *See* A.R.S. § 38-431.05(B). Although courts have not addressed whether these amendments affect *Karol*’s holding, this Office believes that *Karol*’s guidance is relevant to the question

presented here.<sup>2</sup> For example, A.R.S. § 38-431.05(A) is substantially similar to the statute that the court considered in *Karol*.<sup>3</sup> Additionally, the ratification procedures, which correct notice deficiencies, would become superfluous if they were extended to action taken on properly noticed agenda items. When a public body takes action on an item properly set out in the agenda of a properly noticed meeting, the public's right to attend and to listen to the deliberations has been satisfied with respect to that action. For that action, there is no notice deficiency for the ratification procedures to correct.

A properly noticed meeting at which a public body takes action on properly noticed agenda items complies with the OML. A.R.S. § 38-431.09. If the public body also takes action at that meeting on a single item not properly noticed on the agenda, that particular action violates the OML and is null and void. *Johnson*, 199 Ariz. at 570, 20 P.3d at 1151; A.R.S. § 38-431.05(A). The public body may ratify the action pursuant to A.R.S. § 38-431.05(B), although the violation may still subject the public body to the penalties described in A.R.S. § 38-431.07.<sup>4</sup>

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<sup>2</sup> Three cases have considered A.R.S. § 38-431.05 since the enactment of the 1982 amendments. *See Tanque Verde Unified Sch. Dist. No. 13 v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003); *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 20 P.3d 1148 (App. 2001); *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 803 P.2d 891 (1990). *Tanque Verde* held that action taken during an executive session in violation of the OML could be ratified and did not address whether any other action taken during the meeting required ratification. 206 Ariz. at 208-10, 76 P.3d at 882-84. *Johnson* affirmed that legal action taken in violation of the OML is itself null and void, but it did not address any other action taken at the meeting. 199 Ariz. at 570, 20 P.3d at 1151. *City of Prescott* held that members of a public body could meet in executive session with the public body's attorney to discuss aspects of proposed legislation including its legal propriety, phrasing, and scope because such discussions fell within the legal advice exception to the OML requirement but that discussions concerning the merits of enacting the legislation or what action the body should take based on the attorney's advice fell outside the exception and must be open to the public. 166 Ariz. at 485-86, 803 P.2d at 896-97.

<sup>3</sup> Compare A.R.S. § 38-431.05(A) (2008) ("All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void except as provided in subsection B.") with A.R.S. § 38-431.05 (1974) ("All business transacted in any body during a meeting or public proceedings held in violation of the provisions of this article shall be null and void."). *See also* A.R.S. § 38-431.05(B) ("A public body may ratify legal action taken in violation of this article.").

<sup>4</sup> Section 38-431.07 allows a court to impose civil penalties, order payment of attorneys' fees, and remove public officers from office for OML violations.

The actions taken on the properly noticed agenda items are not void.<sup>5</sup> *Karol*, 122 Ariz. at 98, 593 P.2d at 652.

### **Conclusion**

When a public body violates the OML by discussing, proposing, or taking legal action on a matter not properly noticed on the agenda, that violation does not nullify all other legal action taken at the meeting when the violation has no demonstrated prejudicial effect on the complaining parties

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<sup>5</sup> There may be some situations in which an action taken on a properly noticed agenda item is so interrelated with an action taken at the same meeting on an improperly noticed agenda item that both actions become void, but those facts are not presented here. *Cf. Karol*, 122 Ariz. at 98, 593 P.2d at 652 (finding “no demonstrated prejudicial effect”).