



OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

June 19, 1975

(R75-260)
BRUCE E. BABBITT
ATTORNEY GENERAL

75-156

Mr. William Penn, Commissioner
State Real Estate Department
1645 West Jefferson
Phoenix, Arizona 85007

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ARIZONA ATTORNEY GENERAL

RE: Constitutionality of H.B. 2010 as Finally Enacted,
and Whether Personal Liability Would Attach to the
Real Estate Commissioner

Dear Mr. Penn:

You have requested this office to advise you as to the constitutionality of H.B. 2010 as finally enacted. You have also questioned whether personal liability would attach to the Real Estate Commissioner should he be unable to reimburse the real estate recovery fund for funds transferred therefrom within one year of such transfer.

In the absence of pertinent court decisions, it is the policy of this office generally not to pass upon the constitutionality of legislation enacted by the Arizona Legislature, except in cases where there is a compelling need for such an opinion and the constitutional status of the legislation is not arguable.

With reference to your second question, it is noted that you "may" authorize the transfer of all or part of funds exceeding \$400,000.00 from the real estate recovery fund to the real estate fund but you "shall" fully reimburse the recovery fund within one year of such transfer.

A regulatory agency such as the Real Estate Department derives its authority from the Legislature. Generally, when acting in relation to matters committed to their control and discretion, as opposed to mere ministerial acts, an administrative agency and its officers are immune from civil liability for the consequences of their acts. Such immunity is absolute when the acts are judicial or quasi-judicial in nature. Industrial Commission v. Superior Court, 5 Ariz. App. 100, 423 P.2d 375. The Legislature can also grant the authority to perform discretionary administrative acts which may be exercised without any right vesting in third parties. State Board of Health v. Apache Powder Company, 21 Ariz. App. 156, 517 P.2d 114. The Legislature may also mandate ministerial

Mr. William Penn
Page 2
June 19, 1975

duties which must be performed in a prescribed manner without the exercise of the officer's judgment as to the propriety of the act. Liability may attach for nonfeasance in such cases. Industrial Commission v. Superior Court, supra.

It would appear that the questioned legislation grants you the administrative discretion to transfer monies, followed by the mandatory ministerial duty to replace it within one year. Failure to comply with the latter could result in personal liability for nonfeasance. This question of whether personal liability will, in fact, exist for failure to perform ministerial duties depends on the partial circumstances of each case.

Very truly yours,



BRUCE E. BABBITT
Attorney General

BEB:JWW:nms